A TEXTBOOK ON CUSTOMARY LAND LAW OF GHANA

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MATRIMONIAL PROPERTY

CHAPTER ONE
INTRODUCTION AND PRELIMINARY MATTERS

A. What is custom

It is appropriate to begin our enterprise with a definition of custom. According to the Black's Law Dictionary, Delux 9th Ninth custom is "is a practice that by its common adoption and long, unvarying habit has come to have the force of law."In the quotation of Viner as cited by Allen (1939) and later by Allot (1970), "A custom, in the intendment of law, is such a usage as hath obtained the force

of law, and is in truth a binding law to such particular places, persons and things which it concerns ." It is therefore particularly difficult to understand certain dicta of judges which cast doubt on the proposition that customary law is law in any sense.

B. Definition of customary law

Customary law is defined in the Blacks Law Dictionary, Delux Ninth Edition as, "Law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic part of a social and economic system that are treated as if they were laws."

Lon Fuller expounded the concept of customary law further in his seminal work, The Anatomy of Law, page 71 in the following words:

"In cont with the statute, customary law may be said to exemplify implicit law. Let us, therefore, describe customary law in terms that will reveal to the maximum this quality of implicitness. A custom is not declared or enacted, but grows or develops through time. The date when it first came into full effect can usually be assigned only within broad limits. Though we may be able to describe in general the class of persons among whom the custom has come to prevail as a standard of conduct, it has no definite author; there is no person or defined human agency we can praise or blame for its being good or bad. There is no authoritative verbal declaration of the terms of the custom; it expresses itself not in a succession of words, but in a course of conduct."

The customary law of particular communities in Africa today has a chequered history and that of the various ethnic groups in Ghana is no exception. It is often presented as emanating from some immemorable custom. However, new findings in this area suggest it is one of the rather recent developments. As noted by Kunbour, the study of Mamdani offers useful insights to its genealogy as commencing from the closing years of the pre-colonial period; was concretised under colonial rule; and continue in the post-colonial era. As he noted, before the onset of formal colonial rule most African communities were caught up in a state of social upheaval. The process of traditional state formation, the development of markets, and the outlawing of slavery are held to have accounted for such social tensions. There were territory based claims of lineages for emerging traditional kingdoms that were engaged in struggles with kin-based claims of lineages for political power. Where the latter triumphed, non-centralised political entities were integrated into centralised mass political formations. This altered the social power configuration with the entry of new

players as either kings or chiefs. Also, freed slaves could engage in economic activity with its attendant social mobility.

Further, the emergence of market centres for trading in crafts and other wares also raised the social status of segments of the society who hitherto were considered the wretched of the earth.

One may therefore ask if customary law is "Law"? For a long time, it was noted that British judges in West Africa declared that native law is foreign law" as per Francis Smith, J., in *Hughes* v. *Davis* (1909) Ren. 550 at p. 551 (Gold Coast). What they meant in so saying was that Africa customary law was foreign to them and not within their knowledge, and hence must be proved as fact like foreign law properly so called. It has frequently been referred to in earlier times as "native law and custom". As indicated by Allot , "If this phrase is treated as severable, then the use of" "law" in the collocation "native law" would seem to indicate sufficiently the mind of the legislator". To him, "custom" on the other hand, would have been linked (illegitimately) with local or other custom as used and practiced in England.

Customary law as a source of law under Article 11 of the 1992 constitution has lent itself to several definitions by many scholars and legislations. Under section 2 of the Gold Coast Colony Native Administration Ordinance 1927, 'native customary law' for the purposes of the ordinance is said to be:

> "'Native customary law' means a rule or a body of rules regulating Rights and imposing correlative duties, being a rule or a body of rules which obtains and fortified by established native usage and which is appropriate and applicable to any particular cause, action suit, matter, dispute, issue, or question, and includes also any native customary law recorded as such in a statement which shall have been declared under section 123 to be a true and accurate statement of such native customary law."

This provision was reproduced in sustainably identical terms in the Gold Coast Native Courts (Colony) Ordinance 1944, and accordance Allot (1970) were adopted in an abbreviated form by the then Eastern Regional of Nigeria Customary Courts Law 1956, s. 2, and by the Tanganyika Local Government Ordinance, cap.299, s. 53 A (4), as amended, and by the Sierra Leone Courts Act 1963.

The Ghanaian provision was re-enacted in 1958 by a new definition contained in the Local Courts Act 1958, s. 2 of which provided:

"'Customary law' means any uncodified rule or rules having the force of law and not repugnant to the law as of Ghana, whereby rights and correlative duties fortified by established usage have been acquired or imposed, and includes any declaration of customary law published from time to time in the *Gazette".*

This definition was again repealed by the Courts Act 1960, and a new definition of customary law substituted.

For the purpose of this study, Customary law is defined as based on Article 11(3) of the 1992 Constitution as:

"Rules of law, which by custom are applicable to particular communities in Ghana", written or unwritten. It also includes rules determined by the Superior Courts of Judicature.

Another concern regarding the customary law is time factor. Thus if the courts are asked to apply the customary law, which law of what period are they to apply? In *Mensah v. Wiaboe* (1925), D. Ct., the notion that customary law must have existed from time immemorial (AD 1189) was abandoned, and instead it was suggested that the effective date was 1876, being the date of the coming into force of the old Supreme Court Ordinance.

C. Ghanaian Customary Land Law

Ghana operates a pluralist legal system. Legal pluralism refers to the co-existence of more than one form of law within the same jurisdiction or legal system. In Ghana, as in most African countries, by reason of our colonial history, we have a pluralistic legal system, with the system of law inherited from the colonial period co-existing with the customary and religious systems of law. This co-existence has not been an altogether easy one, principally in the area of family law and land rights.

In the area of land law, the existence of more than one system of law regulating land rights adversely affects the rights of many with regards to access to land and land use. Generally, the complexity of land rights and security of title is the result of the co-existence of different systems (customary, religious, statutory law, and constitutional) in the regulation of such rights.

Indeed one can identify a hybrid of English Common Law rules and principles; the Ghanaian customary rules and principles, constitutional provisions and statutory provisions.

The picture is even made complicated by Article 11 of the 1992 Constitution which outlines the sources of law in Ghana. Article 11(1)(e) mention "the common law" as one of the sources of law in Ghana. Then Article 11(2) defines the common law of Ghana as comprising the received common law and the rules of customary law. Customary law is defined in Article 11(3) as "rules of law which are by custom applicable to particular communities in Ghana".

Given our concept of community in this country, how many variations of the customary law do we have in Ghana? In other words what is the Customary Land Law of Ghana? To even take it to another level: Is there any such thing as the Customary Land Law of Ghana that we should be studying?

It would be difficult to answer these questions. However, you can be sure that we are able to make broad generalisations after a distillation of rules and principles from the available body of case law, customary practices and writings of scholars and practitioners in the field. Particular propositions of law may not be applicable country-wide or even in the same political region or ethnic group or subdivision. Yet that is what makes the subject challenging.

Be that as it may a caveat must be sounded regarding making broad generalisations about the customary land law. You could go wrong!

D. The Concept of Land or Immovable Property

Under Ghanaian customary law, property may be divided into four classifications: land, that is to say, the soil or earth; things savouring of land such as houses, huts and farms; movables; and intangible property such as medical or magical formulae. This classification has legal, sociological and religious significance since such questions as alienability, the quantum of proprietary interest which an individual can hold and the powers of customary fiduciary functionaries over corporate property and substantially affected by the nature of the property in question (Asante, 1969). The learned author further indicated that property may also be classified into three broad groups according to the character of the owning entity: stool, family and individual property. This classification is pertinent to questions relating to the management of property, conveyancing forms and the extent of beneficial enjoyment.

Traditional thinking drew a sharp distinction between the soil or earth and the tangible fruits of man's endeavour thereon. Farms, houses and other buildings were not considered land and were not subject to the doctrinal restraints on alienation which characterized land law (Rattray, 1929). Nor did the customary conception of 'land' encompass incorporeal interests or usufructuary rights. But this traditional view has been rejected in recent legislation and commentary

(Ollenu, 1962). The Interpretation Act of 1960 follows the broad English definition of land [Law of Property Act 1925, s. 205 (1)]: "'Land' includes land covered by water, any house, building or structure whatsoever, and any estate, interest or right in, to or over land or water." [Interpretation Act 2009, (Act 792).

It is not clear whether the above definition disposes of the customary conception of land. It is arguable that the Interpretation Act is merely concerned to postulate the purview of the term "land" for the purposes of legislation. It did not prevent the Supreme Court from applying the traditional definition of land in the case of *Dadzie* v. *Kokofu* (1961) G.L.R. 90 in which the court held that ownership of cocoa farms was to be strictly distinguished from ownership of the land had no automatic claim to such farms, where these had been made by another person under a licence granted by the deceased.

A meaningful discussion of customary land law necessarily entails an excurses into the religious aspect of land. Throughout Ghana, traditional philosophy ascribed as sacred significance to land as seen amongst various ethnic groups. According to the Northern ethnic groups, land was the property of the earth spirit who was the giver of life and the wherewithal to live. Similarly the Gas attributed ownership of land to sacred lagoons, while the Ashantis regarded it as a supernatural female force –the inexhaustible source of sustenance and the provider of man's most basic needs . She was "helpful if propitiated and harmful if ignored." Land was the sanctuary for the souls of the departed ancestors, and a reference to a place as the burial grove of the ancestors has a deep emotive significance. Indeed another important premise of the religious significance of land was the deep-seated idea that land belonged to the ancestors. In the celebrated words of the late Nana Sir Ofori Atta I, a distinguished traditional dignitary: "Land belongs to a vast family of whom many are dead, a few are living and countless host are still unborn." Concepts of land ownership were thus bound up with the ancestral worship. This cult is predicated on the belief that the departed ancestors superintended the earthly affairs of their living descendants, protecting them from disaster and generally ensuring their welfare, but demanding in return strict compliance with time-honoured ethical prescriptions. Reverence for ancestral spirits dictated the preservation of the land which theLiving shared with the dead. In effect land was an ancestral trust com mitted to the living for the benefit of themselves and generations yet unborn. Land, then, was the most valuable heritage of the whole community, and could not be lightly parted with.

That eternal corporation of the past, present and future was the state, symbolized by the stool. It only needed a well-integrated and centralized political system, as in Ashanti, to extend the religious idea of ancestral ownership of land to the legal doctrine of the stool's absolute ownership of all land within its

territorial boundaries . The Chief's position vis-à-vis stool land was that of a fiduciary. As the top executive functionary he had authority to manage and administer the property, but he was required to do so in the interest of his subjects . A central consequence of traditional religious and political dogma was the attribution of the unqualified ownership of all land within the state to the stool.

Before the indigenous economy became predominantly agricultural a stool subject could not claim exclusive rights of possession and user over any part of the land; "every member of the tribe had equal rights to wander over and hunt upon the land which belonged to the group." Later, when people settled down to farming as the main economic activity, and stool subjects reduced portions of land into their possession for the purposes of cultivation, there developed the concept of the subject's usufructuary right to stool land, that is to say, the right to occupy, till, or otherwise enjoy and unappropriated potion of stool land and to appropriate the fruits of such user. This right of beneficial user in no way derogated from the allodial title of the stool; to use Lord Haldane's words, the usufructuary right was "a mere qualification of or burden on the radical or final title of the Sovereign…" (*Amodu Tijani* v. *Secretary, Southern Nigeria* (1921) 2 A.C. 399 at p. 403).

Traditional ideas drew a sharp distinction between the subjects' right of beneficial user in stool land, and the stool's absolute ownership thereof. An Ashanti saying runs; "The farm (meaning the farm Produce) is mine, the soil is the Chief's . User, however long, could never ripen into ownership (See *Kuma* v *Kuma* (1938) 5 W.A.C.A. 4 (P.C.); there was no equivalent of the Anglo-American idea of prescription. As a consequence of this scheme no land could be ownerless (See Wiapa v Solomon (1905) Ren. 410).

Regarding land Blackstone, the legendary English legal historian commented as follows: "Land is a word of a very extensive signification".

Ordinarily land is seen in terms of physical ground. For example Kofi owns land. Upon hearing this, your mind is focused on a plot of land or a piece of turf located somewhere at West Legon or Ofankor, for example.

According to Ollennu:

"The term land as understood in customary law has a wider application. It includes the land itself, i.e. the surface soil, things on the soil, which are enjoyed with it as being part of it by nature, i.e. rivers, streams, lakes, lagoon, creeks, growing trees like palm and dawadawa trees or things artificially tied to it like buildings and any structure whatsoever. It also includes any estate, interest or

right in, to or over the land or over any of the other things which land denotes, i.e. right to collect herbs or snails or to hunt on the land".

For legal purposes land includes all trees, shrubs, hedges, plants and flowers growing thereon, whether cultivated or wild. However, in the *Dadzie* v. *Kokofu* (1961) 1 GLR 19, the Supreme Court held that ownership of cocoa farms was to be strictly distinguished from ownership of the land on which they were situated, and that the successor to the land had no authority to claim such farms where these had been made by another person under a license from the deceased.

For legal purposes water is seen as a species of land.

The Interpretation Act 2009 (Act 792) provides that 'Land' in any enactment includes any estate, interest or right in, to or over any land or water".

England's Law of Property Act, 1925, S.205 (1)(x) defines land as follows:

> "Land includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings…(whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; and also a manor, advowson, and a rent and other incorporeal hereditaments and an easement, right, privilege or benefit in, over or derived from land".

Several unfamiliar terms have been introduced in this definition. But importantly land is not regarded just as a mere ground. But a category describing a whole range of rights associated with the ground.

The above definition distinguishes between two very important categories of rights, which make up land, viz., corporeal and incorporeal hereditaments. Hereditament signifies rights that are heritable, i.e. capable of passing by way of descent to successors in title.

Corporeal hereditaments include the physical and tangible characteristics of land. These are the physical features of land and consist of the physical surface and everything attached to the land. For example minerals, buildings attached to the surface and plants and trees growing on the land.

Incorporeal hereditaments refer to certain intangible rights which may be enjoyed over or in respect of land. These are intangible rights existing in the land as a physical entity. Thus proprietary rights in the land are classified as land. For example lease, easement and mortgage may all be regarded as land.

E.Relationship Between Ownership of the Surface of Land and Rights Above and Below the Surface

The general rule is that ownership of the surface of land carries with it rights to what is below the surface and to control of the airspace above. This is expressed in Latin as: *"cuius est solum, eius est usque ad coelum et ad inferos"* (meaning whoever owns the soil owns everything up to the heavens and down to the depths of the earth). Whether accurate or not this notion articulates the sacred notion of the nature of property rights in the common law. The above principle is illustrated in the case of*Kelsen* v *Imperial Tobacco Co. (Of Great Britain and Ireland) Ltd.* [1957] 2 All ER 343. In this case, the plaintiff, Mr Joel Kelsen, was the lessee of a one-storey tobacconist's shop at No 407 and No 407B, City Road. He brought an action against Imperial Tobacco Company (of Great Britain and Ireland) seeking an injunction requiring the defendant to remove from the wall above his one-storey shop, a large advertising sign which projected into the air space above the plaintiff's shop by a distance of some eight inches. The plaintiff claimed that the defendant, by fixing that sign in that position, had trespassed on his air space and that they threaten to continue to trespass unless restrained by the court. The court held that the air space above the shop was part of the premises demised to the plaintiff, since on the true construction of the lease of December, 1948, there was nothing to displace the prima facie conclusion that the demise of the premises included the air space above the shop. It was further held that the invasion of the plaintiff's air space by the sign amounted to a trespass on the part of the defendant. Hence, he was entitled to a mandatory injunction requiring the defendant to remove the sign.

However in the case of *Pountney* v *Clayton*[1881-85] All ER Rep 280
Also reported 11 QBD 820; 52 LJQB 566; 49 LT 283; 47 JP 788; 31 WR 664

the above rule was not strickly applied. In *Poutney* v. *Clayton*, the plaintiff brought an action to stop the defendant from mining on a parcel of land.The plaintiff bought the said piece of land from a railway company which compulsorily acquired the land under the powers given by the Railways Clauses Consolidation Act. However, the defendants had been mining on the land before it was sold to the plaintiff. On the above facts the court held that the defendant cannot be stopped from mining on the land since the plaintiff bought the land subject to the activities of the defendant. Hence the ownership

of the surface of the land was distinguished from the ownership of the soil below the surface.

Also, in the case of *Lord Bernstein of Leigh* v *Skyviews & General Ltd*. [1977] 2 All ER 902 the plaintiff brought an action against the defendant for trespass. The basis of the plaintiff's action was that the defendant took a single aerial photograph of the plaintiff's premises from a height of several hundred feet. The plaintiff objected to the photogragh being takenand also without his permission. He further contended that the defendant was not entitled to rely on the statutory defence under section 40(1) of the Civil Aviation Act 1949, since that section was limited to a bare right of passage over land and did not permit the use of air space for the purpose of photography. Giving judgment in favour of the defendant, the court held that the rights of an owner of land in the air space above the land extended only to such height above the land as was necessary for the ordinary use and enjoyment of the land and the structures on it, and above that height the owner had no greater rights in the air space than any other member of the public. Hence, the defendant did not trespass since his aircraft was at a distance far away such that it did not trespass on the property of the plaintiff.

See also, the case of*Star Energy Weald Basin Limited and another (Respondents)*v.*Bocardo SA (Appellant)* [2010] UKSC 35

The defendant drilled three wells under the land owned by Bocardo SA in order to extract the oil that lies beneath it. Bocardo SA then instituted an action for trespass against them.The plaintiff's argument was that, since it owns the land, it therefore mean it owned everything attached to the land.The defence on her part was of the opinion that because the minimum depth of the well is about 800 feet, it cannot be reasonable to say that they are trespassing on the plaintiff's property, and that their activity cannot negatively affect the plaintiff's use and enjoyment of their property. However, the court held that he who owns the land owns anything that is above or below the land.

However, it is worth noting that the definition of land includes 'fixtures' attached to the land. This is consistent with the common law notion of *quicquid plantatur solo, solo cedit* (meaning whatever is attached to the ground becomes part of it). In order to achieve this goal, the law has to distinguish between 'fixtures' and 'chattels'.

Fixtures comprise that category of material objects which, when physically attached to the land, are regarded as becoming annexed to the realty. Irrespective of their previous ownership, title to such objects, thenceforth vests automatically and exclusively in the owner of the realty or land. As fixtures, they are regarded as having merged with the 'land' by reason of some curious legal metamorphosis, and thus pass with all subsequent conveyances of the realty unless and until lawfully severed from the land.

By contrast the category of 'chattels' consists of objects which never lose their character as mere personalty, but which retain their 'chattel' status even though placed in some close relationship with realty. Not being included within the realty, chattels do not automatically pass with conveyances of the land.

The distinction between 'fixtures' and 'chattels' is not entirely straightforward. The distinction seems largely to turn on two separate but related tests as to the intention of the original owner of the object in question. These two tests relates to the degree of annexation present in a given circumstances and to the general purpose of the annexation. We shall return to this discussion in Volume II.

E. The Nature and Scope of Immovable Property law

1. What is Property?

It is important at the onset to dispel one common lay person's notion concerning 'property'. Non-lawyers (and sometimes even lawyers) speak loosely of property as the *thing* which is owned. While this usage appears harmless in ordinary parlance, it tends to obscure certain salient features of property as a legal phenomenon.

C.R. Noyes, in his book *The Institution of Property*, at p. 357 defines property as:

> "The interest, which can be acquired in external objects or things. The things themselves are not, in a true sense, property, but they constitute its foundation and material, and the idea of property springs out of the connection, or control, or interest which, according to law, may be acquired in them or over them".

In other words, property is not a 'thing' but a relationship. Property is the relationship between the owner and the thing, i.e. between a 'subject' and an 'object'. This explains why it is possible for conflicting claims to be brought by two or more 'subjects' in respect of the same 'object'. This is demonstrated more clearly in the case of land. Land could be the object of a multiplicity of

claims made simultaneously by an owner-occupier, a tenant, a building society or a neighbour who enjoys an easement.

Generally speaking "Property" concerns the ownership of things. At a basic level everyone is familiar with the idea of property since they have some experience of owning something – for example your car, clothes, etc. As a consequence of your ownership you are able to do whatever you want with it (subject of course to the limitations imposed by the law). You can sell it, destroy it gift it and so on. All of these are made possible by the fact that you own the car. There are two main types of property, namely Tangible and Intangible Property.

2. Distinction Between Tangible and Intangible Property

Tangible property consists of things, which are physical in nature, e.g. car. Intangible property consists of things which are not physical in nature but which are regarded as property because they are capable of ownership, e.g. shares in a company, intellectual property.

3. Distinction Between Proprietary and Personal Rights in Property

A proprietary right is a right, which exist in relation to a thing, whether tangible or intangible. For example a house, which is "owned" by one person may be leased to a tenant and mortgaged to a bank. In this case the owner, tenant and bank will all enjoy proprietary rights in the house. In other words a proprietary right is a right existing in the "res" or thing to which it relates. Such right is described as a right *in rem* – in the thing itself. For example a lease is capable of enduring through changes in ownership and is enforceable against the new owner.

A personal right is an entitlement, which a person enjoys against another specific individual person. Its central characteristic is that it can only be enforced against that specific person. It is described as a right *inpersonam*.

4. What is the Law of Immovable Property?

The law of immovable property is not particularly concerned with things. It is concerned with the relationships which arise between persons in respect of things. The law of immovable property comprises of the range of legal rules and principles, which regulate the proprietary issues concerning that, which is classified as land. It is an analytically coherent body of law as, for example, is criminal law which concerns itself with how the law determines if conduct is criminal in the eyes of the state or the law of contract which comprises of the legal rules regulating obligations voluntarily entered into by consensual

agreement. The concerns of land law are of tremendous social significance since the ownership, control and exploitation of land is of fundamental importance to society. No one can live in the modern world without reference to land. Land may provide a home, place of work or recreation. You can make a long list.

5. What does the Law of Immovable Property Cover?

The law thus covers the following: ownership of land, and formalities and procedures for transfer of land;
Creation of subsidiary interests in land and the rights and obligations of holders of subsidiary interests;
Priorities between competing interests.

6. The concept of Ownership and its Usefulness or Appropriateness in the Analysis and description of the system of landholding and interests of land in Ghana.

One of the critical issues in the discourse on customary land law of Ghana relates to the question of terminologies for describing interests in land. This difficulty arise partly from the hydra-headed nature of the customary law on land. We need to answerthe question whether all or some of the English legal terminologies are appropriate for describing interests in land in Ghana.Arguable some of the the borrowed English terminologies may not adequately describe local land interests and tenurial systems.

The next question to be answered is whether ownersip as a term appropriately relate to land. In other words is it good enough to say one is the "owner" of land? Or should we rather say that one has an "interest" in land. You will discover the answer after you have completed reading this book!

CHAPTER 2
THE ALLODIAL INTEREST

A. INTRODUCTION

1. Land Tenure

Land tenure denotes the various laws, rules and obligations governing the holding and/or ownership of rights and interests in land. The system provides a framework within which the rights and interests are exercised or left dormant in the use, development and transference of land. Rights and interests vary widely; customary/private or public, temporary or perpetual, big or small, secure or otherwise. In Sub-Saharan Africa, the dominate land tenure system is the customary land tenure. The major characteristics of customary tenure is that the land is regarded as belonging to the whole social group and not to an individual. It is also referred to as a system of land relation in which the ownership of the land is vested in a collective (whether a family, lineage or a clan) while the individual enjoys virtual unrestricted rights of usage. The head of such a collective or community is regarded as a symbol of the residuary, reversionary, and ultimate ownership of all land held by the collective . The communal land is a social resource and also has some religious significance; it is only through his or her relationship with the land that an individual perceives a sense of place and personality.

The main percept of Ghanaian customary land law as expounded by Ollennu is that every parcel of land has an owner. Ownership is a complex relationship between people in a society in respect of anything acquired by them either as individuals or jointly as a group. This relationship involves understanding and attitude concerning the liberties of the acquirer in respect of the thing acquired .

According to DA Rocha and Lodoh:

"The concept of ownership of land embrace possession of land title of land. An owner of land is a person who can prove that he and those through whom he claims title have possessed the land so long that there can be no reasonable probability of the existence of a superior adverse claim".

Ownership of land is expressed in terms of rights exercisable over such land. It is the bundle of rights that enable a person to exercise ownership of the land. The western or English ownership of land includes the right to exclusive use, the right to dispose of one's interest and the right to enjoy the fruits of such land. As Ollennu indicated, ownership of land is vested in more than one person and the right, title or interest vested in one may be different materially from the right, title or interest vested in the other(s). Thus one person may have the absolute ownership of land vested in him, another may have the right of immediate enjoyment of the beneficial interest in the same land vested in him, while yet another may have vested in him a right by licence to use the land for a specific purpose' example to build, fell palm trees, to grow seasonal crops or to fish in creeks for a specific number of years.

2. Types of Customary Land Tenure

Customary sector holds 80 to 90 percent of all the land in Ghana . These land are held by individuals and families, communities represented by stools, skins and families and in some areas, Tendamba or clans. It has also been noted that there are significant differences in customary tenure and management systems between the north and south of Ghana. Customary ownership of land could be of different forms of peculiar legal rights. The types of ownership of land in customary law are:

- Allodial or paramount title (interest)
- Sub Paramount title (interest)
- Usufructuary/Customary freehold interest
- Tenancies
- Licences
- Pledges

These forms of land ownerships as practiced are discussed into details below in relation to specified traditional areas in Ghana.

3. The Allodial or Paramount Interest

Allodial is derived from the German word 'olod' or 'allod' meaning entire property from which was derived the mediaeval Latin word "allodium" (allodium) which means an interest held of no-one, an absolute or original heritage. The allodial title is the highest quantum of interest or title that can be held and it cannot be extinguished or terminated. According to Kasanga 'customary authorities hold "allodial title", that is, the residual title to the community's land from which all other rights derive'. It means that this interest to land resides in the group as a whole, with the stool's occupant who is normally the chief, being the caretaker or trustee. Thus ever since its recognition, chiefs in Ghana have been waging both political and legal campaigns to expand their claims to the absolute 'owners' of the land and hence particularly in urban areas to act like 'rent seeking office-holders' (Berry, 2001:92). According to Rayner C.J,

> 'the notion of individual ownership is quite foreign to natives' ideas. Land belongs to the community, the village or the family, never the individual'.

Thus land is always conceived as a communal property, passing on to successive generations. This is supported further by Nana Ofori Atta who indicated that…..

"land belongs to a vast family of people, many of whom are dead, a few are living and countless hosts are still unborn" .

This means that land is always conceived as a communal property, passing on to successive generations. Therefore ownership is not in individual members and certainly not in the head except symbolically.

4. Nature and Location of the Allodial Title

There are mainly two forms of the Allodial ownership:

- State Ownership
- Family Ownership

In most Akan states such as Ashanti and Akyem,the fundamental answer to the question who is the owner of the land is that the land in effect belongs to the state or to the whole community usually represented by the stool or its occupant. Thus in the words of Bentsi-Enchil , ownership of the land is vested in the state. This means that the land is attached to the paramount stool, or that it is the property of the whole community. In view of this, the basic principle in such areas is that allodial title to land within such a state can be transferred only by the paramount chief acting with consent and concurrence of his principal elders and councilors. It follows therefore that in any state where the land is deemed to be owned allodially by the whole community as such, the interests of the constituent members of the community in land occupied by them are regarded as falling short of the allodial ownership.

The second form of allodial ownership of land is common among the Ewes, Ga-Adangbe and some parts of Northern Ghana. To them families own allodial title to land separate from stool lands. These lands are held in trust for the family members by the family head. Any transactions in such lands demand the consent and concurrence of family member before it can be regarded as valid. It is also possible for some Akan areas to also exhibit this form of allodial ownership. According to Bentsi-Enchil , it is only when an outright grant had been made by the whole community through its "management committee" to an individual, a family, or other larger group, could individual, family, or other larger group claim to be the allodial owner of the land so granted.

Apart from the two major forms of allodial ownership sited above; the courts have also held that this form of ownership is possible of being vested in individuals as stated in the case of *Nyasemhwe and another* v. *Afibiyesan* (1975) 1GLR297 and also in substools such as *James Town (Alata) Stool and Another* v. *Sempe Stool and Another* (1989-90) GLR 393.

The allodial interest also provokes contestation in areas of Ghana which do not share its essentially 'Akan' character – the notion of the Stool as embodiment of a political jurisdiction implies also recognition of rights over land. In non-Akan communities such as Ga and Ewe, land is held by families, not Stools, and in some societies of the Northern and Upper Regions, 'land priests' or *tendamba* control access to land as representatives of the lineages of 'original settlets'. Thus Schmid's and Crook et al's generalization that tendamba hold allodial claims to lands in the Northern Kingdoms in what is now Northern and Upper Regions which has laid down the seeds of currents conflicts with both tendana and with subject peoples' such as the Nawura or Konkomba is not supported by the evidence on the ground.

This interest is also described as the Paramount title, Absolute title or Ultimate title. According to Bentsi Enchill it is the only customary title that is not held by a tenant from a lord. Under English law there is legally speaking only one landlord, i.e. the Crown. Everyone else is a tenant of some sort.

If one considered a hierarchy of interests under the customary law, the allodial title occupies the apex. It is thus the highest interest you can hold in land under the customary regime. There is some controversy as to what entities can hold the allodial title. In other words where is the allodial title located? Two ideas are put forward. First are customary communities, viz Stools and Families and Individuals.

There are authorities which have held that in certain parts of the country the allodial title is vested in customary communities called *Stools.*The cases of *Akwei* v. *Awuletey* (1960) GLR 231 and *Kote*eiv. *Asere Stool* (1962) 1 GLR 312 are good examples of these.

However in *Jamestown Stool*v. *Sempe Stool* (1989-90) 2 GLR 393, it was held that the allodial title was vested in sub-stools. See also *Gyeabour II & Ors.* v. *Ababio* (1991) 2 GLR 416.

The Sub-paramount title is vested in the occupants of the subordinate stool or skin under the head stool or skin and it is the second highest to the allodial title. Ollennu distinguished between the paramount and sub-paramount titles as follows:

> "When the paramount, ultimate or absolute ownership is vested in a 'stool' or skin' having other stools or skins, tribes, wards quarters or sections subordinate to it, the absolute ownership by the principal stool is dependent upon sub-paramount ownership…. that sub-paramount ownership by the subordinate stool. Skin, tribe, ward or section has a very real existence, and

is *sine quan non* to the paramount ownership by the head stool, skin, ward or quarter. Unless a piece of land in a state can be shown to be attached to a subordinate stool or skin, the absolute ownership in that land cannot, by customary law, be said to be vested in the paramount stool or skin."

On the basis of the above, it is commonly express that the allodial title is frequently vested in both a head stool and its sub-stools or constituent families and in such circumstance rights may be exercisable variously by the head stool, by the appropriate sub-stool or family, or by both either jointly or in the alternative . According to Josiah-Aryeh, though he analysedthis particular type of interest his views have not been generally followed and this title was, left out of account in the scheme of interests incorporated into section 19 of the Land Title Registration Act, 1986 (PNDCL 152).

In other parts of the country the allodial title is vested in customary communities called *Skins.*Thus in *Azamtilow* v. *Nayeri* (1952) DC (Land) (1952-1955), 20 the court held that although the paramount chief of the Builsa traditional area as well as that of Mamprusi traditional area have the capacity to litigate in respect of land, the position might be different elsewhere in the Northern Territories.

In the light of the abovein the case of *Saaka*v.*Dahali* [1984-86] 2 GLR 774-785, where the plaintiff/appellant sued for a declaration of title and recovery of possession to herlate father's house in Tamale, the Court of Appeal held that the chief of Tamale rightly gave the land in question to the appelant's father, Saaka Dagomba, to be built upon; for Saaka Dagomba being of the Dagomba tribe is entitled under Dagomba customary law to be given part of the land attached to the Dagomba skin for building purpose. Thus, once Saaka Dagomba has exercised this right and has built on it, he has a usufruct of that land which cannot without just cause be taken away from him by the skin. The land, now built on a plot of land, ceased to be vacant land attached to the skin.

But then, there are authorities holding that the allodial title could also be vested in families. Such judicial position include that which was stated in the case of *Ameoda*v. *Pordier* (1967) GLR 479 where trial judge was first invited to decide as the first issue on the summons for directions the question as to whether all Ningo lands are stool lands or Ningo lands are owned by various Ningo families. But contrary to the position of the trial court, the appellate court held in that case that the learned trial judge ought to have adjudged the appellant's family the owner of the land and that the lands in Ningo are not stool lands but are

owned by families or quarters and that the lands in dispute belong to the appellant's family.

Also there had been a suggestion of the possibility of the allodial title being vested in *Individuals*. In the case of *Nyasemhwe* v. *Afibiyesan* (1977) 1 GLR 27, while two lower courts were ad idem that title to a piece of disputed land "belongs to the plaintiff and his ancestors..." the Court of Appeal in a unanimous decision by Archer, Anin And Hayfron—Benjamin JJ.A. held that that the plaintiff is entitled to a declaration in his favour in respect of his allodial title to the disputed land and his reversionary rights as such allodial owner. However, there is some ambiguity in the decision as the judge also seemed to suggest that in the particular case the allodial title was vested in the plaintiff's family.

See also:
Amodu Tijani v. *Secretary of Southern Nigeria* (1921) 1 AC, 399.
Compare with:

Golightly v. *Ashirifi* (1961) 1 GLR 28 (PC).
Sasraku v. *David* (1959) GLR 7.

In *Golightly* v. *Ashirifi* the Okaikor Churu family had been in possession of land at Kokomlemle ever since 1875. They had been given the right to farm it by the Gbese stool. Distinguished members of the Gbese stool were buried on the land. When the trial judge visited it he found a tomb with a headstone showing that in 1932 a priest was buried there. In 1942, however, the Atukpai family claimed to be the owners of the land. They sold it to purchasers who put up buildings on it. In 1943, the head of the Okaikor Churu family brought an action against the Atukpai family claiming a declaration of title and damages for trespass and an injunction. Later on the Korle priest was apparently joined as co-plaintiff. At the trial in 1951, the learned judge decided in favour of the plaintiffs and made a declaration which does decide the essential issues in this appeal. His order was as follows:—

"The plaintiff, Afiyie, is granted a declaration that she and the other members of the Okaikor Churu Family are possessory owners of that portion of land [here it is described] which they are entitled to use for purposes of farming and residence by the members of their family, subject to the rights of the Ga and

Gbese and Korle Stools who are recognized by customary law as being the allodial owners of that land.

"In respect of the trespass by authorising this building of a house [described] the nature of the trespass was one which has destroyed the character of the land as farming land and was persisted in despite protest . . . . I assess the general damages at £G100.

"The plaintiff is granted the injunction prayed for (that is to say, a perpetual injunction restraining the Atukpai people from entering upon the land or dealing with it in any manner whatsoever)".

"Today they are described as being the "caretakers" of these lands for the Ga, Gbese and Korle Stools. But it must be clearly understood that the word "caretaker does not mean simply one who looks after land for another, but connotes one who has an interest in the land. The three stools cannot however alienate stool land without obtaining the consent and concurrence of individuals or families who are lawfully in occupation of the land, such as subjects of the Gbese stool who are in occupation, or strangers who have been properly granted some interest, be it a farming or occupation interest, in the land".

Ghassoub & Ghassoub v. *Sasraku*concerned certain lands approximately eight square miles in area which formed part of a much larger area of land in Chempaw. The respondent family company claimed that the lands (consisting of three adjoining pieces of land) were sold by the stool of Chempaw. The stool of Chempaw is a sub-stool to the Paramount Stool of Kokofu. Kokofu is within what was, prior to 1957, the colony of Ashanti. The respondent (representing the plaintiff company) further claimed that the sale had been with the knowledge and consent of the Paramount Stool of Kokofu and that his family company had been in possession ever since they had purchased.

The action arose out of certain events which took place early in 1956. A member of the plaintiff family company who was a headman of a village on the lands in question was working on his farm when he heard the noise of the felling of trees. He went to investigate and saw a caterpillar-machine. It had, he said, "cut a sway the right through from Chempaw over our boundary into our land". He said that they (the plaintiff family company) had kept the boundaries of their land cut. He saw a young man with an axe cutting a mahogany tree. Enquiries

revealed that those who were engaged in the process of felling trees (certain persons trading in partnership as Naja David Sawmill Company) were doing so pursuant to rights which they claimed were given to them under a timber felling agreement made by them with Nana Osei Assibey III and his elders, representing the Kokofu State, on the 30th October, 1953. By that agreement the Sawmill Company were to be entitled upon stipulated terms to cut down certain prescribed numbers of trees of defined species during a certain period. The trees could be felled within the area of Chempaw lands.

The co-defendant raised a number of issues in his defence. Prominent amongst them was the following:

"The co-defendant says that the existing custom prevailing in Ashanti and which also prevails at Kokofu is that stool lands are not sold, and that no portion of the Kokofu stool land has ever been sold by the Kokofu stool to anyone,"

The High Court rejected the above contentions and held that there was a plentitude of instances of land sales in Ashanti and further that the land in question had been sold to the Plaintiffs. This judgment was upheld on further appeal to the Privy Council.

The last three cases deal with the question of whether or not the allodial title could be transferred to an individual. Note particularly *Sasraku* v. *David*and examine the position taken by Jackson J, and indicate whether you agree with him on his reasoning.

Read the following cases in relation to specific cases in "Accra". Accra in inverted commas as for the purposes of the above exercise Accra is used in reference to the area around Kokomlemle, not as synonymous with the national capital.
See *Golightly* v. *Ashirifi* (1955)14 WACA 676, affirmed (1961) 1 GLR 28.

5. SPECIFIC EXAMPLES

La – *Mechanical Lloyd* v. Nartey (1987-88) GLR 314.

Onano v. *Mensah* (1948) DC (Land) (1948-1951) 97.

Osu – *Akwei* v. *Awuletey* (1960) GLR 231.

Kwami v. *Quanor* (1959) GLR 269.

Teshie – *Mensah* v. *Ghana Commercial Bank* (1958) 3 WALR 123.

Jamestown – *Koteei* v. *Asere Stool* (1962) 1 GLR 312
Jamestown Stool v. *Sempe Stool* (1989-90) 2 GLR 393

Read the full reports of the above cases from the *Cases and Materials on the Customary Land Law of Ghana, Vol. I.*

8. INCIDENTS OR RIGHTS OF AN ALLODIAL TITLE HOLDER

By incidents we are referring to the bundle of rights which accrues to the holder of the allodial interest or for that matter any interest in land. It describes the rights of user and control that the holder of an interest in land can enjoy. Pay attention to the incidents of the allodial title and be prepared to compare those with the customary law freehold.

For the purposes of our discussion under the allodial title one must distinguish between subjects of the stool on one hand and strangers on the other. We use subjects and strangers in place of citizens and aliens respectively. These include the following.

(i) Exclusive Possession

As a concept, it denotes visible possibility of exercising physical control (copus possession is ie. direct control and indirect control of land) over a thing with intention (animus possedendi) of doing so to the exclusion of all others. It is presumed that although the owner may nay be in direct control i.e. physical control, he has the intention to hold on to the land.

(ii) Use and Enjoyment

This right gives the owner rights as how to use the land as well as the right o the law. Thus the old customary law rule in *Ashon*v.*Barng* (1897) which was no longer reasonable, was overturned in *Atta* v. *Esson* (1976) IGLR 128

(iii) Right of Alienation

It gives the presumption that the person who has the legal right or interest has the right to alienate i.e. "*nemo dat quod nan habe*t. The holder could either give:
The whole/entire interest
A little/part of the interest
A lesser rights like share tenancy or customary licence(s)
A lease

When the holder gives part of the interest to the other and retains part, the whole interest reverts back to him at the end of the term.

It has long been possible for a community to transfer its allodial title to another community. However, it was once impossible for an individual to own any substantial interest in land. Thus it must have been impossible to transfer to an individual the allodial title, which is the most extensive interest known to customary law. It is now necessary to investigate whether the law has changed. There is some conflict between the authorities.

There was an early idea that when a citizen occupied vacant communal land his interest eventually 'ripened into full ownership,' ousting the community's title altogether a noted in the case of *Lokko*v. *Konklofi* (1907) Renn. 450 (D.C. and F.C.). This however seems to have been a misunderstanding of the nature of the usufruct. More recent cases have so often made it clear that the community retains its allodial title that this idea must be regarded as overruled a in *Thompson* v. *Mensah* (1957) 3 W.A.L.R. 240 (C.A.)

We have therefore to investigate the authorities on express grants. Nevertheless, after eliminating such cases, one finds some decisions of the West Africa Court of Appeal which seem to support the view that the allodial title can be granted to an individual. In *Sasraku* v. *Okine* (1930) 1 W.A.C.A. 49), the court held that a stool might sell lands to a stranger, retaining nothing more than a remote chance of reversion if the purchaser died without successors. In *Safo* v. *Yensu* (1941) 7 W.A.C.A. 167 a p. 170) the court cited and approved a statement by the trial court that lands might belong, not to a stool, but to a private individual. A case which discusses the question more fully is *Golightly* v. *Ashrifi* , on appeal from the decision of Jackson J. in the Kokomlemle Consolidated Cases. Jackson J. had held, for reasons to be mentioned below, that a stool could sell its title in land, provided that the sale was necessary preliminary condition to the sale of stool land.' The court relied on the opinions of Redwar and Casely Hayford, to be mentioned below.

The view of Ollennu is that even when the sale appears to be outright the stranger acquires the usufruct only. The community retains a 'jurisdictional interest' equivalent to its rights in land in which a citizen has a usufruct. He accepts that this is contrary to the decision in *Golightly* v. *Ashrifi*. He argued that Jackson J.'s decision was defective in that it restricted the power to grant usufructuary interests as well as the allodial title, and that on appeal the court and parties were so concerned to remove the restriction on grants of the usufruct that they lost sight of the fact that the allodial title, was entirely inalienable to individuals. However, the decision was given by the West African Court of Appeal, and was part of the *ratio decidendi.* It is not likely to be overruled unless it can be shown to be contrary to other authorities. There appear to be no such authorities. Danquah, considered that a paramount stool had 'jurisdiction' over all land in its area, whether alienated or not. The Ashanti Confederacy Council stated emphatically that outright grants to individuals were impossible, although it realized that there had been attempts to make such grants . This is admittedly strong evidence, although it is possible that the law has changed since that time. It is also possible that the law is different in Ga areas from that in Akim and Ashanti.

(iv) Right of Proprietorship in Perpetuity

This right manifests itself most where the allodial interest is owned by a group rather than an individual as a group that never dies and is in perpetuity thus allowing for the enjoyment of this right. It was noted in *Quarm* v. *Yankah II* (1930) 1WACA p. 80 per Sir George Deane C.J. that "…..The concept of the stool ie, it has always been accepted in the courts of this colony is that it is an entity which never dies, the corporation sole, like the Crown, and that while the occupants of the stool may come and go, the stool goes on forever."

(v) Right to Residual Proprietary Interest (Reversion)

The owners can have parallel rights in the land together with any other body to whom they have transferred some of the rights to. After the expiration of the term, the exclusive right to ownership comes back to them. E.g. they can grant a lease after which the land returns back to them.

9. Acquisition of the Allodial Title

There are various ways in which the community acquires the allodial title in land. In in the case of *Ohimen*v. *Adjei* 2WALR, 275 p. 279), it was held that "there are four principal methods by which a stool acquires land".

Danquah suggested two further modes of acquisition, namely foreclosure after a pledge or mortgage, and reacquisition of title by reversion from a grantee.

Discovery followed by settlement appears to be the only original mode. It might be expected that, for it to give an original rather than a derivative title to the settling community, it would be necessary for the land to be unowned immediately before the settlement. A difficulty arises here, because it is a firm principle of customary law that there is no unowned land in Ghana. This was stated by Sarbah in 1897, and it has been said that the superior courts have followed it "since their inception". (*Wiapa* v. *Solomon* (1905) Ren. 410 (F.C.). The principle applies to events before the latter date, although it is unclear how far back into history it may be extended. Probably it would not operate in respect of events before the early eighteenth century. Since the date at which it came into force, title cannot have been acquired by discovery of and settlement on unowned land. But although the courts regard all land as having been owned for at least two and a half centuries it is clear that not all land was occupied before that time. What is the basis of title to land which has been unoccupied for periods since then? In a number of cases the courts have had to determine title to such land. Thus in *Ofori Atta* v. *Attafua* (1913) D. & F.C. '11 – '16, 65), Smyly C.J. found that the land in dispute had been unoccupied. He held as follows:

> "These lands being uninhabited lands situated between two paramount stools would according to native law and custom accrete to the paramount stools and the question of boundary between the two paramount stools would be one in respect of adjoining lands."

The same solution was applied in the *Coconut Plantation Acquisition*, [citation] while in *Ababio* v. *Kanga* (1932) 1 W.A.C.A. 253) it was held:

> "Now in the Gold Coast there is no land without an owner, all vacant lands being attached to the nearest stool in which they may be said to vest for the community represented by that particular stool".

Thus it seems that, if no acts whatsoever have been done in respect of land, it belongs to the nearest community by the mere fact of contiguity. How should we then interpret the cases where acquisition has been said to be by settlement? It is submitted that the answer depends on the date of acquisition. If the acquisition was before the earliest date to which the "no unowned land" doctrine is applicable, it was by settlement on unowned land. At that date, all remaining unowned land must be deemed to have automatically accrued to the nearest communities; here the acquisition may be said to have been by contiguity. Where a community is said to have acquired land by occupation since that date, it must have acquired it at the expense of another community. Therefore the

basis of the acquisition in this case has not been occupation of a *res nullius* . It is submitted that such acquisition is by settlement on land owned by another community, whose acquiescence in the settlement estops it from subsequently asserting its title.

The *locus clasiccus* on this matter is the case of *Ohimen* v. *Adjei.* From the above and and subsequent cases the following modes of acquisition can be identified:

Conquest and subsequent settlement and cultivation by subjects of the stool.

In *Ohimen* v. *Adjei*, the plaintiff sued the first and second defendants respectively as head of Asona Stool Family and as occupant of the Asona Stool of Agona Swedru. The claim is for a declaration of title, an injunction and damages for trespass. The Native Court held it to be established law and custom that undisturbed possession of land for fifteen years would have vested ownership of the land in the person in such possession. They dismissed the plaintiff's claim. The plaintiff appealed to the Land Court, which held as follows::

There are four principal methods by which a stool acquires land.

They are: conquest and subsequent settlement thereon and cultivation by subjects of the stool; discovery, by hunters or pioneers of the stool, of unoccupied land and subsequent settlement thereon and use thereof by the stool and its subjects; gift to the stool; purchase by the stool. Each of these methods involves either the sacrifice of lives of subjects, or the expenditure of energy or contribution of money by subjects, and use and occupation of the land by the subjects. The stool holds the absolute title in the land as trustee for and on behalf of its subjects, -and the subjects are entitled to the beneficial interest or usufruct thereof and have to serve the stool. Each individual or family is regarded in the broad sense as the owner of so much of the land as it is able by its industry or by the industry of its ancestors to reduce into possession and control. The area of land so reduced into the lawful possession of the individual or family, and over which he or they exercise a usufructuary right, is usually called his property. It cannot, save with the express consent of the family or individual, be disposed of by the stool. The individual or family may assign or dispose of his interest in the land to another subject of the stool and the land may be sold in execution of a decree against the individual, or the family, as the case may be,

without the consent of the stool. But he may not dispose of the stool's absolute ownership in it to strangers without the consent and concurrence of the stool.

See also *Edward Awuku* v. *Bryne Yaw Attigah*No. J4/13/2010 [29TH June, 2010 Unreported

In this case, following conflicting claims by the 1st, 2nd and 3rd claimants to the area in dispute, the Chief Registrar of Lands referred the case to the Land Title Adjudicating Committee Tribunal, Accra, for adjudication under Sections 22 and 236 (b) of the Land Title Registry Law, PNDCL 152. On the evidence the land in dispute was at Maamobi which was indisputably on Osu Stool lands. There is no dispute by the parties about this fact.

The claim of the first claimant was that his uncle Charles Gilbert Noi granted the land to him in 1975. The uncle had himself obtained a grant of the land from Nii Kpakpo Adokwei Saka, the care-taker of Maamobi lands. Charles Noi's conveyance was confirmed in 1966 by Nii Dowuona V the then Osu Manche. The 1st claimant (appellant herein) claimed he leased the land to one Daniel Ofori in 1978 and an indenture was issued but the transaction did not materialize for Daniel Ofori never went to occupy the land nor even paid for it. After this the 3rd claimant/appellant sought and obtained permission to park his vehicle on the land.

The second claimant based his claim of title to the land on the strength of a conveyance from Nii Dowuona the Osu Manche, to his father, Emmanuel Yao Attigah, who also conveyed his interest to the 2nd claimant by a conveyance dated 16th November, 1973. During the construction of the Nima Highway the Government compulsorily acquired a portion of his land for the construction. By his claim he sought to recover the portion that was not covered by the acquisition.

On the part of the 3rd claimant/respondent, he said he entered the land in 1974 when it was vacant and has since then been in quiet and peaceful occupation thereof.

It was in 1981 when he approached Nii Nortei Owuo III the Osu Manche (as he then was), for a grant of the land from him, but before he could succeed in the

enterprise, he was destooled. In 1986 he succeeded in getting a grant from Nii Ashong Omaboe, the then Osu Manche.

In brief then it was these competing claims that were sent to the Land Title Tribunal for adjudication.

At the end of the trial, the Tribunal gave judgment in favor of the 1st and 2nd claimants, which judgment was later reversed on appeal by the High Court. The 3rd claimant appellant was dissatisfied with the verdict and appealed to the Court of Appeal. The result was that the Court of Appeal affirmed the decision by the High Court and as stated already, the 1st claimant appealed to this court.

The Court held as follows:

"I have read the whole evidence provided by the appellant, including the unchallenged oral evidence and the documentary evidence in Exhibit A2, to offer the proof that the Osu Manche Nii Dowuona V ratified or adopted the grant of the Maamobi land to Charles Gilbert Noi, the uncle of the appellant, by Nii Kpakpa Adokwei Saka the caretaker of the Maamobi lands, the same day as Exhibit A2 was made. A careful reading of A2 reveals it was made by Nii Saka as the 'donor' but not in the name of the Osu Manche so that he could ratify it later. That meant the transaction between Nii Saka and Charles Gilbert Noi was not adopted or ratified properly so as rectify the anomalous situation. It remained the acts of the caretaker of Maamobi lands purporting to grant Osu Stool lands to Charles Gilbert Noi. He lacked the capacity to do so and nothing passed or was received legally under the transaction; the Court of Appeal was therefore right in concluding as it did in its judgment that following *Hammond v Odoi [1982-83] 1 GLR 1215*, only a valid customary grant could be confirmed in writing by the same grantor or his successor. It remained solid. I affirm the decision by the Court of Appeal that the caretaker/headman of Maamobi lands had no authority to grant Osu Stool land, unless the Osu Mantse adopted or concurred in the grant later upon knowing the true facts. The Court of Appeal affirmed the court's finding that that requisite condition was not satisfied. Consequently, ground 1 of appeal fails and is accordingly dismissed.

The evidence offered by the appellant to establish or prove his root of title was hinged on Exhibits A2, the grant from appellant's uncle to him appellant, and also Exhibit B, the grant from the caretaker which on the evidence was not

properly adopted by the Osu Manche, to the appellant's uncle. The lower courts herein, namely the Land Title Adjudication Committee Tribunal, the High Court and the Court of Appeal held both exhibits were null and void. In this appeal the appellant did not succeed in turning the scales in his favor. The result was that the grant was null and void ab initio; nothing could ever be founded on it for in law you cannot put anything on nothing and hope it to remain there it will fall; also, "Ex nihilo nihili fit" (nothing comes out of nothing). The maxim of old is still good and applies to this appeal. I believe I state the law correctly that where an appellant's title was derivative, he ought to demonstrate that the predecessor in title held a valid title which he could pass to his grantee, for if the foundation was tainted the superstructure was equally tainted.

It was incumbent on counsel who invited this court to go the way of an iconoclast and pull down one of the pillar and foundation of Osu customary land law to show a strong and cogent reason why it should be so. Counsel did not show in any way that the authorities he cited have fallen into desuetude or are so moribund that they ought not to be followed for they are no longer good law. On the contrary the view is that they are not to be given their quietude for they remain of much abiding value".

See also *Awulae Attibrukusu III* v. *Oppong Kofi & Ors.*No. J4/27/2009 (Unreported), where the plaintiff was Omanhene of the Lower Axim Traditional Area and belongs to the Royal Nvaviley Family of Lower Axim who are the owners of Lower Axim stool lands. The land in dispute forms part of Lower Axim Paramount Stool lands. The plaintiff sues for himself and on behalf of the Royal Nvaviley Stool family. In his pleadings he gives the background of his claim as follows: The ancestors of the defendants who belonged to the Royal Nvaviley Clan but were not immediate family members of the plaintiff's Nvaviley Royal Family came from Abassie in the Ahanta area. The ancestors of the plaintiff by name Ebriku and King Kweku Kyina I granted permission to the ancestors of the defendants to farm on various portions of the land including an area called Kudu Bolofo. The plaintiff who was enstooled Omanhene in 1987 is a successor to a long line of chiefs who had been in possession and control of Lower Axim Stool Family lands of which the land in dispute is a part from time immemorial.

The land in dispute has been the subject of several concession enquiries and litigations involving the plaintiff's stool. As owners of Lower Axim Stool Lands, occupants of the stool in consultation with principal members of the family

appointed certain individuals not necessarily members of the Nvaviley Royal Family as Odikro, Headmen etc. to oversee the interests of the Royal Family over the lands. These included the chief of Ewoku. In spite of the plaintiff's stool family's dealing with the land as owners in the form of mining and timber concessions over the years and their involvement in several litigations over the land in dispute, on 22nd August 1984, the defendants' late head of family, Adia Kpole caused to be published a Statutory Declaration over the disputed land purporting to be Ewuku Nvaviley Family lands. The plaintiff contends that the said Statutory Declaration, which was made at a time when there were cases pending at the High Court Sekondi involving the parties over portions of the disputed lands, was calculated to deceive the general public and therefore null and void. It is also alleged that soon after the Statutory Declaration, on 22nd August 1984, the defendants alienated portions of the disputed land to individuals and organisations and had the documents covered by the grants signed by Omanhene of Ahanta Traditional Area who has no jurisdiction over Lower Axim Lands.

In their pleading the defendants stated categorically that it was their ancestors called Arizi, Kwadoh, Kaku Kyinah, Kofi Tsea who were all members of the Royal Navivaley family of Ewuku who cultivated the land when they joined their sister Azia Mansah who had earlier founded the village of Ewoku. They planted food crops on the land and after their death the portions of the land they had cultivated were given to both family and non-family members for planting coconut and palm trees. Apparently, for the use of the land they paid tribute in the form of food crops to the plaintiff stool during Kuudum Festivals. They stopped the practice of paying tribute to the plaintiff's stool when the plaintiff's predecessor took action against their predecessor. They contend that the land in dispute belongs to them and they had dealt with it long before the Statutory Declaration.

The Supreme Court held that:

"Even though we are of the view that the Court of Appeal based its decision inappropriately on forfeiture of the land granted to the defendants' family which the plaintiff did not ask for, we still share the opinion that taking into account the totality of the evidence adduced at the trial and the reasons given in this judgment the appeal ought to be dismissed. We therefore dismiss the appeal. However, in place of the orders given by the Court of Appeal in its judgment we

make the following orders: (i) Declaration of title to all that piece and parcel of land described in relief (a) of the plaintiff's claim, subject to the rights of the defendants' family as holders of the determinable or usufructuary title in respect of the land granted to them at Ewuku. For the avoidance of doubt, the areas outside the land granted to the defendants' family by the plaintiff's stool are declared in favour of the plaintiff's stool. (ii) In place of reliefs (b) and (c) of the plaintiff's claim we make an order for the defendants and their grantees in areas beyond the environs of Ewuku to negotiate with the plaintiff for terms of their occupation of lands on which they have trespassed. (iii) We grant the order for perpetual injunction against the defendants, their agents, servants, assigns and workmen etc. in respect of the lands outside the area of the defendants' family's grant at Ewuku. (iv) Declaration that the Declaratory Instrument described in relief (f) of the plaintiff's claim is null and void and of no effect".

In *Nii Ago Sai* v. *Nii Kpobi Tettey Tsuru III,* J4/21/2008 (24-3-10),the sole issue was who owns the allodial title to Obgojo lands in Accra? Is it the Labadi Stool or the Anahor and Dzirase families of Obgojo village?The appellant claimed allodial title to the land by reason of settlement whilst the respondent claimed the same by conquest. It is trite law that both modes are legitimate customary means of acquiring such allodial title.

The trial Court found as a fact that it is notorious that the La stool acquired certain lands by conquest. See *Owusu v. Manche of Labadi* (1933) 1 WACA 278. The appellant's case was that though the La Stool owns certain lands by conquest they do not include Obgojo lands.

The following additional facts were also not in dispute, namely that the first settlers of Obgojo lands are the Anahor and Dzirase families. Accordingly the only question is whether the allodial title was thereby acquired by them. How and in what capacity the land in dispute was acquired is of course a question of fact in the light of the customary law.

The Court held that one of the ways of establishing an allodial title of a stool is occupation and user of the land in question by its subjects after its acquisition by the stool. However occupation and user of land by stool subjects is not necessarily proof of the stool's title to the land in question.

In any case, the appellant has in my view been able to lead satisfactory evidence that will convince any court that the La Stool did not have any rights of ownership

which will divest the appellants of title.The Court went held that Ogbojo lands, are certainly not La rural lands over which the La stool has ownership rights. The Supreme Court allowed the appeal set aside the judgement of the Court of Appeal together with all the orders made by them save the order re-instating the case in respect of the 1st and 3rd co-defendants.

In the result, the judgment of the learned trial High Court Judge, dated 17th day of February, 2004 was affirmed in its entirety that the Ogbojo lands are not La rural lands belonging to the La stool or the respondent herein, but belong to the Anahor and Dzrase families of Ogbojo who own these lands in dispute.

In *Nyamekye*v. *Ansah* (1989-90) 2 GLR 152,thethe plaintiff and the second defendant, the chief of Kajebi, were members of the royal family but belonged to different branches. Following the granting of a piece of land by the chief to the first defendant, a stranger, the plaintiff claiming that that land belonged to their branch, i.e. the Apia Branch, brought action against the defendants for declaration of title in their Apia branch and an order of injunction to restrain the defendants from interfering with the rights of the branch in the land. The second defendant contended that the whole of the Kajebi lands belonged to the stool and therefore as the occupant of the stool he had authority to make the grant. He therefore counterclaimed for declaration of title in the stool. The plaintiff led evidence to show that Apia, the founder of their branch, was the first to cultivate the land in dispute in 1909; after his death one Fynn as successor and head of the Apia branch took over control of the farm and the land; for a period of sixteen years before the suit, she had been collecting the proceeds of the farm and the land; several others had acquired specific interests in portions of the Kajebil lands and after their deaths those portions had vested in their respective branches; the Apia branch granted the oman land for a new cemetery but still collected proceeds from the felling of economic trees on the land. The trial judge however held, inter alia, that the plaintiff had no capacity to bring the suit because whether the land was stool land or was for the whole of the royal family or for the Apia branch since she was neither the chief nor the head of the royal family and she led no evidence on her appointment as successor or head of her branch she could not sue. He therefore dismissed the action and gave judgment for the second defendant on his counterclaim. On appeal by the plaintiff against that decision, she further contended that since the first defendant did not give evidence at the trial, judgment should have been entered against him.

The appellate court held that the customary law position was that even though individuals and families might first cultivate on land it was the stool which first settled on the land that had the allodial title in the land. The occupation of land by individuals or families, quarters and sub-divisions of a community was therefore a sine qua non to acquisition of land by a stool. But any portion of unoccupied or vacant land which individual members of that community or tribe were able by their labour to reduce into their possession became the individual's property, and land so occupied would belong to their families after the individual's death. The interest that the individual or family would hold was the determinable or usufructuary estate in the land and it was concurrent with the existence of the absolute ownership in the stool. So long as the subject or family acknowledged their loyalty to the stool or tribe, their determinable title to the portion of stool land they occupied prevailed against the whole world, even against the stool, community or tribe. On the evidence, the whole land belonged to the royal Ekissi family and therefore the allodial title was vested in the Kajebi stool. But since the plaintiff's family had exercised ownership rights over the land in dispute and continued the exercise of those rights, the land had acquired the character of family land which the head of family with the concurrence of its members was entitled to occupy as family land and which right included all the incidents of living, whether by residence on the land by members of the family or by lease of the land to strangers provided they did not alienate the land from the stool. The stool could not therefore deprive them of the land in dispute.

ii)Discovery by hunters or pioneers of the stool and subsequent settlement thereon and use thereof by the subjects of the stool.

Ngmati v. *Adetsia* (1959) GLR 323.

About 400 years ago, the two Krobo peoples,Yilo Krobo and Manya Krobo- were immigrants who settled on the top of the Krobo Hill, which, with the surrounding land, was then

unoccupied. The two communities lived on the hill as separate communities, each community under a head called "the Konor." Members of both communities farmed on the plains at the foot of and surrounding the hill. Each person became owner of so much of the land as he was able to reduce into his possession and occupation by cultivation. The several portions which together formed a block of land so acquired by the subjects of each Stool respectively, became vested by customary law in the Stool to whom they owed allegiance.

iii) Contiguity—where there is unoccupied land between two paramount stools.

Wiapa v. *Solomon* (1905) Ren. 405.
Ababio v. *Kanga*(1932) 1 WACA 253.
Ofori-Ata v. *Attafua* (1913) D & FCt. (1911-16) 65-66.

For an analysis of the last three cases, s*ee* Kludze, The Ownerless Lands of Ghana (Reproduced in page ?? of *Cases and Materials on Customary Land Law of Ghana*).

10. Loss of the Allodial Title

According to Woodman , the derivative modes of acquisition listed in the preceding section all involve loss of the allodial title by the previous owner. Thus sale, gift, foreclosure, estoppel and conquest are all modes whereby one owner losses the allodial title at the same time as another acquires its. Abandonment of the allodial title may also once have been a mode of loss. Since today there can be no unowned land, it can no longer occur unless the title simultaneously vests in someone else. In such cases the loss will be by estoppel. It is necessary to refer to the relevant enactments, and then to discuss a further problem concerned with loss of the allodial title by gift and sale. The allodial title may be lost through:

(i) Effect of Legislation

The title may also be lost as a result of legislative enactment. In three instances holders of allodial titles have lost them or are liable to lose them as a result of legislation. First, the Administration of Land Act 1962 (Act 123), s 7 (1), provides.

> "Where it appears to the President that is in the public interest so to do he may, by executive instrument, declare any stool land to be vested in him in trust and accordingly it shall be lawful for the , on the publication of the instrument, to execute any deed or do any act as a trustee in respect of the land specified in the instrument."

See *Nii Nortey Omaboe & Others* v. *Attorney General & Another* SUIT NO. REF.J6/1/2005

In this case Mrs. Justice F. Owusu-Arhin in a High Court ruling dated 1 April 2004, referred an issue in the above matter to us for interpretation. She adjourned the case sine die and has framed the referral in the following terms:

"Whether or not by virtue of Article 267 of the 1992 Constitution, the vesting power of E.I. No. 108 of 1964, namely, the Accra-Tema City Stool Lands (Vesting Instrument, 1964, has lapsed."

The Plaintiffs herein, in a writ of summons and Statement of Claim issued against the Defendants on 31st October 2003, claimed the following reliefs:

"1. A declaration that the control and management by the Defendants of the Osu Mantse Layout lapsed with the promulgation of the 1992 Constitution;

2. A declaration that all leases renewed after the promulgation of the 1992 Constitution are null and void and of no effect;

3. A declaration that the 1st and 2nd Defendants were enjoined by E.I. 108 of 1964 to collect the rents and other outgoings accruing from the properties situate in the Osu Mantse Layout and pay same to the Osu Stool;

4. An order for accounts of all moneys received by Defendants and payment of same to the Plaintiffs;

5. Any further or other reliefs as to the court may seem meet."

After pleadings had closed, it transpired that the second Defendant, the Lands Commission, had not filed any Statement of Defence. The Plaintiffs therefore applied for an interlocutory judgment in default of defence to be entered against it. This came up for hearing on 1st April 2005. The learned High Court judge took the view that the Plaintiffs' claims called for an interpretation of Article 267(1) of the 1992 Constitution, and declined the application. Hence the referral to this Court.

The Supreme Court held as follows:

"In the absence of any extrinsic aid, we must still make sense of the Constitution that we have been called upon to interpret. One age-old canon or maxim of interpretation is that there is a presumption of consistency among the various parts of the same document; and that one should as far as possible avoid an interpretation that will lead to internal inconsistency.

When we put together Articles 267, 257, and 258, the following appears to be the scheme of landholding policy established under the Constitution: First of all, Stool lands that had not been vested in the President or Government prior to January 7th 1993, that is, those stool lands properly envisaged under Article 267(1), continue to be duly vested in their respective stools in trust for the subjects of the stool in accordance with customary law and usage.

Even though such lands have been legally vested in the stool, Article 267(2) of the same Constitution directly establishes the Office of the Administrator of Stool Lands whose functions are undoubtedly those of management, revenue collection and disbursement; and whose authority covers all stool lands. More specifically, Article 267(2) directs that the Administrator of Stool Lands establish a stool lands account for each stool into which all rents, dues, royalties, revenues or other payments shall be paid. The Administrator is to account for monies so collected to the beneficiaries named in that Article; and to make disbursements to his Office and to the beneficiaries according to a formula also spelt out in the same Article. There is no inconsistency between 267(1) and (2), for as already explained, the vesting of title in one party may go side by side with management functions being lodged in another entity. Nor is there any absurdity in the constitutional arrangement, even though others might

question the policy choices made by the framers of the 1992 Constitution on land tenure policy.

There is a further stricture on the powers of the stools even as the holders of the allodial title. Under Article 267(3), there can be no disposition of an interest in such lands, and no development thereof, unless the Regional Lands Commission of the region in which the land is situate has certified that such an act is consistent with the development plan approved by the planning authority for the area concerned. Further, under Article 267(5), the stools cannot, subject to other provisions of the Constitution, create and transfer a freehold interest in stool lands to any person. But what is also clear from the constitutional provisions is that the Lands Commission cannot by itself create any interest in stool lands. The role of the Lands Commission is confined in this respect to consent and concurrence under provisions such as Article 267(3).

The second landholding policy arrangement concerns those lands that were once stool lands, but which had been vested at some point in the President or Government, without any subsequent de-vesting in favour of the original stools by a statutory or constitutional provision. Our position is that they continue to be vested in the President or Government until the state takes measures by an express statutory language to de-vest itself and re-vest it in the original stool owners. As long as they remain vested, they come under the administration and management of the Lands Commission created under Article 258 of the Constitution.

A close look at Article 258(1)(a) indicates that there are three basic categories of lands entrusted to the management of the Lands Commission on behalf of the Government of Ghana: public lands, lands vested in the President by the Constitution or by any other law, and any lands vested in the Lands Commission itself. The distinction drawn in this Article between lands vested in the President and public lands is amplified by the definition of public lands in Article 257(2), which confines it to lands vested or to be vested in the Government of Ghana as such. The clause reads as follows: ... 'public lands' includes any lands which immediately before the coming into force of this Constitution, was vested in the Government of Ghana on behalf of, and in trust for, the people of Ghana for the public service of Ghana, and any other land acquired in the public interest for the purposes of the Government of Ghana before, on or after that date". The import of the distinction in Article 258(1)(a) between public lands and lands vested in the President is probably of historical significance only, since Article 257(1) also vests public lands in the President, and both public lands and lands vested in thePresident are held by the state in trust for the people of Ghana and for the public service of Ghana. At any rate, both categories of land, as envisaged under Article 258(1)(a), are expected to be managed by the Lands Commission. It follows that the Osu Mantse Layout, as lands vested in the President, comes under the management portfolio of the Lands Commission, and not the Office of the Administrator of Stool lands.

Finally, there are lands which might have had no stool origins or connections, such as family or individual lands, but which could also become public lands by virtue of compulsory acquisition or negotiated transactions. These would also fall under the Lands Commission's management umbrella.

We now sum up our analysis of this problem. We hold, first of all, that the purpose of the framers of the Constitution, whether viewed in terms of original intent or a purposive, contemporary intent, was to resolve the old problem of the vesting of stool lands in favour of stools. This is clearly reflected in the language of Article 267(1) of the Constitution. At the same time, we do not read that Article as de-vesting the President or Government of all lands which were once stool lands but which had become so vested, and thereby retroactively vesting all those lands in the original owning stools. Therefore we hold further that Article 267 does not cover lands that were not stool lands on the coming into force of the 1992Constitution on 7th January 1993.

In conclusion, we state our response to the referral made to this Court by Justice F. Owusu-Arhin in the following terms:

Upon a true and proper construction of Article 267(1) of the Constitution, the vesting power embodied in E.I. 108, The Accra-Tema City Stool Lands (Vesting) Instrument, 1964, has not lapsed".

Secondly, the government's other powers of compulsory acquisition can be used to acquire the allodial title to land whether or not it is subject to the Administration of Lands Act.

Thirdly, certain Ordinance and Acts have vested specific areas of land in the state. (eg. Ashanti Stool Lands Act 1958 (No. 28) and the Takoradi Harbour and Town (Acquisition of Lands) Ordinance (CAP. 140).

(ii)Abandonment. In *Mensah* v. *Asamoah* (1975) 1GLR 225 CA, Archer J.A. See also *Nikoi Olai* v. *Adams*, Land Court, 22 November 1951, [unreported]. In this case a large portion of what the plaintiff claimed to be Mukose lands was sold to a Lebanese called Captan. These sales were evidenced by two deeds executed in October and December 1947 respectively. The sales were made by one of the indigenous families of Asere called the Abbetsewe. They were endorsed by the Asere stool which received a handsome part of the consideration money. When the plaintiff's family got wind of it, it instituted proceedings in the native court seeking a declaration of title to that land, damages for trespass and a perpetual injunction. That action was taken against named members of the Abbetsewe family. The suit was in due course transferred to the Supreme Court where it was heard and determined by Jackson J. As the Abbetsewe family relied on a gift of the land from the Asere stool, and as that stool was itself a concurring party to the sale, the learned judge thought that the stool should be joined to that action as co-defendant and he made an order to that effect on his own motion. The stool made no issue of this and indeed took opportunity in this later action to reassert its failed tradition about the original founding of Mukose. It is plain that the real object of the plaintiff's family in launching this litigation was to set at nought the sale of the land to Captan or as one of its witnesses put it to "quash the sale."

The court held that quite clearly, this land in issue was occupied very many years ago by some members of the plaintiff's family and who farmed it to some degree.

It is equally clear that whatever villages they occupied then as farming villages they have abandoned for very many years, the last one at Mukose in 1926, and by the ordinary practice of customary law whatever character of family land it may then have possessed disappeared with its abandonment, and the land was free for any subject of the Asere stool to farm upon

and was equally open to strangers who had received the permission of the Manche or headmen to farm upon payment of an annual toll and so the evidence proves they did farm."

(iii) Conquest *Owusu* v. *Manche of Labadi* (1933) 1 WACA 278.

(iv) Adverse possession under the Limitations Act, 1972 (NRCD 54).

(v) Extinction by effect of constitutional provisions. See 1992 Constitution, Article 266(3), which converts existing freeholds held by non-citizens into leases for 50 years effective August 24, 1969. Issue is whether allodial title is the same as freehold?

(vi) Sale. See *Golightly* v. *Ashirifi* (1961) 1 GLR 28 (PC).
Sasraku v. *David* (1959) GLR 7.

(vii) Compulsory acquisition. Examine the following provisions:

1992 Constitution, Article 20, clauses 1,2,3,5 & 6.
Administration of Lands Act, 1962 (Act 123).
State Lands Act, 1962 (Act 125) as amended.

Distinguish between the procedure as well as the effects of compulsory acquisition and vesting. Particularly emphasise the effects on the allodial title.

In compulsory acquisition the allodial title is extinguished. However, vesting does not extinguish the allodial title. For effects of vesting refer to the case of *Nana Hyeaman II* v. *Osei* (1982-83) GLR 495.

Section 7(1) provides that of the Administration of Lands Act provides:

"Where it appears to the President that it is in the public interest so to do he may, by executive instrument, declare any stool land to be vested in him in trust and accordingly it shall be lawful for the President, on the publication of the instrument, to execute any deed or do any act as trustee in respect of the land specified in the instrument".

Section 10(1) provides that:

"The President may authorise the occupation and use of any land to which this Act applies for any purpose which in his opinion, is conducive to the public welfare or the interests of the state".

Section 10 makes provision for the payment of appropriate compensation from funds voted by parliament. Examples of Vested Land are Koforidua and Nkawkaw Lands (E.I. 195 of November 1, 1961); Efutu and Gomoa Ejumako Lands (E.I. 206 of November 21, 1961) and Stool Lands within one mile radius of the Winneba Roundabout (E.I. 83 of June 6, 1963);.

But discuss the possibility of reversion in cases where the acquired land is not used for the intended purposes. Refer to current government position on the matter, especially in the light of Article 20(6) of the 1992 Constitution. Eg. Atomic Energy area, P & T at Pantang, Achimota School v. Owoo Family.

12.Constitutional and Statutory Interventions in the Incidents of the Allodial Title

"Man cannot always be allowed by society to be complete master of what he calls his own, and that he must submit to the restrictions placed by the law upon the exercise of his proprietary rights." For example:

Article 267(5) of the Constitution which on prohibition of grant of freeholds by stool.

Article 266(1) – (5) governing restrictions on grants to persons who are not citizens of Ghana.

Article 257(6) which vests minerals in their natural state in the president on behalf of and in trust for the people of Ghana. See also section 1 of the Minerals and Mining Act, 2006 (Act 703).

Article 268 which subjects grants of concessions or right for the exploitation of any mineral or natural resource to parliamentary ratification.

Article 267(1) and 267(6)governing the receipt and disbursement of revenue from stool lands. See also the Office of the Administrator of Stool Lands Act, 1994 (Act 481), SS. 2 & 7.

Concessions Act, 1962 (Act 124), as amended by the Timber Resources Management Act, 1997 (Act 547), S.1.

Petroleum Exploration & Production Act, 1984 (PNDCL 84), s.1.

Legislation relating to Planning and Zoning, e.g. Local Government Act, 1993 (Act 462) S. 49, 52, 53, 54 and 55.

13. Social, Economic and Political Influences on the Allodial Title

Note particularly the following:

- Economic and technological developments leading to the new and intensive uses of land.
- The emergence of the customary law freehold.
- The extension of the governmental authority in land administration.
- Changes in the nature, structure and organisation of customary communities and particularly traditional notions and structure of the family.

CHAPTER 3
THE USUFRUCTUARY INTEREST

(1) What is this interest?

In Roman law, usufruct was the right of using and enjoying a chattel (not immovable property) belonging to another person provided the substance of the chattel remained unimpaired or unchanged. In Roman law, a usufruct was not capable of being alienated. In addition, the Roman usufruct did not survive the life of the usufructuary. On the other hand, the Ghanaian usufruct is inheritable, alienable and potentially perpetual. The usufruct was described as a burden on the allodial title. According to this view, the usufruct is not another species of ownership in itself but consisted of perpetual rights of beneficial user or land, which now co-exist with the allodial title.

This land interest is variously called the "usufruct", "customary law freehold", "customary freehold", "determinable interest" and "subordinate interest". Individuals and families from the landholding group hold the 'customary freehold'. This principle is valid for all parts of Ghana where allodial title is vested in the wider community. Thus under the indigenous tenure system, access to land is based, primarily, on membership of a landholding community. Customary freehold is an interest in land which a member of a community, which holds the allodial title to the land, acquires in a piece of vacant, virgin, communal land by exercising his or her inherent right to develop such land by either farming or building on it. It has been noted that this interest prevails against the whole world including the allodial title which gave birth to it. Judicial authority shows that the allodial title holder cannot displace or extinguish the usufruct and once the usufruct is created, it becomes a species of interest which co-exist with the allodial interest as long as nothing is done by the usufruct holder to prejudice the interest of the allodial title holder.

The courts have held conclusively that so long as the subject acknowledges his loyalty to the stool, his or her usufructuary interest in the portion of the stool land occupied by him prevails against the whole world, even against the stool or community. In this regard, it should be possible to value the usufructuary interest and compensate both the usufruct as well as well as the allodial owner upon the coming into being of the usufructuary interest.

The usufructuary interest is, therefore, a recognized estate which can be properly transferred under customary law and the interest is of indefinite duration and therefore, potentially perpetual. The usufruct may be lost in very limited circumstances including (i) abandonment by the subject or member of the landowning group, (ii) absence of successors on the death of the usufruct holder and (iii) upon the denial by the usufruct holder of the title of the stool or allodial title holder.

The pressure on land and its increasing economic value has resulted in the gradual redefinition of the usufruct and whittling away the bundle of rights attached to the interest under indigenous customary law. Currently, there is considerable lack of clarity and some confusion surrounding the scope and extent of the usufruct. Actual practice with regard to the usufruct seems to be at odds with the documented customary law as noted above. In certain areas attempts are being made to re-write and re-interpret customary law so as to diminish the scope of the rights attached to the usufruct, in some cases seeking to limit the usufruct to use rights which are terminable at will by the allodial title holder. In peri-urban areas, especially in the Greater Accra Region, lands that are held under usufruct are arbitrarily taken over by chiefs and family heads and sold to strangers. This trend is clearly in conflict with judicial authority that the holder of the usufruct can impeach a grant made by the stool without his consent.
However, in *Awuah* v. *Adututu* (1987-88) GLR 191, the Supreme Court described the usufruct as "a specie of ownership co-existent and simultaneous with the stool's absolute ownership".

See also *Yiboe* v. *Duodu* (1957) 2 WALR 293 (Ollennu J, as he then was). See also Denning LJ in *Kotey* v. *Asere Stool* (1961) GLR 492 (PC).

Usufructuary title in Ghana is the highest type of land ownership a subject or individual member of a family can hold in stool/skin or family. It is an interest in land held by sub groups and individuals who acknowledge the land to be owned allodially by a larger community of which they are members. This applies to:

Families and individual subjects of a clan in part of the clan's land;
Families and individual subjects of a stool in part of the stool's land.

It is therefore a very substantial encumbrance on the allodial interest. This term was quoted from the Roman law *ususfructus* and was subsequently adopted by Woodman (1996). It is also called "determinable estate" or title by Ollennu (1985) because of the fact that it is a type of absolute ownership, which may be determined under certain conditions without affecting the community's ownership. The term "customary freehold" was first proposed by Bentsi-Enchill and was adopted by the Ghana Law Reform Commission in its recommendations for reforms of the Ghana land law in 1973. The title in question is both inheritable and alienable. In the case of *Amodu Tijanı*.*Secretary, Southern Nigeria,* [1921] 2 A.C. 399, the Privy Council described the determinable or usufructuary title as follows:

> "A very usual form of native title is that of a usufructurary right, which is mere qualification of or burden on the radical or final title of the sovereign (stool) is a pure legal estate, to which beneficial rights may or may not be attached. But this is qualified by a right of beneficial user, which may not assume definite forms analogous estate……."

The Supreme Court also describe the usufruct as "a species of ownership co-existent and simultaneous with the stool's absolute ownership". This was held in *Awuah* v. *Adututu* (1987 – 88) 2GLR 191 C.A.) Other terms given to this interest is customary law freehold, possessory title or the usufructuary.

Origin of the Usufructary title

As noted by Asante , when people settled down to farming as the main economic activity, and stool subjects reduced portions of land into their possession for the purposes of cultivation, there developed the concept of the subject's usufructuary right to stool land, that is to say, the right to occupy, till, or otherwise enjoy an unappropriated portion of stool land and to appropriate the fruits of such user. This right of beneficial user in no way derogated from the allodial title of the stool; to use Lord Haldane's words, the usufructurary right was "a mere qualification of or burden on the radical or final title of the Sovereign…." (*Amodu Tijani* v. *Secretary, Southern Nigeria* [1921] 2 A.C. 399 at p. 403). Traditional idea drew a sharp distinction between the subjects' right of beneficial user in stool land, and the stool's absolute ownership thereof. An Ashanti saying runs: "The farm [meaning the farm produce] is mine; the soil is the Chief's . User, however long, could never ripen into ownership [see *Kuma* v. *Kuma* (1938) 5 W.A.C.A (P.C.)]. There was no equivalent of the Anglo-American idea of prescription. As a consequence of this scheme no land could be ownerless. The usufruct, as we have noted, was not a species of ownership; it consisted of perpetual rights of beneficial user in re-alienated the stool's land. Stool subjects had an inherent right to a usufruct in any unappropriated portion of state land; accordingly the bare facts of effective occupation or cultivation by a subject were enough to establish his usufructuary interest without the necessity of a formal grant by the stool. But a second form of acquisition was by express grant

by the stool. Such grants were usual in the case of town lands, where strict supervision of allocation of parcels was necessary for the purposes of town planning. Finally, a subject could transfer his usufruct to a fellow-subject. The usufruct was usually held by a corporate body – the sub-stool, lineage or family; but there was no doctrinal prohibition of its acquisition by an individual. The greater incidence of corporate holding was a result of economic convenience; traditional social process employed co-operative endeavour to accomplish the formidable tasks of clearing and cultivating large tracts of impenetrable forest lands, and the collective efforts of kinsmen invariably resulted in the creation of corporate or family property. But there was nothing to prevent an enterprising individual from establishing his own private concern by his own unaided exertions. In an agricultural economy where subsistence depended on full and extensive exploitation of land, public policy leaned towards liberal appropriation of lands by families and individuals alike.

The usufruct was potentially perpetual; it subsisted as long as the subject or his successors continued to acknowledge the superior title of the stool. The proviso for the recognition of the stool's title did not limit the subject's quantum of interest which persisted so long as the subject or his successors retained their status as subjects, but indicated the political basis on which the subject's proprietary interest, as well as his other civic rights, rested. The usufruct was heritable and devolved on the family of the subject on his death intestate. It lapsed upon express abandonment of the land in question or failure of successors, whereupon the stool resumed its dominium free from encumbrances. The security of the subject's usufruct was reasonably assured. The stool could not alienate it to another person without the usufrucutuary's consent. Nor did the stool's dominium carry the right to divest the subject of his interest expect for a recognized and specific public cause. No compensation was payable in consequence of such dispossession, but the inclination and opportunity for such divestiture were extremely rare in olden times.

The usufrucutuary had an exclusive right to the possession of the land subject to his usufruct, which was fully guaranteed against invasion by other subjects. User of the surface of the land was virtually unrestricted; the usufructuary could cultivate, build or enjoy the land in any manner he chose provided he did not invade the stool's right to the minerals and treasure-trove. Otherwise there was nothing in the nature of "incidents of tenure". True the subject had to render prescribed services to the stool, such as offering the first fruits of his annual harvest or presenting specific of game killed on the land. But these services are not analogous to feudal incidents of tenure, for they were eligible, not in consequence of a proprietary arrangement between stool and subject, but by virtue of the political and kinship ties binding them. Thus the general obligation to perform services to the stool persisted even where the subject was no longer resident in his own state. The relationship between a stool and its subject was primarily political, though it undoubtedly had proprietary implications such as the subject's inherent right to a unsfruct, and his obligation to present part of his annual produce to the stool.

Acquisition of the Usufructuary Interest

It can be acquired in four (4) ways.

Discovery of vacant land by pioneers of a stool.
As a general rule, when the subjects of a stool discover unoccupied land, and subsequently settle thereon and reduce into occupation, the stool acquires the allodial title and the subjects acquire the usufruct. See *Ngmati* v. *Adetsia* (1959) GLR 323. (Already cited at page ??? .)

Implied grant from a stool.

Subjects of a stool have an inherent right to a usufruct in any unoccupied portion of stool land and the fact of the occupation and cultivation by a subject was all that was required to establish a usufruct. No formal grant was required. See the following cases:

Ohimen v. *Adjei* (1957) 2 WALR 275. (Already cited at page ???)

The case of *Bruce v. Quarnor (1959) GLR 292* is illustrative on this principle. The Plaintiff instituted an action seeking among others a declaration of title to a parcel of land in James Town Stool which was granted to one Reverend Ernest Bruce, by Nii Kofi Akrashie the then occupant of the James Town Stool. The grant was made according to customary law. The 1st defendant had entered upon part of the land claiming the right to occupy that portion of the land by reason of a grant made and a deed executed to her by Nii Kofi Akrashie II and she further argued that since the plaintiff had granted the land to his children he did not have any title left in the land and as such had no locus. The other defendants respectively claimed the right, by a grant direct from the James Town Stool.

It was held that any conveyance of land which is made in accordance of the customary laws of that community becomes effective from the moment it was made and that a deed subsequently executed could only add to but could not derogate from the title and interest so conferred by the customary grant. That the plaintiff being a member of the royal family of James Town; is a subject of the stool and by customary law he has a right to occupy any vacant portion of the land, which he can do upon actual or implied grant. That even if the plaintiff was occupying the said land without an actual grant, such occupation or possession is good title because he is a subject of the stool. And his title would take precedence over any grant which the stool may subsequently make on any portion of the land.

By customary law a stool has no right to grant land which is in the occupation of a subject to any one-subject or stranger-without the consent and concurrence of the person in possession. This principle was also stated in the case of *Oblee v. Armah (1958)* 3 WALR 484.

In *Oblee* v. *Armah*

In *Budu II v. Ceasar (1959)* GLR 410, at 426 there was an action for declaration of title to a certain land and claims for damages for trespass.Judgment was given against the defendants who appealed. The appellate court set aside the judgment and remitted the case to the Akwamu Native Court "B" for hearing de novo.

It was held that "By customary law, a subject of a stool is entitled, either by express or implied grant from the stool, to occupy any vacant portion of the stool land; the occupant of such portion of the land becomes the owner of the possessory title in it; the land descends (upon his death intestate) to his family" – Per van Lare J

Express grant from a stool
Such grants were usual in the case of urban lands where some supervision of the allocation of plots was necessary for the purpose of orderly development and equitable allocation of communal lands.*Armatei* v. *Hammond* (1981) GLRD 300.

In *Armatei* v. *Hammond*

Frimpong v. *Poku* (1963) 2 GLR 1.
Oblee v. *Armah* (1958) 3 WALR 484 (see holding 5).

It must be noted, however, that though the subject may now be required to seek an express grant from the stool, the subject's access to land still remains an entitlement.

Transfer

This could be from a subject to a subject or from a subject to stranger as illustrated by the case of *Kotey* v. *Asere Stool* (1961) GLR 492 (PC).

Such grant to a subject or stranger being one under customary law is effective from the moment it is made and a deed subsequently executed by the grantor may add to, but cannot take away from the effect of the grant already made under customary law. *Bruce* v. *Quarnor* (1959) GLR 292.

Whether a subject has satisfied the degree of occupation required to confer the usufructuary title is a matter to be determined on a case by case basis. The general rule is that the presence of economic trees on the land is a prima facie indication that someone is in occupation.

In *Norquaye-Tetteh v. Malm (1959) GLR 468,* late Henerike Cornelius Malm bought a parcel of land from the property of the Akumadjaye Stool. A deed of conveyance was made by Nii Abossey Okai, the caretaker of the Abose Okai lands. Henerike bequeathed the said lands to his daughters by a deed of gift. Thirty years later a portion of the Abossey Okai lands were conveyed to Emmanuel Norquaye-Tetteh and David Quao Norquaye-Tetteh by deeds of conveyance perfected by one Nii Ayikai II, Mantse of Akumadjaye, acting on behalf of the Akumadjaye Stool. After the grant the brother went ahead to erect a barbed wired fence over the land they bought, on seeing this, the daughters of late Herenike objected claiming it was their fathers land and thereon erected a signboard on the land stating the owner of the land. The two brothers brought an action against the defendants; late Herenike's daughters. The plaintiff submitted that the only evidence the defendant led of their occupation of the land was evidence of the existence of three mango trees on the land, the fruits of which they alleged they had been harvesting. They went on to further submit that harvesting of the fruits of the mango trees on the land is not sufficient evidence to show that the land is in the possession of the defendants.

It was held that mango trees cannot survive on the Accra plains without someone tending to it, and even though trees generally sprout up in cultivated areas, it is the owners of the farm that look after and tend to it, therefore where mango trees or cashew trees grow on a land that is overgrown with weeds, *it is prima facie evidence that the area where they are found is a farmstead, once under cultivation by the person who now harvests their fruits.*

This point is further buttressed by the case of *Owusu v. Manche of Labadi (1933) 1 WACA 278* and *Wuta Ofei v. Danquah (1961) 1 GLR 487.* It should be noted that this principle amounts to a presumption, which can be rebutted by contrary evidence.

The subject can alienate so long as the obligation to recognise the allodial ownership of the stool is preserved. The case of *Total Oil Productsv.Obengand Anor. (1962) 1 GLR 228* illustrates this principle. In this case the land in dispute was a portion of the Tafo stool lands under the Akim Abuakwa paramount stool. The land was granted to the plaintiff company (Total Oil Products Ltd.) by the defendant who was an Ashanti man, and not a subject of the Akim Abuakwa stool for lease of a term of years. The plaintiff's had paid £G250 to the 1st

defendant for the lease. They were subsequently ejected from the said land by the Tafo stool. Upon the failure of the 1st defendant to put them back in possession, and in order to remain on the land the plaintiff's took another lease of the same land from the Tafo stool. The plaintiff then instituted an action claiming anorder to rescind the lease granted by the 1st defendant, for recovery of £G873 8s from the first and second defendants jointly and severally; the 2nd defendant (Yaw Kyeame) originally sold the land to the 1st defenedant). The plaintiff submitted that the stool can alienate land in the possession and occupation of a subject without informing the subject in possession and occupation.

The court held that he lease granted to the plaintiff-company by the Tafohene, which is a lease by a stool to a stranger of land in the possession of a subject of the stool or his grantee without such grantee's consent, upon the well-established authorities, e.g. Golightly and Ors. v. *Ashrifi and Ors.*, *Ohimen* v. *Adjei and Anor.*, *Thompson* v. *Mensah* , is null and void, and passed no interest in the land to the plaintiff-company. The Court further went on to add that lease of land by a subject is not alienation of his usufructuary title or any interest in the land; it does not therefore require the prior consent of the stool. The judge relied on the decisions in the case of *Thompsonv.Mensah*where the Court of Appeal stated the law as follows:

> "... *the correct statement of the native custom is that a usufructuary title can be transferred without the consent of the real owner provided the transfer carries with it an obligation upon the transferee to recognise the title of the real owner and all the incidents of the subject's right of occupation, including the performance of customary services to the real owner*".

The principle that a subject owner to a stool land can alienate without the prior consent of the stool as long as he recognised the absolute title of the stool was further enunciated in the case of*Awuahv.Adututu(1987-88) GLR 191* where the the plaintiff/appellant was a stranger grantee of a stool in respect of a defined portion of the stool's forest land which he had cleared and cultivated. The respondent (1st defendant) who had usufructuary interest granted that portion of stool land to the appellant (plaintiff), and subsequently went ahead to grant part of that portion to another person (the second defendant). The magistrate court judge found in favour of the appellant (plaintiff) that the first defendant had no vacant land left between the plaintiff, Sefa and Boahene which he could validly sell to the second defendant; he had already sold it to the plaintiff, therefore he had no right to resell it to the second defendant. On appeal to the high court, the High court judge set aside the decision of the lower court and stated that because the ownership of the disputed land was in the stool-grantor and not in the plaintiff, the claim for a declaration of title was not maintainable.

It was held on appeal that that the usufructuary title is a specie of ownership co-existent and simultaneous with the stool's absolute ownership and also said that the plaintiff had an estate in that portion of the stool land of which he took effective possession, occupied and cultivated, which estate could be described variously as usufructuary, possessory or determinable title. The usufructuary can alienate voluntarily to a fellow subject or involuntarily to judgment creditor without the prior consent of the stool, this is because he is regarded as the owner of the area of land he has possession of. There is no limit to his right to alienate his usufructuary title as long as he recognises the absolute title of the stool. Neither can the stool divest the usufructuary of his title by alienating it to another without the consent and concurrence of the usufructuary

On the other hand; the stool cannot make a valid grant of land in which a subject holds the usufruct without the consent of the subject as was seen in *Total Oil Products v. Obeng* supra.

However, when alienation is without the consent of the stool, it is only voidable, not void and can be set aside only when the stool acts timeously. This principle was enumerated in the case of *Buour v. Bekoe (1957) 3 WALR 26* where an order for the redemption of a cocoa farm pledged by the plaintiff's predecessor to the first defendant was made. The plaintiff claimed that the said farm was pledged to the first defendant, but at 'the request of the latter a note on the pledge was made in the name of the second defendant, a brother-in-law of the first defendant. The third defendant bought the land from the second defendant and claimed that the original transaction between the plaintiff's predecessor and the second defendant had been one of outright sale and not of pledge and that the second defendant had therefore been fully entitled to re-sell the land to him. The native court found for the plaintiff. On appeal to the High court, the plaintiff submitted that even if the original transaction had been a sale, it was void ab intio, this he said; was because since the purchaser was a stranger to the stool, the seller should have gotten the necessary consent of the stool before alienation. The defendants in return argued that the stool was estopped from attempting to enforce their rights on the land because they had stood by for 30years without attempting to enforce same. The High court held that; if that had been the case, i.e if it was an outright sale, then the consent of the stool would have been needed to validate the alienation, he held further that "*the absence of consent in such circumstances renders a sale voidable at the suit of the stool: it does not make a sale void ab initio"*

On appealit was held that if there was any sale, *such sale would be voidable and not void*. And if it was shown that the stool knew of such sale and sat by, allowing the purchaser to incur expenses and improve the land, innocently believing that he had acquired good title. The stool would be estopped. *Awuahv. Adututus*upra can be compared with the opinion in *Armatei* ***v.*** *Hammond* supra.

The above principle was further buttressed in the case of *Mansu* v. *Abboye* (1982-83) GLR 1313.

The plaintiff-appellant, hereafter called the plaintiff, sought a declaration of title to his family's land at Yarbiw in the Western Region. He pleaded that his ancestors had reduced the virgin forest into cultivation and had been in uninterrupted occupation of it until the trespass complained of. The defence failed to challenge the plaintiff's boundary neighbours who testified in his support and who claimed to be still in possession of their farms. The only witness for the defence dealt the co-defendant a lethal blow when he asserted, "The plaintiff's land is not included in the land of the second defendant."

The co-defendant's case was, however, that as the Odikro of Yarbiw, he was the allodial owner of Yarbiw lands. He had also fought for the release of the lands from the State Farms Corporation which had previously acquired them compulsorily. The lands had reverted to him with the blessing of the town committee, and therefore he had every authority to grant a licence to the defendant to tap and uproot palm trees, perhaps in the better interest of husbandry and for the good of the entire community. He, however, made no claim against the plaintiff for breaches of customary tenure which would justify forfeiture, nor was he attempting re-possession following abandonment. Indeed, his was the novel proposition that a stool could estreat a subject's land and extinguish his possessory title, if land compulsorily acquired were later released, or if the town committee decreed it.

The Court of Appeal held that since plaintiff had paid his contribution to the fund set up to reimburse the odikro, as custom demanded and had not failed in his obligations, there was

no basis to warrant any forfeiture of his lands. The judgment denying him his claim was a travesty. By one eclectic stroke the circuit judge was rejecting a hallowed canon of customary law, that the stool subjects in possession can only be dispossessed of their usufruct in land with their consent or on proven and unrectified breaches of customary tenure, or upon abandonment.

The Court further stated that , the defendants undertook the herculean task of proving the acquisition and its release. They had the burden of proving the legal consequences of the release and establishing that it included a reversion to the stool. They failed woefully in the discharge of this duty. In *Ohimen* v. *Adjei* (1957) 2 W.A.L.R. 275, a case constantly approved by this court, it was held at p. 280, that:

"It would be repugnant to natural justice and good conscience if, while the Stool can insist upon the services and customary rights due to it from the subject, it could arbitrarily deprive its subjects of the enjoyment of the portions of the stool land in their possession. On the other hand the only title in land which a subject can claim against a stool is the usufructuary title to the portion of the stool land in his actual possession. If he proves that, he is entitled to a declaration of this title to that land."

To the same effect are *Mansah* v. *Asamoah* [1975] 1 G.L.R. 225 at p. 236, C.A.; *Nyaasemhwe* v. *Afibiyesan* [1977] 1.G.L.R. 27 at p. 31 C.A. and *Atta Panyin* v. *Asani II*; *Atta Panyin* v. *Essuman (Consolidated)* [1977] 1 G.L.R. 83, C.A.

But compare opinion in *Armatei* v. *Hammond* (1981) GLRD 300.

Incidents of the Usufruct

The holder of the usufructuary interest is entitled to the enjoyment of the following rights and benefits.

(a) Right of possession

It is a right in rem and exclusive and is a potential perpetual term allowing the bearer to possess it for an indefinite period of time. It is potential because it is possible for the term to end. This right of possession cannot be divested by the stool/family to another party or for public purpose without the consent of the subject or stranger holding the land. (See *Robertson* v *Nii Akramh II* (1973)2GLR 445, *Mansah* v. *Asamoah* (1975) 1GLR 225 CA, and *Ohimen* v. *Adjei* (1957) 2WALR 275 and recently *Mansu* v. *Abboye* (1982-83) GLR 1313, C.A.; *Oblee* v. *Armah* (1958) 3 WALR 484 (see holding 5).

(b) Use and Enjoyment

The owner is entitled to all economic tree he plants. However, the allodial owners are entitled to all, trees growing naturally on the land. As regard natural growing trees, the usufructuary can also use them for his personal purposes only. Ollennu and Woodman made this quite clear, when he stated:

"Another important incident of the determinable title is the right to palm and cola nut and other economic trees of the land. In all parts of Ghana where the oil palm tree and other species of palm grow, it is the owner of the determinable title in land, and he alone who is vested with the right to harvest the fruits, to fell the palm trees or to tap wine from them. Neither the owner of the absolute title nor the owner of the sub-absolute title can go upon land to harvest cola nuts, palm wine or fell palm trees for palm wine. They may request the owner of the determinable title to supply so many pots of palm wine or a quantity of palm

nuts or cola nuts as customary services, but they are not permitted by custom to go upon land in possession of a subject to take any of these things."

Asante , also shares the same view but further goes to include timber. He indicates that:

> "It need hardly be stressed that the usufructuay is entitled to income of the land. This may take the form of prescribed proportion of agricultural produce under an abunu or abusa tenancy, or rent accruing form a lease, or the consideration for the grant of license or the "brute product" of the land arising without the intervention of human labour such as palm-nuts, cola nuts and timber."

(c) Right of Alienation

The title holder can grant. However, he cannot grant anything higher than what he holds as this will result in adverse claim. The holder in his own accord can decide to grant a lesser right or all of his right to another person. In the old law, the holder needed consent from the allodial owner before making the right to alienate. But it is now settled principle in Thompson v. Mensah (1957) 3WALR 240 supra, that no consent is needed provided due recognition is given to the allodial title in the transaction. The court stated inter alia that the correct statement of native custom is that a usufructuary title can be transferred without the consent of theowner (allodial) provided the transfer carries with it an obligation upon the transferee to recognize the title of the owner (allodial) and all the incidents of the subject rights of occupation, including the performance of customary service to the allodial owner. [See also *Total Oil Products* v. *Obeng* (1962) 1GLR 228; *Nana Asani* v. *Atta Panyin* (1971) 1GLR 166, and *Robertson* v. *Nii Akramah II* (1973) 1GLR 445 C.A

It is important to note that when alienation is without the consent of the stool, it is only voidable, not void and can be set aside only when the stool acts timeously (See Buour v. Bekoe). Where the usufructuary sues the interest as collateral in securing a loan and he defaults in paying, the property can be seized and sold to defray the debt. It was held in *Lokko*v. *Konklofi* (1907) Ren 450, that the usufructuary can be used as collateral to secure a loan. In his judgment, Sir Branford Griffith said inter alia that:

"….assuming the land to be stool land, the subject still has a valuable interest in the land. I see no reason why this property should not be seized and sold in execution, and on that ground, I am of the opinion that the land should not be released."

(d) Right to an Action in Trespass

The holder of the usufruct can maintain an action in trespass against the stool and can impeach a grant made by the stool without his consent. This has been decided in *Awuah* v. *Adututu* (1987-88) 2GLR 191, C.A.); *Nunekpeku* v. *Ametepe* (1961) GLR 301.

(e) Heritability of the Usufructurary Title

According to Bentsi-Enchill , it is well settled in customary law that the usufructuary interest is heritable. This means that in the event of the death of the usufructuary holder, his interest will devolve on his next- of- kin. Where the subject is a member of the land owning group, "…..the interest descents to the next of kin of the holder and remains with him for as long as there are kinsmen to take" (Per Ollennu J, in *Makata* v. *Akorli* (1956 1WALR 169). In the case of a stranger usufructuary, the interest is also inheritable. In *Mensah* v. *Asamoah* (1975) 1GLR 225 CA, Archer J.A., delivering judgment indicated that, case law has settled that:

"Land only becomes abandoned if either the stranger died intestate without successor to take or if the land was effectively and voluntarily abandoned without an intention on the part of

the grantee returning to it. The mere absence or death simpliciter of the stranger was not enough to constitute abandonment; there must be an intention to abandon and the fact of abandonment must co-exist with such intention".

Since this is a potentially perpetual interest, it passes on the death of the holder according to the ordinary rules of inheritance [see *Golightly* v. *Ashrifi* (1955), W.A.C.A. 676; *BuduII* v. *Caesar* (19590 G.L.R. 410; *Kwao II* v. *Ansah* (1975) 2G.L.R. 176]. According to Woodman , the right to use of land, power of alienation, and security of tenure are rights constituting the customary freehold interest.

(f) Right to Compensation

In *Owusu* v. *Manche of Labadi*, it was held among other things that the subject of a stool acquires usufructuary rights which did not derogate from the stool's dominion, and while as such usufructuaries the subjects were entitled to a share of the compensation "upon its distribution in accordance with native custom". The stool was the proper authority to receive the compensation.

(g) Rights to Customary Service

The duty of the usufruct is to render customary service to the stool. "These services were eligible, not in consequence of proprietary arrangement between stool and subject, but by virtue of the political and kinship ties binding them".

Loss of the Usufruct

The usufructuary interest may be lost through the following means:

- Abandonment.
  Mansu v. *Abboye* (1982-83) GLR 1313.
- When the usufructuary denies the title of his grantors (forfeiture).
  Total Oil Products v. *Obeng* (1962) 1 GLR 228.
- Failure of successors.
  Mansu v. *Abboye* (1982-83) GLR 1313.
- By consent of the usufructuary.
  Mansu v. *Abboye* (1982-83) GLR 1313.
- Extinction by operation of legislation

The New Usufruct

Woodman has argued that the rights enjoyed by the subject usufructuary have reached a point where one can safely say that when a subject acquires the usufruct, it essentially extinguishes the allodial title. There is support for this position. Particularly the opinion of Denning LJ in *Kotey* v. *Asere Stool* (1962) 1 GLR 492. See also the views expressed in *Yiboe* v. *Duodu* and *Awuah* v. *Adututu*.

The usufruct has undergone some form of development. According to Agidi (1976), at first, at the initial stage of settlement, the stool was the absolute owner of all lands without any encumbrances on its title. Before the indigenous economy became predominantly agricultural, a stool subject could not claim rights of permission over any part of the land. Every member of the tribe had equal rights to wander over and hunt upon the land which belonged to the group. With the advent of settled agriculture, the members' right of user of the stool land i.e. right to occupy, till enjoy an unappropriated part of the stool land. This was a burden or qualification on stool allodial title. The customary usufruct was perpetual and heritable. It

substituted as long as the subject continued to use the land and will only revert to the stool upon abandonment. The usufruct could be held by individuals and families alike and at any rate what belongs to an individual will in one day become a family's.

The customary usufruct underwent a second change with the advent of the tree crop farming. Commercialization of agriculture led to commercialization of land and the subsequent birth of an agricultural land market. The question was whether the subject could not alienate the usufruct without the previous consent and concurrence of the absolute owner (*Golightly* v. *Ashirifi*)
The usufruct in stool land has matured into a "freehold" owing to the impact of modern economic and social phenomena. The security of corporate or family holding as corporate entities has also followed the same line of development. The usufruct, then as heritable and persists in perpetuity is seen to assure security of tenure .

The Privy Council in *Kotei*v. *Asere Stool* [1961] G.L.R. 492 at p. 496, P.C. held, differing on this point from Jackson J., that the "plaintiffs [are entitled to] a declaration that they possess such rights in the area edged in green, on the plan, exhibit 1, as are conferred by law on a subject of a stool who is in possession." That court held that such rights are not mere farming rights as Jackson J. thought but an estate or interest in the land which the subject can use and deal with as his own, so long as he does not prejudice the right of the paramount stool to its customary services. The Privy Council proceeded to spell out further the rights attached to a subject by that estate. It says at p. 495:

"He can alienate it to a fellow-subject without obtaining the consent of the paramount stool: for the fellow-subject will perform the customary services. He can alienate it to a stranger so long as proper provision is made for commuting the customary services. On his death it will descend to his family as family land except in so far as he has disposed of it by will, which in some circumstances he lawfully may do."

Constitutional and Statutory Interventions
Article 267(5) prohibiting grants of freehold in stool land. Whether it takes away the inherent right of the subject.

In addition, Article 267(5) of the Constitution has implications for the customary freehold. Article 267(5) states that no interest in, or right over, any stool land in Ghana shall be created which vest in any person or body of persons a freehold interest howsoever described. There has been some debate as to the full import of this constitutional provision, especially with regard to the extent to which it affects the land rights of subjects of the landowning communities and other customary freeholders. Taken at face value, this clause could be taken to mean that all holders of the customary freehold of stool lands and 'strangers' are being turned into tenants of the chiefs. However, this interpretation would impute to chiefs ownership rights that do not exist in customary law. It has far-reaching implications for the evolution of land rights and security of tenure and is likely to increase litigation and chieftaincy disputes and create further insecurity in land transactions. It appears that this policy and the associated practices cannot be substantiated by a proper interpretation of the constitutional provision.

An interpretation of Article 267(5) as prohibiting the grant of customary freehold interests in stool lands could empower chiefs to feel justified in issuing only leases even to their own subjects, thus further eroding the rights of customary landholders and their ability to resist re-appropriation of customary lands for 'development' purposes by stools which wish to cash

in on the rising value of peri-urban lands. It has been strongly argued that Article 267(5) should not be interpreted as an outright prohibition on the grant of 'customary freehold' in stool lands, and neither should the provision invalidate such freehold where already declared, nor prohibit the registration of a land transaction described as a 'customary freehold', where the grantee or the transferee is a subject of the landowning stool.

The reasons for our position on Article 267(5) are as follows:

- First of all, it appears that the rationale behind Article 267(5) was to ensure some inter-generational equity through the prohibition of permanent alienation and resultant loss of stool lands in a manner detrimental to future generations of stool subjects. The grant of or the existence of the 'customary freehold' to stool subjects, is however, perfectly consistent with the above-mentioned policy objective, as it ensures that perpetual proprietary interests in land would vest in and inure to the benefit of the present and future members of the landowning communities through inheritance.

- Secondly, the operative part (the prohibited conduct or action) in Article 267(5) is *shall be created*. Thus the prohibition does not apply to the subject of the landowning stool because, among other reasons, the stool subject's entitlement to the 'customary freehold' is inherent and not conferred by an act amounting to a creation. The inherent character of the subject's 'customary freehold' in vacant stool land is an inextricable component of the structure of the customary legal system. Indeed, there is ample legal authority for the proposition that the necessity for an express grant from the stool is a recent practice dictated by the exigencies of modern society, particularly, the need to ensure orderly development of stool lands and to ensure their equitable allocation. Further, the authorities agree that a request from a subject cannot be refused so long as there is vacant stool land to be allocated.

Finally, Article 267(5) should be read and interpreted in the light of Article 267(1) of the Constitution and subject to *customary law and usage*, which recognizes that the subjects of a stool and for that matter a member of a family is entitled as of right to a portion of vacant stool or family land and upon such occupation the subject or member acquires the 'customary freehold' (*Oblee v. Armah* (1958) 300 WALR, 484 and *Amartei v. Hammond* [1981] GLR 30.

In *Yiboe v. Duedu*the plaintiff claimed, for himself and on behalf of the Amandja Clan of Akloba, a declaration of title to, and recovery of possession of, a piece or parcel of land known as Bogloto-Sakada "situate at Akloba in the Nkonya area. The defendant was sued in his capacity as sub-chief of the said Nkenya Akloba. The defendant counterclaimed for a declaration that the "Bogloto-Sakada" land is communal land for all tribes inhabiting the town, and that it is under his control and administration as the overlord or chief of the said town of Akloba.

On July 17th, 1944, the defendant instituted another action in the Magistrate's Court at Kpandu for £25 damages for trespass, alleging that the plaintiff had wrongfully entered upon the land, made a plan of it and fixed pillars thereon. In a judgment delivered on November 26th, 1948, the Magistrate held as follows:

" I can therefore only conclude that the land specified by the plaintiff in his claim is not Akloba Stool land but belongs to the defendant either in his personal capacity as head of his family or of the Amandja clan. I therefore find that the plaintiff's claim for damages for trespass committed by the defendant fails."

The defendant appealed to the Land Court but his appeal was dismissed. He thereupon appealed to the West African Court of Appeal. That court by a judgment delivered on March 7th, 1952, dismissed the appeal, but amended the judgment of the Magistrate by deleting therefrom the passage declaring the plaintiff the owner of the property on the grounds that no declaration could be made in his favour when he had not counterclaimed.

On January 10th, 1956, the plaintiff instituted the present suit. In support of his case he gave short oral evidence and tendered in evidence the writ of summons in the former case, the proceedings and judgments in it up to the Land Court, and the judgment of the West African Court of Appeal. He led no other evidence in proof of his title and refused to answer any questions by the defendant or the Native Court relating to title, and called no witnesses. He also refused to attend the inspection of the land by the Native Court.

The defendant on the other hand led evidence and called witnesses to prove his counterclaim that the land was communal land, and, at the inspection of the land, showed the Native Court features on the land evidencing the use of it as communal land by all four clans of Akloba.

The Court held that in cases of claims by a stool against a subject, or by a family against a member, the ownership of the subject or member-defendant in possession could be only a usufructuary interest while absolute title might be vested in the stool or the family. Therefore, a declaration of ownership in favour of the individual against the stool or the family may amount to nothing more than a declaration that the individual is entitled to the usufructuary or the possessory right in the land and that declaration may not affect the absolute title of the stool or family.For that reason it is only in rare cases that a stool can succeed against a subject in an action for trespass, and for that matter a family against a member thereof.

In such a case all the plaintiff, a subject or member of the community, needed to prove to succeed, in the action -for trespass by the stool or head of the community against him, was that he was in possession or occupation. I do not, therefore, see how the West African Court of Appeal could have come to any other conclusion than the one to which they did come.

*Buor*v. *Bekoe & Others* (1957) 3 WALR 26

The plaintiff sought to redeem a plot of stool land from the third defendant. He claimed that the plot was one which his predecessor had held of the stool for a determinable estate and had pledged to the first defendant. The first defendant asserted that although he had been involved in the transaction the pledge had in fact been taken by the second defendant. The third defendant claimed to have purchased the land from the second defendant and asserted that the original transaction between the plaintiff's predecessor and the second defendant had been one of outright sale and not of pledge and that the second defendant had therefore been fully entitled to re-sell the land to him. The Native Court found for the plaintiff.

On the appeal it was argued for the plaintiff, inter alia, that even if the original transaction had been a sale (and this was denied) it was void *abinitio* because, as stool land was involved and the purchaser was a stranger to the stool, the necessary consent of the stool to the alienation had not been obtained.

The court held thatif the original transaction had in fact been an outright sale then, since it would have caused the alienation to a stool-stranger of a determinable estate in stool land, the consent of the stool would have been necessary to validate the transaction. The absence of consent in such circumstances renders a sale voidable at the suit of the stool: it does not make a sale void ab initio. In this respect the consequences of such a sale are the same as

where the head of a family or other family member alienates family land without obtaining the necessary family consents.

In *Robertson*v. *Nii Akramah II and Others (Consolidated)* [1973] 1 GLR 445–463

About four miles north-east of the centre of Accra, was a fairly large tract of land said to be of poor agricultural value. With the rapid growth in the population of Accra and the consequent scramble for suburban building areas, it became valuable building land. It is known as the Mukose lands. This land was the subject-matter of the litigation which culminated in this appeal. Rival claims to it were made by the Nikoi Olai family on one side and the Asere stool and its grantees on the other.

The Nikoi Olai family belongs to the Asere Djorshie division of Accra. It has a stool named the Nikoi Olai stool. It was claimed that that stool was properly the Paramount Stool of Asere and that Nii Akramah II is the Paramount Chief of the Asere division. He occupies a stool other than the plaintiff's stool. It is called the Akotia Oworsika stool. Accordingly, the plaintiff's stool is sub-servient, at any rate, as at present, to that stool. It follows from this, that the plaintiff's family qua family, are subjects of the Asere Paramount stool.

We think that as a pure legal question both the courts and textbook writers are ad idem. We must conclude from this, that the plaintiff's family who has been adjudged to have the determinable or usufructuary estate in the Mukose lands is the proper entity to alienate that land or portions of it. It is necessary to pose the question what is the resultant position if an alienation is made not by the owner of the determinable title but by the holder of paramount title. On this, Ollennu provides a self-evident answer. He says at p. 56 of his book:

> "Having regard to the very superior nature of the determinable title, customary law prohibits the absolute owner from alienating that land, or dealing with it in any way without the prior consent of the subject-owner. Any grant which the stool (or the head of family) purports to make, either to a subject or to a stranger, cannot affect the title of a subject in possession. The purchaser upon such alienation cannot obtain possession, and he and his grantors commit trespass if they enter upon the land for the purpose, or in pursuance, of the alleged grant."

We think that view accurately reflects the law. It is not in dispute that the Asere stool made grants of portions of Mukose lands. It is also equally clear that those grants were made without the prior consent of the plaintiff's family and indeed in the face of objection by it. It must follow that such grants were invalid-for our judgment and must await decision at an appropriate time.

In view of what we have said in the foregoing paragraphs of this long judgment, the plaintiff's family succeeds in each and every one of the four suits. In the first suit, it claims a declaration that as owner in possession of Mukose lands, it is entitled to make alienation of that land. Had the declaration sought been so worded, we would have acceded to the prayer but it is limited to Abeka village and the lands around it without furnishing an accurate description of it. That description made it somewhat uncertain for the enforcement of a perpetual injunction. For that reason and that reason only, we decline to make the declaration or grant perpetual injunction. But we are satisfied that the Asere stool by its agents entered on that part of Mukose land edged green and made alienations of it. For this undoubted trespass, we award the plaintiff's family against the defendants in suit L.232/61 jointly and severally ¢1,000.00 damages.

In *Kuma* v. *Kuma* (1938) WACA 4, the appellant brought an action in the Divisional Court, Cape Coast, seeking a declaration of title to a parcel of land. The Court granted a declaration in his favour. The defendant appealed to the West African Court of Appeal which reversed the decision of the Court below. Appellant further appealed to the Privy Council.

The Privy Council held that the evidence produced on behalf of the plaintiff, if accepted, was sufficient to establish his title. It appears, therefore, that among the natives, occupation of land is frequently allowed for the purpose of cultivation but without the the payment of tribute and yet ownership of the land is not parted with. The owner of the land being willing to allow such occupation so long as no adverse claim is made by the occupier; the occupier knowing that he can use the land as long as he likesprovided he recognises the title of the owner.

The Privy Council concluded that:

"If the evidence as to occupation be considered with the caution which has been deemed essential by the Board in such cases present it is the opinion of their Lordships not inconsistent with the title of the plaintiff and it is by no means conclusive of the defendant's title.
For these reasons their Lordships are of opinion that the judgment of the Court of Appeal should be set aside and that the judgment of the trial Judge should be restored".

Bruce V. *Quarnor & Ors.* [1959] GLR 292-299 illustrates the principle that by customary law a stool has no right to grant land which is in the occupation of a subject to any other -subject or stranger-without the consent and concurrence of the subject in possession.

The Court held that the plaintiff, as proved by the witness for the defendants Nii Adama Asua II, is a member of the royal family of James Town, the stool family. He, as a subject of the said stool, is entitled by customary law to occupy any vacant portion of the land of the said stool. This he can do either upon actual or implied grant.

Thus, even if the plaintiff's possession and occupation of the land was not upon actual grant, his possession and occupation as a subject of the stool is good title, and it will take precedence over any grant which the stool may purport subsequently to make of any portion of that land. By customary law a stool has no right to grant land which is in the occupation of a subject to any one-subject or stranger-without the consent and concurrence of the person in possession.

In the case of *Nchirahene Kojo Addo*v. *Buoyemhene Kojo Wusu*[1940] 6 WACA 24-25, the plaintiff instituted an action for declaration of title. The defence was that the defendants had been in undisturbed possession for more than 200 years. The only question is in this case is whether the Plaintiff should be estopped from asserting that ownership owing to the Defendant having been led during their 200 years' occupation to regard the land as his and so to spend money in improving it or in defending his rights to it. The evidence upon which the Defendant relied to establish such estoppel falls into two categories. First the Defendant alleged that he had incurred litigation expenses in four cases in defending his rights to the land. The Assistant Chief Commissioner gave careful consideration to each of these four cases and was " unable to find that the Defendant has proved that any expense has been incurred in defence of his title to the land now in dispute." We have given full consideration to the arguments adduced by Appellant's Counsel in his attempt to displace this finding, but see no good reason to reverse the Assistant Chief Commissioner's finding of fact upon this point.

Secondly the Defendant alleged that he had spent money in improving the land, in that he has constructed a motor road to Buoyem. Upon this the Assistant Chief Commissioner found.

"Such expenditure may legitimately be regarded as having been incurred in improving the value of the land, but since the road was constructed entirely for the benefit of the people occupying the land it cannot be claimed that it was the landlord's responsibility, or that the Defendant incurred this expense as a result of his belief that he was the owner of the land."

Further the native custom as to the resting place of the ultimate ownership would be well known to the Defendant and his people, but they could not be expected to rely on the English doctrine of estoppel to defeat the undisputed ownership of the Plaintiff. According to native ideas there would be no question of the ultimate ownership in the land having passed.

In *Attah and Others* v. *Esson*[1976] 1 GLR 128-135, the plaintiff and his family had been declared by a series of judgments and an arbitration award to be tenants in perpetuity of the first defendant's family in respect of a large piece of land in the Central Region. In spite of these judgments the plaintiff and his people were denied the quiet enjoyment of the land which they feel themselves entitled to. The latest act of the defendants which precipitated this action was the felling of palm trees which the plaintiff claimed his family had cultivated on the land. On account of this alleged interference with the plaintiff's family's right, the plaintiff brought this action claiming damages from the defendants and a perpetual injunction restraining them and their agents from having anything to do with the land. The case came up for trial before Archer J. (as he then was) sitting at Cape Coast . At the trial, counsel informed the court that they had agreed that a point of law which would dispose of the whole case be taken first. That preliminary point which was taken, arises out of the following pleadings of the parties. By paragraph (10) of the statement of claim, the plaintiff pleaded:

"That in spite of all these consent judgments, awards and orders the defendants have unlawfully entered the said land without the plaintiff's consent and permission felled over 400 palm trees which the plaintiff's family has cultivated on the land in dispute.

In answer to this pleading, the defendants stated in paragraph (6) of their defence:
"The defendants say that in view of customary law which empowers a landowner to enter upon his land in the possession of another as tenant to collect palm nuts or enjoy the palm and other indigenous edible trees on the land, the defendants can exercise the right to enter the said land for that purpose and are therefore not liable to the plaintiff as claimed in any amount or at all and thereon join issue with the plaintiff."

The defendants in agreeing that a decision on the legal point raised by these pleadings would dispose of the case before the court, admitted that the plaintiff and his family were their tenants and further that they, the defendants, had entered on to the land occupied by the plaintiff's family and cut down the palm trees as alleged. Moreover, the defendants' concern was not with distinctions between palm trees already on the land before the tenancy was created on the one hand and palm trees planted by the tenant after the creation of the tenancy. To the defendants, in either case the landlord was entitled to the palm trees on the land. Therefore they did not in their pleadings specifically deny the claim of the plaintiff that his family had planted the palm trees. In view of the pleadings quoted above and of counsel's agreement that a decision on the legal point arising therefrom disposes of the whole case the Courtaccepted that the palm trees in this case were planted by the plaintiff's family as claimed.

Archer J posed the following question: Did the defendants have this right they claimed or not? The Court went on to say that no less an authority than Sarbah supports their contention. In

his Fanti Customary Laws first published in 1897 he said (quoted from the third edition (1968) at pp. 69-70):

"The original owner or his successor can at any time go upon and retake possession of the land as soon as the tenant asserts an adverse claim to it. In the absence of such adverse claim he cannot disturb the quiet enjoyment of the tenant, without prior notice to the tenant that he requires the land. Where, however, there are palm-trees on the land, whether planted by the owner of the land or by the tenant, the landowner has full right, at any time he pleases, to cut trees or gather any nuts therefrom. Custom does not permit any person to be improved out of his land, and palm-trees not only improve, but also enhance the value of lands.

Where nuts from a palm land are manufactured into oil, the owner of the land receives half of the oil, and the oil manufacturer the other half, and the expenses of preparing the oil is equally shared by them. If, instead of oil manufacture, there is extracted from the palm-trees palm-wine, then the owner of the palm-trees is entitled to one-fourth of the proceeds of such palm-wine, the person who fells the trees and prepares the wine is entitled to one-fourth of such proceeds, and the person who sells such palm-wine is entitled to half of such proceeds. According to a well-known practice of the Law Courts, each palm-tree is valued at twenty shillings."

This statement of the law seems to have obtained in more recent times some endorsement from Bentsi-Enchill. At p. 398 of his Ghana Land Law he said: "income-yielding shrubs and trees already on the land, such as palm-trees, kola, and timber generally, are understood to belong exclusively to the landlord." Bentsi-Enchill, it appears, was not prepared to go the lengths which Sarbah did because he limited the landlord's rights to economic shrubs and trees "already on the land." And his statement was made when discussing the arrangement "where the tenant is given virgin land to bring into cultivation." On the proposition that the landlord was entitled to the fruits of economic trees planted by the tenant on the land, Bentsi-Enchill expressed no view. Sarbah's proposition cannot, therefore, be said to have got the unqualified approval of as modern writer as Bentsi-Enchill.

In spite of the opinion of such a formidable jurist as Sarbah to the contrary, Archer J. decided in Esson v. Attah, High Court, Cape Coast 20 June 1968, unreported; digested in (1968) C.C. 125 that the defendants were not entitled to cut the palm trees on the land occupied by the plaintiff's family. The defendants appealed to the Court of Appeal..

The Court of Appeal upheld the decision of the High Court stating as follows:

"The pith of the learned trial judge's argument in rejecting the opinion of Sarbah is contained in the one sentence which said that: "It sounds unreasonable indeed that where a tenant has by his own labours planted palm trees his landlord should indiscriminately enter the land and cut the palm trees at any time as he pleases." Like Archer J., we do not wish to cast doubt on the distinction and learning of Sarbah. Indeed the learned judge accepted that what Sarbah wrote might have represented the customary law of the nineteenth century. So do we. But even if this was so, customary law embodies the rules of conduct of the people at a particular time. These rules represent what is reasonable in any given situation in the society. Customary law, therefore, must develop and change with the changing times. What was reasonable in the social conditions of the nineteenth century would not necessarily be reasonable today. A contrary theory would ensure that the customary law becomes ossified and incapable of growth to meet new challenges and demands. No proposition would be more out of accord with the hopes and aspirations of Ghanaians today than that a landlord who has spent no effort whatsoever towards that end should enter and collect at will the fruits

of the labour of his tenant. Who amongst us would today be prepared to take land to cultivate on that basis? We cannot imagine an arrangement more ruinous of agricultural enterprise, subversive of expansion and consequently prejudicial to national development than that.

We have no doubt that customary law today would not permit a landlord to enter onto agricultural land granted to his tenant to gather the fruits of economic trees planted on it by the tenant. We would understand a principle which forbids the tenant from committing such waste on the land as would destroy or reduce the value of the reversionary interest of the landlord. But the maxim, if maxim it be, that "custom does not permit any person to be improved out of his land" used to justify what in modern eyes looks no less than a landlord's charter for plunder, appears to us, however beautiful it may sound and whether representative of the values of Ghanaians in the nineteenth century, totally indefensible today. We accordingly agree with the conclusion of Archer J. that the landlord is not entitled to the fruits of economic trees planted by the tenant. In so far as the defendants' contention is that they, as landlords, are entitled to palm trees on the land whether planted by them or by the plaintiff's family, we hold that this appeal must fail.

Learned counsel for the defendants has argued that if Sarbah's proposition was wrong no court has so declared before, and, therefore, presumably persons were entitled to act in accordance with Sarbah until a court declared to the contrary. We do not think so. We think that the customary law as stated by Sarbah became outdated and ceased to be law as soon as conditions in society changed so as to make it unreasonable for persons to conduct themselves by it. It is, therefore, not necessary for the society to await a court's ruling before deciding to act in a manner contrary to a rule of conduct which has become unreasonable".

In *Mensah*v. *Blow* [1967] GLR 424-433the question was whether according to customary practice, an owner of land over which he has permitted a licensee to live and farm can exercise his undoubted right of ownership or use of portions of this land contemporaneously with the right of the licensee to live on and use those portions of such ancestral land which have not been specially allocated to or appropriated to actual use by the tenant or licensee, or is the original grantor or his descendants' right to possession or to occupy and use this land excluded entirely because of the subsistence of the license?

The case was an appeal from a decision of the High Court, Cape Coast, given in its appellate jurisdiction, setting aside a judgment, given in favour of the plaintiff-appellant (hereafter called the appellant) by the magistrate of the Local Court of Komenda, in which he upheld the claim of the appellant to ownership and possession of a small piece of farm land known as "Kotokuom" situate at Bisease in the Central Region of Ghana, and directing that judgment be entered rather in favour of the defendant-respondent (hereafter called the respondent) Ekua Blow for possession of the said piece of farmstead.

The main question arising on this appeal is whether a licensee, who has been permitted according to custom to occupy and use a piece of another person's ancestral land and who in fact has enjoyed an unfettered occupation and use of portions of that land, could rely on such leave and licence as a defence to a claim by the true owner or lessor or his descendants to exercise their natural rights of ownership or possession over portions of such an ancestral land not actually farmed upon or specifically reduced into effective use or occupation by the licensee at custom. In other words, according to customary practice, can an owner of land over which he has permitted a licensee to live and farm exercise his undoubted right of ownership or use of portions of this land contemporaneously with the right of the licensee to live on and use those portions of such ancestral land which have not been specially allocated

to or appropriated to actual use by the tenant or licensee, or is the original grantor or his descendants' right to possession or to occupy and use this land excluded entirely because of the subsistence of the license?

The evidence showed that the true owner of the land, Kwesi Kuntoh, the appellant's ancestor, had permitted or licensed Enimah, the respondent's ancestor and his followers to stay on and occupy the land by building on it or cultivating food or cash crops on it and to enjoy it as improved. Customary law regards the stranger Enimah as a licensee. This kind of tenure or holding which does not confer an interest or estate in the land to the licensee, is the result of a contract or an implied agreement. It has certain important characteristic features about it.

These are:

(1) The owner (or lessor as he is sometimes called) of the land must be willing to allow occupation and user of land or portion thereof or the whole of the land as the case may be, provided the licensee does not set up an adverse claim to his title or right to possession. In other words, the user of the land must be of a nature not inconsistent with the rights of the true owner. If he does, the licensee is liable to forfeit his right to be on the lessor's land and this conduct may justify re-entry by the owner or ejectment of the licensee.

(2) Sometimes the nature of the grant of the occupational tenancy carries with it the obligation on the part of the licensee to pay tribute or tolls or provide some customary services as an act of acknowledgment of the lessor's paramount or superior title to the land. In some cases where the products of the land on which tribute is levied are what may be called natural or food products, the question of the tribute is determined by agreement before the licensee goes on to the land; on the other hand, if it is production of cash crops like cocoa or timber, it is the usual practice to determine the quantum of the tribute by agreement after permission to occupy the land has been granted: see *Asenso* v. Nkyidwuo (1956) 1 W.A.L.R. 243.

(3)The circumstances of the long occupation by the licensee are such that it is difficult to determine whether the customary tribute has been provided or demanded. The evidence led in the present case showed that during the period of occupation by the respondent's ancestors no tribute or tolls were demanded or paid by them. It would seem members of both families, some of whom had intermarried, freely exercised their rights of user over unoccupied portions of the land without reference to anybody. Such user of the appellant's ancestral land must have misled the respondent to believe that her ancestor must have acquired an estate or interest in the land which ought to entitle her to oust the appellant from the particular piece of farmstead in dispute. The respondent in this appeal seems to me to be in precisely the same situation in which the defendant in the old case of *Kuma* v. *Kuma* (1936) 5 W.A.C.A. 4, P.C. found himself when he attempted to sell portions of the licensor's farming land. (4) Like the respondent and her ancestors in the present appeal, it is also an incidence of this holding that the limits or extent of any proprietary rights of the licensee be strictly defined or understood. The licensee only has a right to use the land equally with the grantors, and it is understood according to customary practice, that throughout the period of occupation the licensee at custom has a present right of possession and user over any portion of the grantor's land where the right of the grantor is not ousted. In other words, title and right to enjoy the land of the latter remains unimpaired, and the granting of the licence or permission to occupy the grantor's land without paying tribute or tolls is not to be regarded as a surrender by the owner or lessor of all claims or rights in the land. In this case, I think it was wrong for the respondent to look upon his ancestor's long and unimpaired occupation of the appellant's land

as a surrender of the latter's rights of user of portions not specifically allocated to him or members of his family.

The Court held that it was wrong

"…….on the part of the learned appellate High Court judge to hold that where the respondent licensee has enjoyed for a number of years undisturbed user of another's land, her right of possession or permission to remain and work on the land becomes incapable of disturbances as time goes on to the extent that she can even oust the real owner or dispossess him in respect of portions of the land not specifically granted to her or reduced into her effective occupation. The learned appellate judge did not consider the principle of customary law that defines a licensee's right to occupy and use another's land vis-à-vis the exercise of present rights of ownership still remaining in the grantor or owner.

On these findings it is wrong to hold that the respondent's right to remain and use portions of the appellant's land was superior or cannot be held to have overridden the right of the owner over the disputed area which, as the evidence showed, had already been reduced into the effective occupation by the appellant. It is true the respondent may have enjoyed long and uninterrupted occupation, and she is in possession of portions of the appellant's land by her own right, so far as it is a right, but it is a right which is given by customary law and her right to be on the land accrues to her and members of her family because of the permission originally granted to her ancestors to be there. Therefore the respondent as a licensee at custom has as much protection to be on the land and use the portions of it she is permitted to use, but she enjoys no more protection than the permission granted to her a. This means that according to customary practice she enjoys occupational rights conferred by her license only in respect of portion of the land specially allocated to her for her exclusive use by herself and members of her family, or where the extent of the land on which she is permitted to stay and farm has not been determined or limited, she can exercise rights of occupation and possession on an area not specifically appropriated to use the lessor or members of his family, or where the evidence clearly shows that although a particular area has at one time been either cultivated or reduced into effective occupation by the owners or members of his family it has been abandoned. These are some of the important limitations to the licensee's right of enjoyment or occupation in respect of the land upon which she is permitted to farm or occupy. Her permission to be on the grantor's land is not an assurance whereby the owner conveys an estate or interest in the land to her.

In my opinion, it would be against custom to hold that the respondent, who is a licensee at custom could during the subsistence of the licence or permission exclude the appellant who is lessor or members of his family from using portions of their own land. If she could, then it shows that as against her landlord, the appellant, she holds an estate granted which cannot be extinguished or forfeited for all purposes. But if she cannot, it can only be because her landlord or lessor enjoys a present right of possession or user over portions not occupied by her. This in my opinion is the correct view of the position of the respondent according to customary law. If therefore the appellant, who enjoys a present right of user at the same time with the respondent over portions of land not specifically cleared or occupied by the respondent, claims possession of the specific area now in dispute, which it is admitted on the evidence he cleared before the respondent sent her agent to plough the said area, I do not see what defence could be open to her according to customary law and usage or practice".

Kakrah v*. Ampofoah and Others*(1957) 2 WALR 303

This appeal concerned an Akyem Abuakwa native who settled with some relatives in Nyakrom and cultivated Nyakrom Stool forest land subject to the payment of yearly tolls of £2 to the representative of the stool. The evidence establishes that the successor of the said deceasedupon his death intestate was by native law and custom, allotted or apportioned to the children part of the landed properties of the deceased, including the Cocoa Farms thereon at 'Obotomfo' in Nyakrom which is the subject-matter of this suit; with directions to the said children to discharge the'burdens' on the land," i.e., to pay the yearly tolls payable in respect of the tenancy.

Upon the representative of the stool writing to enquire: to know the present condition of our land lying and situate at Swedru Kwanmu, which your predecessor worked on atObosomfo' who is now working it?" the successor wrote and said "inter alia" : my children are on the land, and any case concerning the land must be referred to me.

The representative of the stool then applied to the children (the defendants in this case) for assistance in paying some stool debt-a debt unconnected with any litigation concerning the particular stool land occupied by them. They refused to assist. The stool next sought to increase from £2 to £12 per annum the yearly toll payable in respect of the land, but this also the children refused to agree to. Thereupon the representative of the stool issued the writ in this case, in effect claiming an order to compel the children to sign an agreement accepting the new rate imposed, and also claiming an order that a portion of the land farmed by two Awowin strangers called Obo and Abeh should be declared as having reverted to the stool.

It was held that the the stool could not vary the agreement made with the late Obodai by imposing new rates. It was further held that since evidence established that the successor allotted and gave the children a portion of their late father's estate-as he is entitled, and indeed may be liable, by custom to do-and thereby made the children owners of that portion, with all the burdens attached to the land, it was proper to sue the children as owners and that in this case they were rightly sued.

However, see the decision of Ollennu J in *Komey* v*. Korkor* (1958) 3 WALR 331appear to be to the contrary. In that casea usufructuary interest had been granted to the plaintiff who was a stool subject and he had taken possession. Seven years later, the caretaker of the land purportedly granted the same land to the defendant who then erected a building on the land even after protests from the plaintiff. The question before the court was whether a stool has a right to grant a land which had been initially granted to another person, in this case a stool subject.

Ollennu J heldthat "by native custom a stool is entitled to forfeit land which it grants to a subject or to anyone else for purposes of building, if the grantee fails, after a considerable period, to build on the land. What is a considerable period will depend on the circumstances of each particular case".

Kwadwo v. *Sono*[1984-86] 1 GLR 7-16

This case was an appeal by the defendant at the court below against an award of ¢61,252 special damages for his destruction of cocoa trees and other crops on the plaintiff's farm. The damage occurred in 1977 in the course of the defendant's timber and logging operations on Dormaa stool land, over which the defendant had concession rights. The plaintiff's claim for

an order of perpetual injunction restraining the defendant from further felling on the plaintiff's farm was similarly dismissed. This part of the decision is not questioned.

On the question of the propriety of the award of special damages for the destruction of the plaintiff's farm the Court held that besides having the land vested in him, section 16 (4) and (5) of Concessions Act, 1962 (Act 124)only empowered the President to grant leases for timber rights. Such a demise affects a person like the plaintiff only insofar as the concessionaire's rights extend as well to timber standing in the plaintiff's farm. This is so because the lease was for the entire specified land. And it is for this reason that the entry by the defendant into the plaintiff's farm was held not to be a trespass. But the defendant's right of precedence to timber on the land does not in any way abridge the plaintiff's legal rights and protection to his crops. It may be observed with interest that the Act does not spell out the customary rights, privileges and interests of the local population over the demised land, as did the Concession Ordinance, Cap 136, s 13 (6)-(9). Nonetheless those rights, in my view, are legal. Not because they are declared so by an enactment but because they are immemorial customary rights and privileges which members of the local population of the stool land have always enjoyed; whether their possession of the land was by right of occupation or by permission from the stool. Specifically those customary rights, in my opinion, are preserved not because they are exempted from the defendant's lease, exhibit 1, but rather that they are rights of the subjects which cannot be alienated by the stool for which the President acts.

The time-honoured customary law regarding the entitlement of the subject to the usufruct was re-echoed in the case of*Adjei* v*. Grumah [1982-83] GLR 985-989*, where the Court emphasised that the principle of customary law that a subject of the stool acquires a determinable or usufructuary title in the stool land he occupies does not apply to virgin forest land on which he expended no labour. The principle is an equitable one rooted in actual possession. It creates an encumbrance or burden on the absolute title of the stool, and vests the subject in occupation with a possessory title that prevails even against the stool itself. The very nature of this possessory title precludes any extension of the principle to cover areas of virgin forest land not reduced to actual possession.

The case of *Yeboah and Others* v. *Kwakye* [1987-88] 2 GLR 50-59appears to place limits on the extent of the rights of the family member ususfruct. It was heldheld that where a family member made a farm on vacant family land even by his own private resources and unaided by the family, whether with or without the prior permission of the family, he acquired only a usufructuary life interest therein. Although the life interest is fully alienable (e.g. it can be given as security for a loan) it is not open to the life tenant, unless he acts with the concurrence of the head and principal members of the family, to alienate any greater interest than his life estate. On his death, the interest in the property vests in the family.

The recent case of *Pastor Yaw Boateng* v. *Kwadwo Manu & Anor.* No. J4/24/2008 (28-5-08) [Unreported] amply illustrates the nature and extent of the contemporary usufruct. In that case the plaintiff/appellant/appellant hereinafter referred to as the plaintiff originally sued only the 1st defendant/respondent/respondent in the Circuit Court claiming:

"(i) a declaration of title to all the 50 building plots bounded by Sisirasi land, Atakyem land and Kwaku Duah's oil palm plantation among others.His claim was founded on allocation to him , as he said of 50 plots of land by the entire Oman. Second Defendant-Respondent is the chief Bosore and 1st Defendant-Respondent is a subject usufurctuary. The plaintiff lost in the trial Circuit Court and on appeal to the Court of Appeal.

He has further appealed to this court upon special leave. His grounds of appeal inter alia was:

4. That the Court of Appeal erred in holding that the 2nd defendant/respondent could not on the basis of the principle of *nemo dat quod non habet* have validly granted the Appellant the disputed plots without the consent of the 1st respondent when there is unchallenged evidence on record to show that it was the whole Oman of Bosore duly represented by all the family heads including the 1st respondent's family who consented and decided to allocate the dispute plots to the Appellant.

The Supreme Court held that "…..one of the most serious questions raised in this case is whether in this day and age of constitutional rule with all the talk of fundamental human rights to own property, the Oman could just get up and grab any land that belongs to a family because the town has to be developed, as was alleged by the appellant in his evidence at the trial court. My view is that the Oman could do that if the land was stool land which had not been reduced into the possession or ownership of any citizen or family within that Oman. In the instant case, the land seemed to belong to the family of the 1st respondent who had had judgments in his favour at the customary arbitration and a previous circuit court litigation. The Oman could not just get up and allocate fifty building plots to an individual where the evidence suggested that the plots formed part of land which was not stool land. That could only be done with the consent of the family because of the elementary principle that *nemo dat quod non habet* or that no one can give what he does not have. If land is to be given away, that could be done if it is established that the land is undoubtedly stool land or state owned. In the instant case, there was no evidence that the land belonged to the stool.

In any case, the onus was on the appellant as the plaintiff to have proved that the land belonged to the stool so as to justify the stool allocating it to him. There was no such evidence on the record. Throughout the trial, the onus remained on the appellant to have shown how he acquired the land. That he failed to do by the inconsistent sources he described as to how he acquired the land. In the allocation paper, exhibit B, no indication was given as to the nature of the grant. In court, he testified that he bought it. There is evidence that the appellant claimed to rendered thanks or gave "aseda" for the land he acquired. By the use if the word "aseda" which he said he gave after the land had been given to him, he undoubtedly gave the impression that he acquired the land by a gift. At customary law, no one buys land and proceeds to make a thanksgiving to the seller. "Aseda" is given where there has been a gift and not otherwise.

There was no merit in the third and fourth grounds of appeal. Both failed and I would dismiss them".

CHAPTER FOUR
CUSTOMARY TENANCIES AND LICENSES

Terminological Controversies

CUSTOMARY TENANCIES (LESSER INTERESTS)

These are interests that can be created by the holders of the allodial title or usufructuary interests. Customary tenancies vary widely from seasonal hiring and renting of land to the sharing of farm produce and even farmland itself. Systems for delegating use rights in land (derived rights for short) have been defined as "all temporary rights obtained by delegation from holders of rights of first occupancy and which include both traditional forms of open ended loans and more monetarised arrangements like rental or share cropping". They are used to describe "procedures whereby someone who controls rights of access and use over a plot of farmland, in his own name or that of his close family group, grants such rights of use to a third party, on a non-permanent basis and in accordance with specific rules". Institutional arrangements of derived rights include leasing, tenancy, share contracts and loans and a whole host of similar arrangements.

When land becomes scarce and more valuable, it was held that the grantor could impose conditions. At first, a number of standard tenancy terms were developed, and grantors (usually communities) could offer one of or a choice of these to strangers who sought the use of land . The movement from a restricted number of tenancies with fixed terms towards a system depending on individually negotiated contracts resulted from the growing complexity of commodity production and exchange relations, and the consequential need for more variable arrangement for the use and enjoyment of land. As noted by Woodman (1996), the terms are not necessarily set by a process of prior bargaining between legal equals. There may be some social standards determining the appropriate terms.

An indication of the type of interaction which occurs and the type of relationship which emerge was given by Lassey J.A., in *Mensah* v. *Blow* (1967) GLR 424, CA:

> "This kind of tenure of holding….is the result of a contract or an implied agreement. It has certain important characteristic features about it. These are: (1) The owner (or lessor as he is sometime called) of the land must be willing to allow occupation and user of land…, provided the licensee does not set up an adverse claim to his title or right to possession..(2) Sometimes the nature of the grant of occupational tenancy carries with it the obligation on the part of the licensee to pay tribute or tolls or provide some customary services as an act of acknowledgment of the lessor's paramount or superior title to the land. In some cases where the products of the land on which tribute is levied are what may be called natural or food products, the question for the tribute is determined by agreement before the licensee goes on to the land; on the other hand, if it is production of cash crops like cocoa or timber, it is the usual practice to determine the quantum of the tribute by agreement after permission to occupy the land has been granted…(3) The circumstances of the long occupation by the licensee are such that it is [often] difficult to determine whether the customary tribute has been provided or demanded….(4)… The licensee only has a right to use the land equally with the grantors, and it is understood according to customary practice, that throughout the period of occupation the licensee at custom has a present right of possession and user over any portion of the grantor's land where the right of the grantor is not ousted. In other words, title and right to enjoy the land of the latter remains unipaired, and the granting of the licence or permission to occupy the grantor's land without paying tribute or tolls is not to be regarded as surrender by the owner or lessor of all claims or right in the land…."

The terms "licence" and "tenancy" are used here without drawing a strict distinction between them. Generally the sources use the term "tenancy" of the interest held on terms set predominantly by standard categories, while the term "licence" is used of the interest held on expressly negotiated terms. However, given the negotiability of all terms today, the categories merge (Woodman, 1996).

With tenancies, Coussey P in the case of *Akrofi* v. *Wiresi and Anor*, described tenure in land as follows:

> "It is a common form of tenure throughout the country for a landowner who has an unoccupied virgin or forest land, which he or his people are unable to cultivate, to grant the same to a stranger to work on in return for a fixed share of the crops realized from the land. In such a case the tenant farmer, although he has no ownership in the soil, has a very real interest in the usufruct of the land. The arrangement may be carried on indefinitely, even by the original grantee's successor, so long as the original terms of the holding are observed".

Forms of Tenancy

A. Share Tenancy

It is a form of landlord-tenant relation at customary law. This is because it is founded on contract between the land owner and the tenant. It is one of the most important land holding arrangement in customary law. It is extensively used in agriculture (commercial farming) and inland fishing (Lower Volta). There are various forms with the most popular being:
Abusa (breaking into three (3) or 2:1 or 1/3)
Abusa (breaking into two (2) or 1:1 or ½)

Abusa

According to the definition by Jackson J "The custom of Abusa is that in exchange for the permission to cultivate the land, the tenant will pay to his landlord 1/3 of the profit made by him [*Kofi* v *Sesu* (1948) D.C. (Land) 48-51. 911]. Further in *Sasu* v. *Asamani* (1949) D.C.. (Land) 48-51, 133, Quarshie-Idun J., also stated that, "Abusa implies that the whole farm cultivated by another".

Abunu

Under this system, the cost of making the farm is in the first instance, born by the landlord and the farmer tenant is then placed in charge of the farm to maintain and improve it. As the landowner does not contribute to the cost of making the farm, he then gets half (1/2) of the farm.

Legal Position of Share Tenancy:

The share tenancy does not create and pass any legal interest in the property to the tenant. The divisional court declared in *Quafio* v. *Asuku* (1944) D.C. (Land) 39-47, 181 that "…tenancy consisted of not more than a right to cultivate the land which is the property of the landlord and to take proceeds thereof paying the landlord a portion of such proceeds." Also in *Munu* v. *Ainoo* (1976) 1GLR 457 C.A, the Court of Appeal declared that the tenant only has "the right to cultivate the land and to partake of the proceeds. He does not acquired title or estate in or a share of the farm." According to the court, the tenancy is created in respect of the share of the proceeds only. The ownership of the land remains always in the landlord. It has been argued that the greatest weakness of share tenancy as the tenant cannot use the land as collateral security because he has no legal interest in it. But in my view this argument is not an accurate reflection. Truth is that the tenant has some interest which is capable of being quantified and valued for the purposes of compensation.

Arising from this proposition, one may ask whether it is appropriate to treat customary tenancies under the scheme of land interests recognisable under the customary law. Ideally interests in land signify "interest proprietary".

Incidents of Share Tenancy

A share tenant may have the right to enjoy any of the following incidental right as a result of the tenancy. These rights are to be enjoyed exclusively by the tenant and the landlord cannot at any instance without prior knowledge of tenant prevent him from enjoying them.

Security/Quiet Enjoyment:

This simply means the right to keep possession of the property and use it without claims from the grantor. Using the property for his benefit and free from claims and disturbances from the landlord. However, the enjoyment of economic trees, the principle in Atta v. Esson holds. Further, the right to cultivate and use the land as well as his right to part of the proceeds is protected. This can be defended by a court action against the landlord as held in *Manu* v.

Ainoo (1976) 1 GLR 457 (CA) a landlord cannot as well, unilaterally vary/alter the terms of the tenancy. In *Akrofi* v. *Wiresi* (1951) 2 WALR (247), the court upheld the order of the lower court restraining the defendant landlord from demanding a half share of the farm proceeds. Furthermore, the landlord was ordered to enter into a written agreement with the tenants.

- ***Right of Alienation***:

According to customary law, the tenant has no right to alienate the land. However, he has the right to dispose of the tenancy inter vivos (*i.e. in his life time*) but with approval of the landlord who shall/may exercise the right of pre-emption (first choice). In the case where the tenant has tied his interest to another agreement and defaults in the latter, could his right to certain share in the land be divested or sold to defray the debt? In the *Vietor* v. *Hammond* (1938) D.C (Land), it was held that "An abusa tenancy was attachable but since the judgement debt was private, the tenancy could not be seized and sole in execution.

- ***Heritability***

At customary law, share tenancy may be passed on to the next of kin of the tenant in fulfillment of the necessary procedure prescribed by custom have to be adhered to. However, where the parties agree that it shall not be passed, so shall it be [*Akrofi* v. *Wiresi* and *Manu* v. *Ainoo*].

Loss of share tenancy

Share tenancy is of potentially perpetual duration since it is heritable unless circumstances result in the determination of the tenancy. It can be terminated:

- Where there is abandonment;
- Where there is adverse claim by the tenants against the landlord; [Bokitsi Concession (1902) Sarbah's FCLR 152]
- Where there is a breach of a term especially where the term is a condition;
- Failure of a successor.
- When the farm falls into ruin, either by natural causes (e.g., devastation by swollen shoot disease) or through neglect by the tenant.

B. Cash Tenancy

In early times, where food crop farming was the predominant pattern of agriculture in Some regions, the possibility of land acquisition by strangers generally called for possession of some definite qualifications, such as permanent residence in the town or village for about a year during which the stranger demonstrates his co-operation in all aspects of community life. With the introduction of commercial agriculture, many farmers turned to crops like cocoa, oil palm, sugar cane, lime and pineapple. Land became a scarce commodity and strangers were willing to pay large sums of money to their landlords, who readily welcomed the opportunity for easy money. The basis for land acquisition has been modified and now acquisition seems to depend very much on the size of the customary "drink" a prospective tenant is able to offer.

Formalities for Acquiring Cash Tenancy

The prospective stranger-tenant must first be introduced to the village or family headman on whose land he would like to establish his farm. The introduction is made through an elder of the village community or family, and must be made through an elder of the village community or family, and must be made with customary drinks. The amount offered for this negotiation varies from area to area. Generally however, it is either a bottle of Schnapps or a sum of money or both. But in most cases, valuable consideration prevails. The stool occupant then

appoints a day on which the land would be offered. Before the appointed day, the headman finds information about the tenant as to whether he is hard working and honest man. At the meeting, the tenant must convince them of his readiness to use the land within the shortest possible time. After the negotiation, the tenant has to pay another drink money. But in the case of a subject (stool member), he only pays a nominal sum as aseda. After negotiation, an elder is delegated to demarcate the land to the tenant. Before the demarcation, all farmers in the vicinity are summoned to indicate their boundaries so that the stranger could be properly shown the extent of land allocated to him. Quite often, large growing trees and stones are used to define the area.

Lands are leased to the tenants for varying periods depending on the type of crop to be grown. But in some cases, durations are not stated. According to a study conducted by Wright (1977), the annual rents payable depend on one of the following:

- The acreage required
- The availability of land in the area
- The reputation of the farmer in the locality
- The link existing between the stranger's hometown or kinship group and that of the area he intends to farm.

Distinguishing derived rights from other land transactions is becoming increasingly difficult because of the blurring of boundaries between transactions. Also some transactions evolve into other forms. For example, it has been suggested that pledges can become permanent transfers if the debt is never paid. Some arrangements for sharecropping become employment contracts whilst some sales are converted to leases. This requires very careful consideration of arrangements to ensure that what is being described is a derived interest.

Systematic research has established that there are at least five and in some cases more than ten derived arrangements with over 30 varieties. However, the main categories often used to describe these arrangements are 'abunu' and 'abusa'. These tend to obscure some of the terms and therefore the full understanding of actual forms. This results in some cases in misleading renditions of terms and also cannot account for the evolution of these terms.

In order to understand these complex and diverse arrangements, it is important to set out the different elements. These include:
a) the extent of the rights granted – nature, duration and renewal;

b) the contribution of the parties to the production process;

c) the division of responsibilities in the production process;

d) forms of remuneration – when and how they are paid;

e) arrangements which are contractual and those which are based on conventions;

f) procedures for setting up arrangements – whether they are verbal, written or without witnesses and whether they are submitted to the competent authorities for ratification;

g) whether the contract is concluded in its entirety at the ….. prior to commencement or whether certain aspects of it could be negotiated as the situation develops;

h) systems for ensuring compliance with and fulfillment of conditions and facilitating coordination between the parties;

i) the parties – their economic and social status, relations between them and the social obligations between them;

j) the productive factors each of the parties bring to the table as well as the objectives they are pursuing; and

k) systems for addressing disagreements and conflicts.

Several categories of share contracts and derived interests have been identified. The best known are *abusa* and *abunu* which are usually a share-cropping arrangement by which the tenant farms the land and, at harvest, gives a specified portion of the produce to the landlord. Three resources, labour, inputs and land are implicated in share contracts and each resource is rewarded with either a share of the proceeds from the harvest or the farm itself. There are also differences in share contracts depending upon region, the relations of production and the interface of land, capital and labour. As well, the nature of the crop being planted and when it is planted in the agreement cycle are also determining factors in the sharing formula.

Certain common problems are associated with customary tenancies, including:

a. Disputes arise concerning the nature of the tenancy itself and the boundaries of the land granted.

b. Disputes between stool due to conflicting interests over the same land results in multiple grants of the same land to different tenants by different chiefs or landowners. This results in protracted litigation in the courts or in the Paramount Chief's palace. A tenant suffers at the end of it all if his or her grantor is the losing party in the court.

c) Newly installed chiefs, in an attempt to assert their positions, dispute title to and the extent of land granted by their predecessors in an attempt to exact additional payments of drinks and money thereby creating conflicts between the tenant/settler farmers and their grantors.

d) Due to the unwritten nature of tenancy agreements, disputes arise concerning the character of the Agreement with the tenant farmer.Some of the lands acquired by tenant/settler farmers have remained uncultivated for years. Attempts by the chiefs to re-enter such lands create tension in the community.

e) In some cases, indigenes of the area forcibly re-enter these lands, which lead to serious conflicts. Some tenant farmers also transfer part of their farmlands to third parties without reference to the original landowners. These new farmers may also refuse to atorn tenant to the landowners or chiefs and refuse to pay anything to them in respect of the lands they occupy.

f) There is a general lack of tenure security because the interests of the tenants fall short of ownership, and there is always the possibility that the landowner can reclaim the land or dispossess the tenant of the land subject to adequate notice.

e) Landowners usually determine the type of crops to be cultivated against the desires of the tenant or even often times against sound scientific advice. This situation adversely affects the economics of the arrangements.

f) The customary service the tenant/settler farmer has to render to the stool or landlord, especially during festivals takes a toll on them. Sometimes, tenants are not in a position to provide such services, leading to conflicts with their landlords.

g) Lack of documentation of farmland transactions creates problems as landlords grant the same or overlapping parcels to different tenants resulting in multiplicity of grants and conflict.

CUSTOMARY LICENCE(S)

This is considered one of the most common and significant land holding arrangements at customary law. It confers a right to occupy and use land subject to agreed terms. It may be granted by a member or subject to another member or subject. On the other hand, it may be granted by a member to a stranger. It may also be granted for valuable consideration or in gratis. Customary licences can be created through a contractual arrangement between parties or through legislation.

Forms of Licences(s)
There are mainly two forms of licences:
Short term licence (sowing tenure/seasonal licence)
Long term licence

A. Short Term Licence (sowing tenure/seasonal licence)

It is a permit for cultivation of annual crops (it is an agricultural tenancy for crops grown over a season). It does not give the licensee the right to put up a structure on the land. Where he desires to do this, he needs a fresh licence from the licensor. Quite often, it is given in gratis. However, it may be granted for valuable consideration either in cash or kind.

The licence cannot be revoked unilaterally until the end of the season. In addition, where the crops are still on the land, the permit (licence) cannot be revoked. The arrangement is for the season only and thus on the expiration of the period, the permit expires or can be determined. If one wants to continue, the licensee has to go for a fresh permit which is to the discretion of the licensor. But after sometime, the renewal may be implied and thus becomes perpetual. In Sarbah's Fante Customary Law, he describes it as "….having sold his crops, the licensee cannot sow a second on any part of the grantor's land without his express permission."

Heritability:
The seasonal licence is not heritable as the arrangement is personal to the licensee. However, on the death of the licensee before harvest time, his successor, shall be entitled to harvest time, his successor, shall be entitled to harvest the crops. The licence arrangement then determines immediately. In *Nyasemhwe* v. *Afibiyesan* (1977) 1GLR 29, the court held that a sowing licence is not heritable but concluded that if the sowing tenant however dies before his seasonal crops are gathered, his successor is entitled to reap them. And as soon as the crops are gathered in, the tenancy seizes.

Alienation:
The licensee has no right of alienation. However, he has the right to dispose of the crops which he has cultivated to any person of his choice at anytime and nothing more.

B. Long Term Licence(s)

It is a permit granted for agricultural or building purposes. Where it is granted for building purpose, it is simply referred to as a building licence. Unlike the seasonal licence, the licensee here does not need separate licence for a building permit. It may be granted for valuable consideration or in gratis. Like the sowing licence, the licensee under long term licence does not get any legal interest or estate. Incidental rights under long term licence include the right of possession free from disturbances. According to Bannerman J., in *Tenewaah* v. *Manu* (1962) 2GLR 143, "When the exercise of the right conferred by the licence involves nothing beyond, there can be no reason to urge against the existence of a power to determine the licence at the will of the licensor….". Long term licences have no time certain. Possession is therefore potentially perpetual. For instance in *Kumah* v *Kumah* (1938) 5 WACA 4 (P.C), the licensee and his successors were in possession for six generations while in *Mensah* v. *Blow*(1967) GLR 434 (C.A.), the licensee and his successors were in possession for fifty years. Thus the court of Appeal in this case described the long term licence as an annual tenure, i.e. from year to year capable of being enjoyed until terminated or enduring for so long as the licensee or his successor recognized and did not dispute the title of the grantor.

Heritability and Alienation

The long term licence devolves on the next of kin of the licensee and is therefore heritable. However, the necessary procedure must be fulfilled. Custom prescribes that the successor be introduced to the licensor so that the latter gets notice of him. The licensee has no power to dispose of the land without the authority of the owner (licensor). In *Kumah* v. *Kumah* (1936) 5WACA 4 (P.C.), the licensee attempted to sell outright portions of lands he occupied by licence. The grantors promptly exercised an action to prevent the sale and to determine the extend of the licensee's right over the land. Also, in *Golightly* v. *Ashrifi* , (1961) GLR 28 PC, the WACA affirmed the judgment of Jackson J, amongst others in relation to suite number 15 of 1943 that:

"The stool cannot alienate the land without obtaining the consent and concurrence of individuals or families who are lawfully in occupation of the land, such as subjects of the stool who are in occupation or strangers who have been properly granted some interest in the land".

Determination or Extinction of the Licence

A licence is determinable under the following conditions.

- Where there is a failure of succession
- Termination in accordance with the terms of the licence
- Forfeiture
- Abandonment
- Extinction by operation of legislation
- Breach of terms
- Adverse claims on the part of the tenant (licensee)

Customary Pledges

It is a security transaction whose effect is similar to that of a mortgage. A pledge is a delivery of possession and custody of a property by a person to his creditor to hold and use till redemption by payment of debt or discharge of obligation. According to Ollennu:

"Pledge in customary law is the delivery of possession and custody of property, real or personal, by a person to his creditor to hold and use until the debt due is paid, an article borrowed is returned or replaced, or obligation is discarded."

In the past, customary law allowed the pledging of both landed property and chattels as loans. And in the distant past, humans were used. However, the Pawnbrokers Ordinance (CAP 189), abolished the pledging of chattels and placed them on commercial basis (Ollennu, ibid).

Essential Requirements and Features of a Pledge

- The pledge is placed in possession of pledged land
- The pledge has the right to the use and enjoyment of the land without accounting to the pledgor. The pledgor has no access to anything on the land (the pledge is entitled to the rights belonging to the pledgor formerly)
- The pledge may cultivate economic trees on the land at his own cost. In the event that the pledgor is ready to redeem the pledge, he will have to settle the cost involved
- A pledge is redeemable at anytime. Influx of time does not change the position of any of the parties.

Alienation of Pledge

A pledge is one form of alienation of land or interest in land. In pledges, the legal implication is that the pledge may use it, not answerable to any deterioration which is the natural consequence of such user. Any right, title or interest in land capable of ownership, except annual tenancy, may be pledged. The arrangement allows the pledge in possession of the pledged land (property) and given absolute right to use and enjoyment of the proceeds of the land without liability to account for the proceeds or interests proceeding thereof. Example, one can harvest economic trees and fell palm trees to tap palm wine.

The true position of law is that customary pledges are not alienable. A pledge of land is not entitled to sell the pledged land except upon an order of a court of competent jurisdiction.

There is some controversy regarding whether with the passage of AFRCD 33 there can still be valid pledge in Ghana. This debate was carried further by Professor E.V.O. in a article titled AFRDC 33 and the End of Pledges in Ghana, which has been reproduced in full in Cases and Materials on Customary Land Law of Ghana, Vol. 1, page ??.

CHAPTER FIVE

MANAGEMENT OF STOOL PROPERTY

1. INTRODUCTION

We have described the allodial title and the usufructuary interest as well as the so-called lesser interests in land under the customary scheme of tenure. Much of what was covered has to do with stools, skins and or family interests in land. We shall now proceed to discuss in more detail the management of stool property and related issues, bearing in mind the corporate character of the stool.

Article 295(1) of the Constitution of 1992 defines a stool as follows: "Stool" includes a skin and the person or body having control over skin land".

A stool may connote a customary community similar to a body corporate headed by a chief, who holds some traditional political authority. It may also connote the symbol of office of a chief or other customary office holder. Normally consist of a small black carved wooden stool. **Explain procedure for consecrating a stool.**

It is the former meaning of the word which will engage our attention under this Chapter. That is to say a stool as a customary law corporation, having a separate legal personality distinct from the individuals who belong to the said corporation. The said individuals are called subjects. In some parts of the country the equivalent of the stool is a skin.

According to Brobbey, "A large proportion of litigation on chiefs and chieftaincy revolves around stool or skin property" which include lands as a result of the treatment given to these properties by their occupants. "Stool land" in Ghana can have various meanings and it can be defined to include land held by various kinds groups of people. A "Stool" is the wooden seat, which symbolizes the political authority of a chief. A lineage head who is not a town chief may posses a stool to signify his authority over his lineage but such private stools are of little political significance (Concessions Enquiry No. 1118 (Accra) 1961 GLR 445). The term is thus broad enough to include land belonging to chiefs with stools (as the term is normally used), skin lands of the Northern and Upper Regions of Ghana, certain already vested in the Government by earlier enactments. "Stool" also means a chief, a head of family, a management committee and any person or groups of person exercising control over stool land.

It is regarded in customary law as a body corporate, which may hold interest in property, but as an inanimate object, it is incapable of holding an interest in property. Hence the occupant of the stool therefore holds any interest in property connected to the stool for the benefit of the stool subjects. An example of such property that a stool can hold is land.

According to Kludze:

"Stool land" may be understood as land to which the paramount title is vested in the stool, which land is therefore under the administration of a chief and his councilors"

This definition though simple, can be taken as basic. It carries the implication that any land that qualifies to be called a stool land must, necessarily be under the administration of the head of the stool concerned. Ollennu J…, giving judgment in *Ameoda*v.*Pordier* [(1967) C.C. 122(C.A.)], defines stool land as …..

> "Land owned by a community, the head of which occupies a stool such that in the olden days of tribal wars the said head of the community carried out the ultimate responsibility of mobilizing the community to fight to save it, and in modern days to raise money from subjects to litigate the communities title to the land" (1962 1GLR:203).

This definition appears to be broad though it does bring out clearly the distinction between stool land and non-stool lands. The definition given by section 31 of the Administration of Lands Act, 1962 (Act 123) is defective. It defines "stool lands" as

> "…….includes land controlled by any person for the benefit of the subjects or members of a stool, clan, company or community as the case may be and all land in the Upper and

> Northern Regions other than lands vested in the President and accordingly "Stool" means the person exercising such control."

This definition erroneously describes all lands held by communities including clan lands and company lands as stool lands but does not go on to define the ambit of the terms company, clan and community. Company here obviously will mean an Asafo Company and not the commercial cocoa companies or a company under the Companies Code, because applying the noseituere a sociis rule of interpretation it will appear that company must relate to an indigenous and traditional corporate entity. The words clan and community, however, elude precise definition for whereas the clan in Akan area is a large dispersed group of persons, transcending territorial boundaries, among the Ewe it is simply a large family having loose ties of relationship between segmentary branches, Being such a large indeterminate group, it is doubtful whether property rights vest in the Akan Clan.

From the above definitions, stool lands may be said to be land belonging to a community whose head holds the paramount title in such lands with members' rights of ownership therein.

Article 172 (1) of the 1969 Constitution provided:

> "Stool land" includes any land or interest in, or right over, any land controlled by a Stool or Skin, the head of a particular community or the captain of a company, for the benefit of the subjects of that Stool or the members of that community or company".

The 1969 provision remained the law until Article 213(1) of the 1979 Constitution provided: "stool land" includes any land or interest in or right over, any land controlled by a stool, the head of the particular community, or a family for the benefit of subjects of that stool or the members of that community or family".

The Stool Lands Boundaries Settlement Decree, 1973 (NRCD 172) under section 14, defines stool land as:

> "any land or interest in…. or right over, any land controlled by a Stool or Skin, the head of a particular community or the captain of a company for the benefit of the subjects of that stool or the members of that community or company".

This definition as noted by Brobbey distinguishes between jurisdictional control on the one hand and proprietary or ownership interest on the other hand upon which the concept of stool land is based. The nature of stool land can only be determined by evidence led at a trial (See *Annobil* v.*Obosu* [1991] 1GLR 383, CA). According to Woodman (1981-82), "Stool" was defined consistently with this as including, among others, persons having control over family land.

The definition section, section 63 (1) of the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law 1982 (P.N.D.C.L. 42) provides:

> "stool land' includes any land or interest in or right over, any land controlled by a stool, the head of the particular community, including a family as known to customary law for the benefit of the subjects of that stool or the members of that community".

The courts have also held in *Nana Hyeaman II* v. *Osei and others* (1982-83) GLR 495-501 and *Gyamfi*v. *Owusu*(1981) GLR 681, C.A. that "vested in president" does not take away the power

of the stool to manage and control stool lands or even to litigate in respect of same. Also, the chief is the proper person to sue or be sued in respect of stool land. In the absence of the chief, another person may be appointed to represent the stool if by customary law that person is competent to represent the stool (See *Ofuman Stool* v.*Nchiraa* [1957] 2WALR 229, *Bukuruwa Stool* v.*Kumawu Stool* [1962] 1GLR 253-357).

Though land tenure system in areas where skin is symbol of authority differs from areas where stool is the symbol of authority, lands traditionally belonging to some skins are described as stool lands. This is confirmed by section 78 of the Chieftaincy Act (2008) Act 759. In area where stools or skins do not have lands, such lands have been established to belong to individual families (*Ameoda* v. *Podier* [1967] GLR 479, CA).

The principal rule is that management of stool land is part of the customary responsibility of the chief as decided in *Korblah II alias Tetteh* v. *Odartei III* [1980] GLR 932, CA and he could be called upon to account during the time that the remains a chief (*Owusu* v. *Agyei* [1991] 2 GLR 493, SC.

In *Korblah II alias Tetteh* v. *Odartei III* [1980] GLR 932, CA, by an originating summons filed on 31 October 1975, the plaintiff claimed the following reliefs:

"This summons is issued upon application of Nii Odartei III, sub-chief of Odarteiman (Nsakina) in the Greater Accra Region of the Republic of Ghana who claims to be the only sub-chief of Odarteiman (Nsakina) for the determination of the following questions: whether under the provisions of the Chieftaincy Act, 1971 (Act 370):

(1) The alleged enstoolment of George Aryee Damey Tetteh, the fourth defendant, under the stool name of Nii Tetteh Korblah II was valid.
(2) The notification in the Local Government Bulletin No. 50 of 22 November 1974, of the alleged enstoolment of the fourth defendant is not void and of no effect.
(3) Paragraph (2) of the Greater Accra Regional Administration's letter No. GAL/ 74/Vol. 3 dated 31st July 1975, purporting to prohibit the plaintiff from interfering in the affairs of Nsakina, that is, the selling of land and the performance of any duties as chief of the area is not void as being ultra vires or without jurisdiction. And for a declaration that:
(a) The plaintiff is the sole legitimate sub-chief of Odarteiman (Nsakina).
(b) There is no such traditional office as senior sub-chief of Nsakina with jurisdiction over the plaintiff's area of authority, namely, Odarteiman (Nsakina).
(c) The plaintiff is entitled to perform his customary duties as sub-chief of Odarteiman (Nsakina) including the management of the stool lands under his jurisdiction."

Three outstanding facts emerged from the evidence: Firstly, Odarteiman or Nsakina is a village in the Greater Accra Region. In respect of this village there exist two Local Government Bulletin notices recognising two different persons, i.e. the plaintiff and the fourth defendant herein, as "sub-chief" and "senior sub-chief" respectively. In the first place, a notice in the Local Government Bulletin dated 28th September 1973 (exhibit N) announced the enstoolment of the plaintiff (James Odartei Lamptey) as sub-chief under the stool name of Nii Odartei III. The effective date of his enstoolment is stated as 29th August 1968 and the particulars of the town or division are given as "Odarteiman (Nsakina), Ga Traditional Area, James Town."

A second Local Government Bulletin dated 22nd November 1974 (exhibit A) gave notice of the enstoolment of the fourth defendant (George Aryee Damey Tetteh) as "senior sub-chief" under the stool name of Nii Tetteh Korblah II with effect from 10 June 1966 for the town of Nsakina in the Sempe Division.

On the testimony of these Local Government Bulletins published in the official gazette, Nsakina appeared not only to be torn between two chiefs, i.e. the plaintiff and the fourth defendant, but also to be condemned to subservience to two rival divisional overlords, i.e. James Town Alata stool and Sempe stool at one and the same time.

The Court held as follows:

"The correct legal position is that management of stool lands falls within the customary duties of a chief. The chief is, virtute officii the trustee and custodian of all stool properties, including realty, attaching to the stool and entrusted to him upon installation. As Mr. Justice Ollennu shrewdly states in his invaluable Essay on "Chieftaincy under the law" at page 44 of the Essays in Ghanaian Law—"Management of stool lands has been one of the aboriginal functions of a Stool. It is true the central government has made certain administrative arrangement for the more efficient discharge of these customary duties by a chief: see, e.g. Stool Lands Act, 1960 (Act 27), the Local Government of the Ordinance, Cap. 64 (1951 Rev.), Part VII, and the new constitutional provisions in article 190 Constitution, 1979—nevertheless, that function appertains to the chief's customary powers and not to his statutory duties. Government recognition of a chief under the proviso to section 48 (1) has nothing to do with a chief's management of stool lands; and the learned judge erred in holding the contrary. The plaintiff-respondent's competence to exercise that customary function depends primarily on whether he has as a matter of fact been nominated, elected and installed a chief in accordance with customary law. On this, the Local Government Bulletin of 28th September 1973 (exhibit N) affords only prima facie proof; and since the plaintiff's averments have been rebutted, they must be conclusively established in a proper trial before the appropriate tribunal".

For sometime the customary law rule was that if occupant of the stool failed to declare and differentiates his self-acquired property from that of the stool, he forfeits his property from the stool (*Dompreh* v. *Pong* [1965] GLR 126, CA). However, the modern view is that each case has to be considered on its own merits. See *Serwaa* v. *Kesse [Citation]*

An interesting and important point of native custom as to whether or not a property acquired by an occupant of a stool, while he was occupying the stool, becomes stool property after his death. In *Kojo Roh* v. *Chief Kofi Adutwum* (1954), DC (land) 52-55, Quashie-Idun, J, held that the property was acquired as his private property, and he was entitled to hold it as such (See *Yamoah IV* v. *Sekyi* (1936) 3WACA 57.

History of Rights in Stool Land

Proprietary interests in stool land originally become vested in people by the effect of customary laws and circumstances which are mainly historical. With the development of the idea of statehood, various enactments affecting stool land have been made, the net result of which has been a disturbance and re-arrangement of the historical pattern of proprietary rights in stool lands. The origin of rights in stool land has been examined by various writers on Ghana land law. Sarbah in his Fanti Customary Laws gave methods of acquisition of rights in land:

(1) discovery and occupation of vacant land, i.e. land without an owner and unoccupied (terra nullius)
(2) Conquest:

(3) accession, i.e. land gained or reclaimed from sea or river; and
(4) alienation, e.g. by sale, gift, testamentary disposition and succession.

Sarbah was dealing with the acquisition of right in land generally, not particularly by a stool, and thus heading (3) and parts of heading (4) are not relevant to this discussion. Casely Hayford in his Gold Coast Native Institutions says:

> "In the early State of the Native State System, upon the acquisition of lands by conquest or settlement by members of a given community, the lands so acquired or settled upon would be apportioned among those worthy of them in the order of merit. Upon that basis, the Chief Military Commander, who subsequently becomes the King, would have his requisite share, and so would every member of the community down to the lowest rank of the fighting men. Thus, each man's land would be his own special property and that of his family, though the King, as overlord of all, would undoubtedly exercise sovereignty over the whole land, every inch of which, however, would have an individual family owning it,"

In that statement Casely Hayford also brings out two methods of acquisition of proprietary rights in land, namely (a) conquest and (b) settlement, and he goes further to show the relationship of the proprietary rights of the overlord and his sub-chiefs. Danquah, in his Akan Laws and Customs (1928: 199-200) also confirms the observations of Casely Hayford and introduces a third method which was included in Sarbah's classification, i.e. purchase and gift.

He enumerated the following methods:

Conquest by a tribe, followed by the supreme commander assuming over-all control and the sharing out of the land among the sectional heads:

Confiscation to the stool of vacant land;

Long and undisturbed acknowledgement of a superior stool's ultimate ownership of a stool land; and

Purchase and gift (which are recent and apply to very small areas of land).

To summarise the above, apart from the more recent and almost insignificant case of purchase and gift, right to stool land originates from a conquest or settlement on land by a community owing allegiance to a stool. There is an element of force and physical sacrifice in both methods and people distinguish themselves in the process. Therefore the over-all head of the community (referred to as the king) after the successful acquisition of the land, shares out definite portions among the head of the various groups of the community. Often, he retains a portion for himself personally and for his immediate relations.

2. MANAGEMENT OF STOOL PROPERTY

Administration of Lands Act, (Act 123 of 1962), S. 31 defines Stool land as:

"Stool land includes land controlled by any person for the benefit of the subjects or members of a stool, clan, company or community, as the case may be and all land in the Upper and Northern Regions vested in the President and accordingly stool means the person exercising such control".

Please note that the reference to lands in the Northern and Upper Regions was superseded by the 1979 Constitution which divested the said lands of state control. See also Article 257 (2), (3) & (4) of the 1992 Constitution confirming the revesting the lands in the Northern, Upper East and Upper West Regions in the appropriate traditional owners. Need to revest was to cure a possible effect of the abrogation of the 1979 Constitution on December 31, 1981.

Article 295(1) of the Constitution of 1992 defines stool land as:

> "Stool land includes land or interest in, or rights over, any land controlled by a stool or skin or the captain of a company, for the benefit of the subjects of that Stool or the members of that community or company".

Section 1 of the Administration of Lands Act (Act 123 of 1962) provides that "The management of Stool lands shall be vested in the Minister".

Article 267(1) of the Constitution of 1992 vests all stool lands in Ghana in the appropriate stools on behalf of and in trust for the subjects of the stool in accordance with customary law and usage.

Please flag the above quoted provision, as we shall be coming back and forth to them under this Chapter.

We need to address one fundamental question. Does the definition of Stool land encompass family lands? In other words is it possible to extend the legal regime relating to stool lands to family lands?

Unfortunately, statutory sources and judicial decisions have even compounded the scope of this controversy. Examine the statutory provisions and decided cases and attempt a resolution of the controversy.

From Article 267(1) of the Constitution of 1992, stool lands are vested in stools as trustees for the subjects and in accordance with custom and usage. Under the custom and usage the stools' allodial titles were the highest interest in land with its incidents. However, we have noted several provisions which seek to place limitations on the powers of stools regarding stool lands.

We also noted that under the State Lands Act (Act 125 of 1962) as amended stool land could be vested in the President in trust for the people. The courts have held that "vested in the President" does not take away the powers of the stool to manage and control stool lands or even to litigate in respect of same. Twumasi J. in the case of *Nana Hyeaman II* v. *Osei and Others* (1982-83) GLR 495 comfirmend this principle when he said "In my opinion, any interpretation of sections 2, 7 and 8 of Act 123 to the effect that the Act takes away completely the ownership rights of a stool to lands attached to it would be an unwarranted detour from well-articulated judicial opinion on the legislative intention in enacting such laws. A careful look at the words "in trust" or "as a trustee" used in sections 2 and 7 of Act 123 reveals that they are not intended to mean that the stools have no rights whatsoever over stool lands. For example, under section 8 of the Act, the stool can make grants of stool land vested in the President. The only fetter on this right is that the concurrence of the minister is required to validate the grant. If the legislature intended that all rights vested in a stool should be taken away, it would not have enacted section 8 of the Act.

In *Frimpong*v. *Nana Asare Obeng* II [1974] 1 G.L.R. 16 at p. 20, Edward Wiredu J. (as he then was) had this to say:

". . . I am of the view that section 2 of Act 123 does not take away the inherent right of occupants of stools to maintain actions in respect of their respective stool lands. The very wording of section 2 of Act 123 recognises this fact . . ."”

He went on to further state that "After an incisive study of the provisions of Acts 123 and 124, I am impelled irresistibly to the firm conclusion that there is nothing, open or esoteric, in the two statutes which would suggest, even faintly, that the legislature by enacting that stool lands including those subject to existing or future concessions shall be vested in the President in trust for the stools concerned intended that the stools should be denuded of their inherent rights to ownership of stool lands. The statutory powers of the President must be construed as running side by side with the powers of the stools as the allodial owners of stool lands."

In *Frimpong* v. *Nana Asare Obeng* II [1974] 1 G.L.R. 16, the plaintiff is the ohene of Bontodiase in the Akim Kotoku area and the defendant is a concessionaire operating a timber concession in an area abutting the plaintiff's stool land. In the course of the operations the defendant felled some logs in an area which was subsequently detected to lie outside the area of his concession. This area on the undisputed evidence fell within an area being claimed by the plaintiff's stool. As a result of this the plaintiff reported the matter to the appropriate governmental authorities, namely, the Lands, and Forestry Departments and the police. Following the report the Forestry and Lands Departments acting in concert under the Forests Ordinance, Cap. [p.18] 157 (1951 Rev.), the Trees and Timber Ordinance, Cap. 158 (1951 Rev.), the Administration of Lands Act, 1962 (Act 123), the Concessions Act, 1962 (Act 124), and the Forest Offences (Compounding of Trees) Act, 1959 (No. 83 of 1959), respectively, conducted a survey of the area where the trees were felled and on becoming satisfied that the trees were illegally felled imposed a fine of ¢300.00 on the defendant. Following this the senior lands officer, Akim Oda, as the administrator of stool lands in the Akim Kotoku area impounded the trees, assessed the royalties payable on them and demanded the same from the defendant. The facts further show that by a letter dated 3rd August 1973, and used as exhibit C and attached to the defendant's affidavit in opposition to the plaintiff's application for an interim injunction, the Lands Department wrote to the defendant as follows:

"Following the inspection of your illegal timber operation in the above area by a combined team of police, forestry and officers of the Lands Department and a subsequent action of the Forestry Department under Trees and Timber Regulations, you are hereby authorised to remove the logs which stumps were checked, subject to payment of the tree royalties involved. This action is taken to prevent the logs from detiorating [sic.] thereby losing their commercial value. The tree royalties, if paid, will be placed on deposit until the disputed area is resolved.
Meanwhile, I have to warn you that no additional tree should be felled in that area in the course of removing the logs and you should confine all your operations in the area approved for you by the Lands Commission."

The dispute over the area where the trees were felled by the defendant as contained in exhibit C according to learned counsel for the defendant is between the plaintiff's stool and another stool which is still pending for determination.

In the meantime the plaintiff worried about the delay in taking action against the defendant by the authorities on 23rd July 1973, applied for a writ of summons in the District Court Grade I, Akim Oda, against the defendant for the following relief:

"The plaintiff as the chief of Bontodiasi and customary owner of the Takraho lands near the Mfumso river in the Akim Kotoku area claims against the defendant herein substantial damages for open trespass on to the said lands and felling timber therefrom without his knowledge permission/concern and for perpetual injunction against the defendants."

The plaintiff followed his summons later with an application for an interim order of injunction seeking to restrain the defendant from dealing with the timber trees. When the application came before the trial court arguments were submitted in support and against the grant. The plaintiff urging that the grant was necessary to avoid a breach of the peace and the defendant resisting the application on the grounds, first that the plaintiff was incompetent to maintain any action in relation to the trees by virtue of exhibits B and C and that the senior lands officer in his capacity as the administrator of stool lands has under section 2 of Act 123 vested title to the trees in him.
The trial learned magistrate did not appear to have been persuaded by the submissions of learned counsel for the defendant and delivered the following ruling:

"This is a motion for an interim injunction in this suit in respect of timber felled on the defendant's stool land. That the land is the defendant's stool land is not in dispute. That the defendant or this stool he represents has an interest in the timber on his stool land in this case is clearly borne out by the law cited by counsel for the defendant in this case. That an interim injunction is desirable in this suit to preserve the status quo is in my view, both from the arguments and submissions of counsel for both the applicant and the defendant most apparent as well as real. In the premises after careful consideration of the motion paper and supporting affidavit and the affidavit in opposition with its annexed exhibits A, B and C as well as the receipt exhibit 1 and arguments of counsel, I am satisfied that this is a most proper case in which an interim injunction should be granted restraining both the defendant and the plaintiff, their servants or agents from dealing with the timber illegally felled by the defendant-respondent in this suit until the final determination of this suit. The defendant as well as the plaintiff are hereby accordingly restrained from dealing with the timber felled in this suit in any way until final determination of the suit. In my view the authorisation of the defendant-respondent by the Lands Department to remove the logs is a nullity and of no effect for a man shall never be allowed to profit by any wrongful act of his. It is hereby further ordered that the Forestry Department remove the logs the subject-matter of this suit and motion forthwith, sell same at the appropriate and lawfully authorised place and deposit the proceeds into court pending the final determination of the present suit."

It is from this ruling that the appeal was brought.

The Court held as follows:

"Even though the point may not be relevant here I am of the view that section 2 of Act 123 does not take away the inherent right of occupants of stools to maintain actions in respect of their respective stool lands. The very wording of section 2 of Act 123 recognises this fact where it states "The President may direct the institution . . . or intervention in, any proceedings relating to any Stool land." The above quoted portion of section 2 of Act 123 contemplates that the proceedings in respect of which the President may intervene must have been pending and commenced by someone on behalf of the stool concerned. In law the proper person in this regard is the occupant of that stool. I therefore hold in my judgment that Mr. Hutchful's

view that section 2 of Act 123 does not take away the inherent right of a stool occupant to maintain an action in respect of his stool land is the correct construction of that section. It follows therefore that the plaintiff's action in so far as it relates to the trespass to his land is maintainable.
In my judgment therefore the appeal succeeds and it is accordingly allowed. The ruling appealed from is hereby set aside and the order restraining the defendant from carting the logs as authorised by exhibit C is hereby quashed. The defendant is hereby ordered to convey the logs. The action in respect of the trespass to proceed in the trial court.

In *Nana Hyeaman II* v. *Osei and Others* (1982-83) GLR 495, the plaintiff, the divisional chief of Gwira Banso in the Gwira Traditional Area, instituted an action for the cancellation and setting aside of a timber lease of a parcel of land attached to his stool. Counsel for the defendant and co-defendants, however, raised a preliminary objection as to the capacity of the plaintiff to institute such an action on the ground that by virtue of the Concession Act, 1962 (Act 124), particularly section 16 thereof, only the President could institute such proceedings on behalf of the stools concerned. Counsel argued in concert that the effect of the words "vested in the President in trust for the stools concerned" used in Act 124, s. 16 was to take away the tradition-clothed powers of chiefs over stool lands.

The Court stated as follows:

"The preliminary question that called for determination in this matter is whether the plaintiff, who is the divisional chief of Gwira Banso in the Gwira Traditional Area, has capacity to institute an action for the cancellation and setting aside of a timber lease of a piece or parcel of land attached to his stool. Counsel for the defendants and co-defendants submitted that there is no such capacity and referred to the Concessions Act, 1962 (Act 124) in substantiation of their submission, particularly section 16 thereof. The answer to the question therefore requires the interpretation of section 16 of Act 124 which provides:

"16. (1) All lands referred to in subsection (2) or subsection (4) of section 4 of the Forests Ordinance (Cap. 157) and which have been constituted or proposed to be constituted as forest reserves under that Ordinance and all lands deemed to be constituted as forest reserves under subsection (7) of this section are hereby vested in the President in trust for the stools concerned:
Provided that all rights, customary or otherwise, in such lands validly existing immediately before the commencement of this Act shall continue on and after such commencement subject to this Act and any other enactment for the time being in force.
(2) All lands which in the future shall be proposed to be constituted as forest reserves under the Forests Ordinance (Cap. 157) shall become vested in the President in trust for the stools concerned with effect from the date of the publication of the notice relating to such land and prescribed under section 5 (1) of that Ordinance.
(3) Any land, other than land referred to in the preceding subsections, subject to the Administration of Lands Act, 1962 and in respect of which rights have been granted with respect to timber or trees under any concession and in force immediately before the commencement of this Act are vested in the President in trust for the stools concerned, subject to the terms of the concession, this Act and any other enactment for the time being in force.
(4) All rights with respect to timber or trees on any land other than land specified in the preceding subsections of this section are vested in the President in trust for stools concerned.
(5) It shall be lawful for the President to execute any deed or do any act as a trustee in respect of lands or rights referred to in this section.

(6) Any revenue from lands or rights vested in the President under this section or derived under subsection (11) shall be collected, paid in and disbursed as provided by the Administration of Lands Act, 1962."

In my opinion, any interpretation of sections 2, 7 and 8 of Act 123 to the effect that the Act takes away completely the ownership rights of a stool to lands attached to it would be an unwarranted detour from well-articulated judicial opinion on the legislative intention in enacting such laws. A careful look at the words "in trust" or "as a trustee" used in sections 2 and 7 of Act 123 reveals that they are not intended to mean that the stools have no rights whatsoever over stool lands. For example, under section 8 of the Act, the stool can make grants of stool land vested in the President. The only fetter on this right is that the concurrence of the minister is required to validate the grant. If the legislature intended that all rights vested in a stool should be taken away, it would not have enacted section 8 of the Act.

The Court concluded as follows:

"There is one sure way of grasping the nettle in this case and it is by no means difficult. One just has to identify the areas of material similarities in the congeries of statutes affecting lands. I prefer to subsume them under what I call "praedial legislation," that is to say, legislation pertaining to land. It becomes obvious, if we adopt the purpose—oriented policy of statutory interpretation, that the legislature had never had the intention of depriving the stools of this country of their inherent right to ownership of stool land, notwithstanding statutory provisions entrusting stool lands to the President for the stools.

This is made manifest by the fact that in one statute, Act 123, there is a provision in section 8 to the effect that stools can make grants of stool lands even though the same lands may have been entrusted to the President. The meaning of such words as "vested in the President in trust for the stools concerned" should be construed uneqivocally in both Acts 123 and 124. The provisions are "in pari materia" and ought to bear the same construction. As Lord Mansfield enunciated with typical lucidity in R. v. Loxdale (1758) 1 Burr. 445 at p.447:
"Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other."

After an incisive study of the provisions of Acts 123 and 124, I am impelled irresistibly to the firm conclusion that there is nothing, open or esoteric, in the two statutes which would suggest, even faintly, that the legislature by enacting that stool lands including those subject to existing or future concessions shall be vested in the President in trust for the stools concerned intended that the stools should be denuded of their inherent rights to ownership of stool lands. The statutory powers of the President must be construed as running side by side with the powers of the stools as the allodial owners of stool lands.

No doubt a stool land can lawfully be taken away to a concessionaire under the provisions of the Concessions Act, but before such a process is brought into fruition, the right of the stool to deal with the land in a manner not inconsistent with the provisions of Act 123 still persists. For example, the stool can sue in trespass to the land. It follows that the occupant of the stool can without any inhibition challenge the validity of a purported concession affecting his stool land. This is exactly what the plaintiff in this case seeks to do. He cannot be hamstrung by facile arguments that stool lands are vested in the President. For these

reasons I hold that the objection to the capacity of the plaintiff is untenable and is accordingly overruled".

An important judicial decision that has to be noted in any discussion regarding the management of stool lands is the case of *Kwan* v. *Nyieni* [1959] G.L.R. 67, C.A. The facts in Kwan v. Nyieni as as follows: Kojo Kwan and Osei Kojo were members of the same family. The head of the family was Osei Kojo. Between 1953 and 1954 there was an attempt to remove Osei Kojo as head of family. The reason was that he was squandering the family property. There was an arbitration in respect of the removal. The arbitrators were not satisfied that he be removed. The family were not equally satisfied. They appointed Kojo Kwan as the head. There were, as it were, two heads of family.

In April 1953, Osei Kojo together with one female member of the family, mortgaged four of the six farms to Kwesi Nyieni. Kojo Kwan knew of this in January 1954 when Nyieni advertised the four farms for sale in exercise of a power of sale under the mortgage. Kojo Kwan, acting as head of the family, instituted an action in the Kumasi West District Court. He claimed:
(a) a declaration that the four farms were the property of his family;
(b) a declaration that the mortgage of the farms by Osei Kojo was without the knowledge and consent of the family;
(c) an order for recovery of possession of the farms; and
(d) an order for interim injunction.

The Court of Appeal held that:

"(1) as a general rule the head of a family, as representative of the family, is the proper person to institute a suit for recovery of family land;
(2) to this general rule there are exceptions in certain special circumstances, such as:
(i) where family property is in danger of being lost to the family, and it is shown that the head, either out of personal interest or otherwise, will not make a move to save or preserve it; or
(ii) where, owing to a division in the family, the head and some of the principal members will not take any steps; or
(iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.
In any such special circumstances the Courts will entertain an action by any member of the family, either upon proof that he has been authorised by other members of the family to sue, or upon proof of necessity, provided that the Court is satisfied that the action is instituted in order to preserve the family character of the property."

The case of *Gyamfi* v. *Owusu* (1981) GLR 612 (Court of Appeal), presented another interesting twist to the issues surrounding the management of stool lands in Ghana.

The appeal arose out of three cases consolidated into one. The actions were instituted for the recovery of about ¢1.5 million. It was in respect of compensation paid by the Government of Ghana for the "acquisition" of certain lands for the creation of a national park and a game reserve. The lands are on the Afram Plains in the Ashanti Region. The lands acquired formed part of the area known as the Digya-Kogyae. The lands are reputed to belong to the Kumawu stool.

The plaintiffs-respondents (hereinafter referred to as the plaintiffs) sued "for themselves and also on behalf of the Oman of Kumawu." The co-defendant-appellant (hereinafter referred to as the co-defendant) asked to be joined to the action in his capacity as the Omanhene of Kumawu. He was joined in his personal capacity as William Kore.

The plaintiffs contended that the co-defendant, in collusion with the three defendants, subordinates to the Kumawu stool, aided by some other persons, fraudulently claimed the compensation. By so doing, moneys meant for the paramount stool of Kumawu—the lands being stool lands—were paid, not to the paramount stool, but to certain individuals including the second defendant-appellant (hereinafter referred to as the second defendant) and the co-defendant. The plaintiffs also contended that the receipt of the moneys by all the appellants, i.e. the second defendant and the co-defendant, (because they were not entitled to them) made them constructive trustees. The extent of the trusteeship of each of them depended upon the moneys which each of them had received. At all times, it is asserted, the oman of Kumawu are those who should benefit from the moneys paid as compensation.

The court found that there was no evidence of an acquisition in law for which compensation could have been paid.

But there is the fact that the sum of about ¢1.5 million had been paid as compensation for an acquisition. It is being contended that the amount paid was not paid to the party or person or authority entitled to be paid. The evidence clearly shows that whatever may have been the fraudulent designs of the defendants and the co-defendant in obtaining the moneys, all are agreed that the lands concerned were stool lands. Being stool lands, the provisions of Act 123 were applicable. Thus counsel for the second defendant and co-defendant raise the issue of locus standi. And they rely on the statute law and on Kwan v. Nyieni [1959] G.L.R. 67, C.A., and sought an extension of the principle enunciated in *Kwan* v. *Nyieni* supra to stool lands.

The court held as follows:

"Constitutional and legislative provisions imposing restrictions on the powers of chiefs, these provisions could all not be considered as being declaratory of the customary law. Chiefs in this country—kings indeed they were—and an English king could do no wrong—had always held land on behalf of their subjects. In that regard, one could say that the Constitution, 1969, introduced nothing new. This had been the system until about 1958 when, by the Akim Abuakwa (Stool Revenue) Act, 1958 (No. 8 of 1958), and the Ashanti Stool Lands Act, 1958 (No. 28 of 1958), attempts were made by the government of the day to control the revenue and property of those stools. It was sought to administer the stool lands on behalf of the stools.

The Constitution, 1969, thus sought to reverse that trend. It sought in that regard to restore to the chiefs "their traditional holding of land in trust for their people." Yet the administration of the revenues were left in the hands, not of the chiefs themselves in trust for the benefit of their subjects, but in the hands of some other authority. The Constitution, 1969, did supersede the Administration of Lands Act, 1962, and the State Lands Act, 1962, but only to the extent that those two pieces of legislation were inconsistent with, or contained anything that was in contravention of a provision of the Constitution, 1969.

A look at article 164 (4) of the Constitution, 1969, shows that certain payments, determined by the regional council were to be made. Which authority makes the payment? Who is the person who makes the payment? That has not been stated. Recourse would thus have to be made to the Administration of Lands Act, 1962, to determine the authority which shall make the payment. The Lands Commission under article 164 (3) and (5) had only the responsibility (a) to consent and to concur in an assurance of stool land, and (b) to exercise an appellate jurisdiction to determine the proportions of moneys payable under clause (4).

Hence the relevance of sections 17 and 21-23 of Act 123. Under section 17 the minister is the proper person to collect the revenue. When the revenue has been collected, payment to the stool, to the traditional authority, to the local and district councils, are governed, not by sections 19 and 20 of Act 123, but by the provisions of article 164 (4). The application of all other stool revenue would fall to be governed by sections 21-23 of Act 123.

Again the Ashantis say, ohene bi bere so wohu, na obi bere so woayere, meaning in one chief's reign skins are treated by having the hairs signed off, in that of another the skins are spread in the sun. And the Romans say, O mores, O tempora. The moral is that times and manners change. And we are being asked to change with them. But can this court effect a change in the face of legislation? Is not legislation part of the change?

Anterkyi J. was disgusted when this case came before him. He was disgusted with the conduct of the defendants. He stated:

> "The principle that a member of a family cannot sue the head of family to recover family property when the head is committing waste is long overdue for an explosion. It is . . . contrary to equity and good conscience to cling to that principle."

Korsah J. was equally indignant. I share fully their concern. It is a concern which the facts of this case justify in an extreme degree. Yet, where the customary law conflicts with the statute law, it cannot be over-emphasised that the statute law should prevail. This is no longer open to discussion. The authority of the customary law cannot override the authority of what Parliament has decreed.

It is contended that the constitutional provisions—article 164—are merely declaratory of the customary law. That is indeed true. And by that declaration the customary law has ceased to be customary law. It has become, in the words of Littledale J. in Re Islington Market Bill (1835) 3 C1. and Fin. 513 "embraced and confirmed." A right thus confirmed becomes a statutory right. The lower becomes merged in the higher, that is to say, the statute. The provisions of article 164 (4) of the Constitution, 1969, clearly abrogated the previous customary law on the matter. Custom thus gives way and the statute law on the matter holds sway. The intent is clear. There is no other conclusion.

I freely admit that the circumstances of this case require that the appellants, i.e. the second defendant and co-defendant, the occupant of the Kumawu stool, be called upon to account. More so, the co-defendant. I freely admit that his conduct is reprehensible, if not sordid. Yet, I am of the view that perhaps the Supreme Court, but certainly not this court, is the proper forum for the explosion called for. And at best, in the language of Megarry V.C., in 68 L.Q.R. 379 at p. 389, "legislation not litigation is the only satisfactory way of delimiting the bounds of so complex a subject."

In view of this, I do not accede to the request that this court extend the principle of Kwan v. Nyieni to chiefs. I would hold therefore that under the statute law as it is now, the minister is the proper person to maintain the action for the recovery of the moneys paid to the co-defendant and his vassals. On that ground the appeal succeeds.

Having held that the plaintiffs had no locus standi to bring the action, I do not think it necessary to go into the other matters canvassed in this case, such as whether compensation is revenue or capital or otherwise. I will only content myself in saying that section 7 (2) of

the Administration of Lands Act, 1962, refers to "Any moneys" without any distinction. Under section 17 (2) of the same Act, "revenue" is defined as:

"includes all rents, dues, fees, royalties, revenues, levies, tributes and other payments, whether in the nature of income or capital, from or in connection with lands subject to this Act."

I would emphasise the words "other payments whether in the nature of income or capital." It is difficult to deny that compensation paid to, or payable into a stool lands account is not income to that account. Subsection (2) is so wide that, in my view it emphasises the use in section 7 (2) of the words "Any moneys."

It should be noted also that stool property cannot be seized in execution with the written consent of the Minister. Chieftaincy Act, 2008 (Act 759). Section ?????

The relationship between between stool property and the property of the occupant of the stool has often presented some practical problems. This situation is not resolved by PNCDL 111, which addresses the issue of inheritance to property, but not succession to office. So in matrilineal systems, succession to office is still matrilineal. The Supreme Courtdealt with this situation in the case of *Serwah* v. *Kesse (1960)GLR 227* when he said; "the principle of our customary law that among the Akans the immediate beneficial interest in a woman's self-acquired property descends to her children and their children—children's children meaning the children of daughters only"

In *Serwah* v. *Kesse* (1960) GLR 227the plaintiff was enstooled Queen Mother of New Juaben in 1948 and destooled in 1952. The defendant succeeded her on the stool in 1952. Between 1948 and 1952 the Department of Agriculture paid rehabilitation grants in respect of 28 farms known as Koforidua North, Koforidua South and Akwadum to the plaintiff and after her destoolment the grants were claimed by her successor the defendant, on the ground that the farms were stool property and the grants were paid to the plaintiff between 1948 and 1952 as stool occupant and not as beneficial owner of the property. In the circumstances the plaintiff brought an action claiming declaration of title to the farms, the recovery of any payments made by the Department of Agriculture to the defendant, an account and also an injunction.

The action was tried in the Land Court, Accra, by Ollennu, J. who held on the evidence that the farms in dispute were family property of the plaintiff and gave judgment in her favour. The defendant appealed to the Supreme Court on the grounds (1) that the plaintiff had not proved title beyond all reasonable doubt, (2) the Land Court had no jurisdiction to hear the case as it related to the recovery of property alleged to be stool property, and (3) the plaintiff had not declared the farms as private family property on her enstoolment and therefore by customary law the farms merged with and attached to the stool properties of the Queen Mother of Juaben.

The Court (per Van Lare JSC) held that:

"On the evidence as a whole the appellant does not appear to have any answer to the strong case made by the respondent nor has she put forward for consideration any case in opposition to that made by the respondent. On the other hand from the evidence of the appellant and her witnesses one is bound to be led to the conclusion that the disputed farms are not stool properties nor could they possibly be attached to the office as alleged. There is no wonder therefore in my view for the trial judge's conclusion that the disputed farms belong to the

respondent's family—Kua family. This decision is in accordance with the principle of our customary law that among the Akans the immediate beneficial interest in a woman's self-acquired property descends to her children and their children—children's children meaning the children of daughters only—see the judgment of Ollennu, J. in *Mills* v. *Addy* (3 W.A.L.R. 357).

Learned counsel relies on the law laid down in Antu v. Buedu (F.C. 1926-29, 474), which is that unless a chief's private property is earmarked when he ascends to the stool, it becomes mixed up with the stool property and cannot be claimed by him on deposition. He further submits that the principle of law so enunciated has no exception and there can be no instance when it cannot apply. He has argued that in the absence of evidence that the respondent earmarked her said family property, that is to say, the disputed farms when she became Queenmother of New Juaben, by customary law her said property became merged and the said property must be deemed to have become a property attached to the stool of the Queenmother of New Juaben.

I am unable to agree. The exception to the general rule has been laid down by a later decision of *Yamuah VI* v. *Sekyi* (3 W.A.C.A. at p. 58) when the West African Court of Appeal accepted and attached great importance to the evidence that:

"the private property of a man put on the Stool as Ohene does not go to the Stool and he can dispose of it as he likes, and that if he is trading whilst on the Stool he can do what he likes with what he makes by his trading if he is trading with his own money."

In my view the following statement of the law which I quote from the judgment appealed from relating to the position appears to me to be wholly correct:

"There are many exceptions to that rule one of them is that where the stool holder has to the knowledge of the elders of the stool, kept his self-acquired property distinct or where whilst he is on the stool he engages in his private business to the knowledge of the elders, from which he earns an independent income, his failure to make pre-enstoolment declaration of his self-acquired property will not make his self-acquired property stool property.

The general rule of customary law referred to by counsel applies either to ancestral stools which have accumulated properties over the generations or to stools to which definite properties were attached upon their creation. The occupant of such stool is expected to use part of the proceeds of such stool property for his upkeep and to apply part in acquiring more properties for the stool. Therefore if an occupant of a stool has a private source of income which is not known to the elders of the stool it is presumed that he maintains himself from the stool property he met, and that any property he acquires whilst on the stool was acquired with funds of the stool and are therefore stool property".

In the present case the stool of the Queenmother of New Juaben is found to be of recent creation and not an ancestral one and as the stool had no property which could possibly be mixed up with any self-acquired property of its occupant, there was no necessity for the respondent or for the deceased member of the respondent's family who occupied the said stool to declare her or their private property prior to or upon installation, as no presumption could arise that such private property became mixed up with stool property by operation of customary law.

In the result I am of the opinion that the learned judge came to a correct conclusion on the facts and on the law involved and I would therefore dismiss the appeal".

3. LITIGATION IN RELATION TO STOOL LAND

The High Court Civil Procedure Rules, 2004 (CI 47) provides in Order 4 Rule 9 as follows:

"9. Representation of stool and families

(1) The occupant of a stool or skin or, where the stool or skin is vacant, the regent or caretaker of that stool or skin may sue and be sued on behalf of or as representing the stool or skin.

(2) The head of a family in accordance with customary law may sue and be sued on behalf of or as representing the family.

(3) If for any good reason the head of a family is unable to act or if the head of a family refuses or fails to take action to protect the interest of the family any member of the family may subject to this rule sue on behalf of the family.

(4) Where any member of the family sues under subrule (3) a copy of the writ shall be served on the head of the family.

(5) A head of family served under subrule (4) may within three days of service of the writ apply to the court to object to the writ or to be substituted as plaintiff or be joined as plaintiff.

(6) If the head of a family is sued as representing the family but it appears that he or she is not properly protecting the interest of the family, any member of the family may apply to the court to be joined as a defendant in addition to or in substitution for the said head.

(7) An application under subrule (5) or (6) shall be made on notice to the parties in the action and shall supported by an affidavit verifying the identity of the applicant and the grounds on which the applicant relies.

In other words the customary law position is that the Chief is the proper person to sue or to be sued in respect of stool land. See:

Gyamfi v. *Owusu* (1981) GLR 612 (Court of Appeal).[see page ??? supra]

In the absence of the Chief another person may be appointed to represent the stool if by customary law that person is competent to represent the stool.

Ofuman Stool v. *Nchiraa* (1957) 2 WALR 229.
Bukuruwa Stool v. *Kumawu Stool* (1962) 1 GLR 353.

In *Ofuman Stool* v. *Nchiraa* (1957) 2 WALR 229,

The principle was upheld in the case of *Bukuruwa Stool* v. *Kumawu Stool* (1962) 1 GLR 353. The facts were as follows:

Customary law position was that private citizens have no standing to commence or defend proceedings in respect of stool lands. Indeed in *Gyamfi* v. *Owusu*, the Court of Appeal rejected an invitation by counsel to extend the exemptions in *Kwan* v. *Nyieni* (1959) GLR 67, (relating to family property) to stool property. See page ??// supra.

However see *Owusu* v. *Agyei* (1991) 2 GLR 493 (Supreme Court) holding that the principle in *Kwan* v. *Nyieni* applies to stool property.

In *Owusu* v. *Agyei* (1991) 2 GLR 493 the Supreme Court made a radical departure from the established customary law position and in all material respects reversed the unanimous Court of Appeal decision in *Gyamfi* v. *Owusu*.

Under customary law i a chief is not liable to account during his reign. *Gyamfi* v. *Owusu* (1981) GLR 612. Per Archer JSC at page 629. However this position appears no longer to be tenable or good law in view of *Owusu* v. *Agyei* (1991) 2 GLR 493.

The facts of *Owusu* v. *Agyei* (1991) 2 GLR 493 were as follows: blank

4. ALIENATION OF STOOL LAND

In whatever category a parcel of stool land falls, however, there is one overriding principle applicable to all stool land, and that is that the supreme paramount interest is not vested in any single person or body as such. The absolute title is deemed to belong to the whole family; dead, living and unborn. "Land belongs to a vast family" said the late Nana Ofori Atta I, "of whom may be dead, a few are living and countless host are still unborn ." (quoted in Ollennu) This is what Ollennu describes as "land is vested in a community which like to brook, goes on forever, while men come and men go…title… remains in a continual flow of people…."(ibid:5) Any member of the stool family has the right to enter stool land for farming, with or without the express permission of the head of the family, and he thus acquires exclusive rights of occupation and user over the area he farms whilst he continues active farming on the land. This is a possessory usufructuary right and individual members of the family can acquire no greater right.

It is obvious from the above analysis that the recent tendency for stools to enter into transactions purporting to effect an outright sale of stool land is in direct contradiction to our customs and notion of ownership in stool land. According toDr. Danquah (1928: 212):

> "Tradition has it that absolute alienation of land was until recent times not generally paractised by the Akan people. Alienation of transfer of land as between family and family, tribe and tribe, or even between state and state, was certainly common, but sale of land for private or non-communal purposes was foreign to people. At any rate the short sighted and reckless manner in which lands are disposed of today, as if they were so may pieces of common cowries to be had for asking, cannot pretend to have any historical evidence in support of the practice…On the whole, it seems safe to say that the conception of land ownership was pare of the general religious scheme, for the many ramifications of ancestral worship could scarcely have left land – the most valuable of all possessions – free and unprotected within the category of things sanctified in religion. An absolute sale of land by an Akan was therefore not simply a question of alienating realty; notoriously, it was a case to sell a spiritual heritage for a mess of pottage, a veritable betrayal of ancestral trust, an undoing of the hope of posterity."

This is a very potent exposition based on observation of custom. Legal backing can be given to the concept if we apply the principle nemo dat quod non habet to the analysis of the disposition of interest mentioned earlier. For what the head of the stool or group and his elders purport to alienate is the absolute title which belong not to the present member alone but to the ancestors and to generations yet unborn. They are attempting to dispose of something larger than they possess and this disposition, it is submitted, is void. Merely pouring libation on the day of disposition on the heads of people who should participate in the contract, but who are inarticulate at that moment, does not sucure their consent of participation. It is for this reason that there should be a law prohibiting the outright sale of stool land, and such law should be written into our new constitution.

In *Allottey* v. *Abraham* WALR 280, it was held that a valid alienation is one which is made by the occupant of the stool with the consent and concurrence of the principal councilors. Again, where the occupant does not participate in the transaction, it is void (See *Abgloe* v *Sappor* [1947]12 WACA 187).The general rule was stated by Justice Ollennu in *Allottey* v. *Abraham* WALR 280 at page 286 as follows:

> "According to native law and custom it is only the occupant of the stool or the head of family who is entitled, with the consent and concurrence of the principal elders of the stool or family, to alienate stool or family land. There can be no valid disposal of stool or family land without the participation of the occupant of the stool or the head of family; but there can be a valid alienation of stool or family land if the alienation was made by the occupant of the stool or the head of family with the consent and concurrence of some, but not necessarily all, the principal elders of the stool or family. The occupant of the stool or head of family is an indispensable figure in dealing with stool or family land."

In *Allottey* v. *Abraham* WALR 280 ……..

There is authority for the proposition that where the occupant does not participate in the transaction, it is void. This is illustrated by the case of *Agbloe* v. *Sappor* (1947) 12 WACA 187. The facts were as follows:

However, a valid act of alienation could be proved, a document purported to be executed by the occupant of the stool and at least the linguist would be deemed to be binding on the stool as enunciated in the case of*Amankwanor* v. *Asare* (1966) GLR 598, where a dispute arose over a land that had been divided among the predecessors of the plaintiff and the defendant, at the magistrate court the judge dismissed the admission of an evidence purportedly made by an elder of the tribe who was an illiterate and there was no attestation clause in the document. The appellate court dismissed the decision of the lower court on the grounds that the evidence was not properly considered by the magistrate, and enunciated theabove principle by stating that; "by native law and custom such a document cannot bind the stool, unless the elders or at all events the linguist of that stool had been a party thereto" – Per Siriboe J.S.C.

The facts of *Amankwanor* v. *Asare* (1966) GLR 598, were that about 30 years before the date of the trial of this action, one Kwame Adu, an uncle of the plaintiff, acquired from the then Odikro of Krodua called Kwabena Nketia, a piece of land for the purpose of cultivating a cocoa farm. The agreement reached between them was that when the cocoa started to bear fruit the farm was to be divided into three parts, that is to say, one-third for the Odikro and the remaining two-thirds for the plaintiff's predecessor.

After the division had taken place as indicated, the Odikro later sold part of his one-third portion to one Paul Darko, the father of the defendant who has since died, and whose successor the defendant is. Kwame Adu too is dead, and so is his brother, one Kwabena Okyere who succeeded him. It was after the latter's death that the plaintiff was appointed successor.

In the lifetime of Kwabena Okyere, the defendant was alleged to have trespassed onto the former's portion when a complaint was lodged against him before the plaintiff's first witness, Kwame Anin (the present Odikro of Krodua), who had succeeded the late odikro. At an arbitration, the defendant relied on a purchase of the land, and when he was challenged to produce the document evidencing it, he asked for two weeks, but could not do so.
After Okyere's death, the defendant repeated the act of trespass by collecting cocoa from the plaintiff's portion resulting in differences between them which eventually went before the police. Upon investigations, the matter was referred to the plaintiff's first witness for settlement, but the defendant refused to accompany the arbitrators to have the boundary between them demarcated, so the plaintiff brought this action claiming the aforementioned reliefs.

The Local Court Judge gave judgement for the plaintiff.The learned judge reversed the judgment of the trial court mainly on the ground that:

"The local court magistrate fell into serious error when he purported to annul exhibit A, because by so doing he expressly and unjustifiably rejected the whole fabric of the defendant's case. Some of his reasons for annulling that document were that it was made behind closed doors, and because the boundaries therein contained contradict those shown by the plaintiff's first witness at the inspection. There is no doubt that in so holding, the magistrate failed to consider the significant fact that this document was made by the plaintiff's first witness himself who is well conversant with the situation of the land and the boundaries, and if therefore he was an unreliable witness, the unreliability of his evidence goes to affect the case of the respondent who called him and not the appellant."

On further appeal, the Court of Appeal held as follows:

"Another significant point the learned judge seemed to have overlooked when considering the relevancy of exhibit A, is that not only was there no attestation clause to it, but it is also quite clear on the face of the document that no elder or linguist of the Krodua stool joined in executing it, even though exhibit A purported to convey part of that stool's land to the defendant's late father. In such a case, it is difficult to see how the defendant could bind the odikro who represents the stool with that document, because by native law and custom such a document cannot bind the stool, unless the elders or at all events the linguist of that stool had been a party thereto".

So also was the case of *Owiredu & ors.* v.*Mamah Moshie &Others*[citation]That case involved a a dispute about land belonging to the Effia Stool. The appellants as plaintiffs claimed on a lease given them by one Chief; the defendant in occupation claimed on a lease given him and his people by the predecessor of that Chief and had the support of the co-defendant, who said in regard to the plaintiffs that the consent of the Family's representatives had not been obtained and the lease to them was unauthorised, and in regard to the defendant, that his

people were recognised by the Family as the tenants. The plaintiffs admitted that the said consent had not been obtained but contended that it was not necessary on the ground that the Family had delegated all authority to alienate land and divested itself of its interest by virtue of the election and installation as chief of the person who gave the plaintiffs their lease. The evidence on the record proved, however, that the consent of the head and principal members of the Family was needed in Fanti Customary Law and also the approval of the Paramount Chief, the overlord of the Effia Stool. The trial judge dismissed the claim and the plaintiffs appealed.

It was held that the lease given to the appellant's was given them without the consent of the head and principal members of the Family and without the approval of the overlord of the Fffia Stool, as required in customary law; that lease was therefore not binding on the Stool Family.

The principle was also illustrated in the case of *Nasaliv*. *Addy*[1987-88] 1 GLR 143-164. In that case the appellant, Ibrahim Nasali, took a loan of ¢800 from one Salifu Maikankan. The security he offered was a plot of land he had obtained from the Abossey Okai family and on which he had commenced the erection of a building. When he defaulted in the payment of the amount due, Maikankan discovered for the first time that the document he had been given was a worthless piece of paper since title lay, not in the Abossey Okai family, but in the Akumajay stool. When he approached the said stool, they offered to sell the land to him. He bought it and in turn sold it to the respondent, Elizabeth Addy.

In an action brought by the respondent in the High Court against the appellant and others it was at first sought to establish that the land belonged to Nasali's grantors but, in the face of the several judgments to the contrary, this line of defence was abandoned at the trial and an attempt made to claim title through the Akumajay stool.

The conveyance was tendered in evidence as exhibit 1. It was not executed by the witness, but rather by his mother, Naa Korkoi Abossey, and other as representing the Abossey Okai family. Furthermore, there was no recital of any prior grant by the Akumajay stool to the witness or anyone else.

In the High Court, Edward Wiredu J. (as he then was) ordered that judgment to be entered for the plaintiff, Elizabeth Addy. An appeal to the Court of Appeal (coram: Francois J.A. (as he then was), Edusei J.A. and Abban J. (as he then was) was dismissed after the court had gone through the various cases which had adjudged the Akumajay stool to be the lawful owners of Opete Kpakpo land of which the land in dispute forms part. It is not necessary to go through all these cases which stand as a brickwall against any claim by the Abossey Okai family of a right to alienate any partt of these lands without the knowledge or consent of the Akumajay stool. It is sufficient to say that the case now being part rof the family that they are not caretakers for the Akumajay stool but the usufructuary owners of the land was rejected by the Privy Council in Okai II v. Ayikai, II (1950) 12 W.A.C.A. 37 at 39, P.C. where the board said:

> "The argument that the judgment was inequitable was based on the evidence that members of the family had been in occupation of the land for a very long time without accounting to the Stool and had exercised acts of ownership, but it ignores the important fact that they were in occupation as caretakers for the Stool."

The Supreme Court (by majority of 3 to 2) dismissed the appeal holding that
The fact that Nasali happened to be an alien was therefore irrelevant because, on the decided cases, even if he had been a Ghanaian, the grant made to him by the Abossey Okai family without the consent of the Akumajay stool would still have been void.

Nowhere in the evidence did Maikankan admit that he was an alien. It was not even suggested to him and the action was not fought on that basis. But the conduct of Maikankan in getting in the legal estate has raised eyebrows and is being equated with fraud vis-à-vis the appellant; it must however be said that Maikankan found himself with a useless document and accordingly set out to protect the loan he had granted. Whether that conduct was fraudulent or not is neither here nor there, for it and not affect the issues before the judge. The respondent was a purchaser of the legal estate without notice of any fraud or incumbrance. It should be, though not necessary, added that the appellant's document was unregistered. The effect of non-registration under section 24 of the Lands Registration Act, 1962 (Act 122) has been discussed in Asare v. Brobbey [1971] 2 G.L.R. 331 at 336, C.A.

The appellant applied to the Supreme Court for a review of its judgment in the case of *Nasali* v. *Addy [1987-88] 2 GLR 286-289 but the application was dismissed.* This was an application to review the judgment of this court dated 7 April 1987.We have this morning held in Fosuhene v. Pomaa [1987-88] 2 G.L.R. 105, S.C. that the court has power to correct its own errors by way of review. The only outstanding question therefore is whether the applicant has made out a case for a review.

The decision which the applicant is seeking to review was given by a majority of three to two in favour of the respondent, Addy. The affidavit attached to the application intimates that the review is sought on two grounds, viz: "(a) Errors apparent on the face of the record; and (b)a grave miscarriage of justice." The affidavit comes accompanied by a twelve-page closely-typed "Statement of the appellant-applicant's case for review or further consideration." This statement is not very different in content from the one filed for the purposes of the appeal. In it the applicant is clearly re-arguing the appeal, and seeking to persuade the majority who found against him to change their mind. The errors he complains of are, in his own words, errors "of ignoring the relevant authorities", and he says that this "brought about the grave miscarriage of justice alleged in the motion paper."

I have looked again at the opinions read on 7th April 1987, and I am satisfied that no relevant authority was overlooked. In particular "the judgments in the war-time Abossey Okai land case reported as *Okai II* v. *Ayikai II* (1946) 12 W.A.C.A. 31 and in the Privy Council in (1950) 12 W.A.C.A. 37, P.C" on which the applicant so heavily relies were extensively discussed.

As stated above, the applicant is merely seeking to reopen the appeal under the guise of a review, a practice that cannot be encouraged. The applicant has not made out a case for a review and I am of the opinion that the application should be dismissed.

Another case on this point is Ntorih v. Lagos [1964] GLR 643-649. The plaintiff was the the chief of Enwhia, representing the stool of Enwhia and brought this action against the defendant who represented the members of the Yuroba Moslem community in Wiawso, claiming damages for trespass. The trespass complained of was that the defendants in spite of a warning were erecting a building (a mosque) on the plot of land belonging to the plaintiff. According to the plaintiff the land is his ancestral property and his ancestor had a dwelling house thereon.

From the evidence it appeared that the land was a grant or presumed grant from the Omanhene of Sefwi-Wiawso. The ancestral house set up on the land wasno longer there. Another significant fact found was that , about thirteen years prior to the institution of this action, a public bath-house had been built on the land by the Wiawso Local

Council. According to the plaintiff, the said public bath had been demolished about four years before the events which led to this action. The defendants however maintained that the said public bath was still in existence on the land but that it was "an unpatronised public bath-room."

The Omanhene of Sefwi Wiawso, Nana Kwadjo Aduhene, the first witness for the plaintiff supported the plaintiff in his contention that the land in dispute is the ancestral property of the plaintiff. He said in his evidence that "the plot in dispute is the property of the Enwhia stool." The plaintiff by his second witness, Kwame Nkrumah, led evidence that he has all along been in possession of the disputed land and that he had recently been fined by the court when his representative on the land failed to keep the plot tidy. There is also evidence that the plaintiff protested to the local council by letter when he found out that the council was purporting to deal with the land.

The defendants do not lay any claims to the land in their own right as owners. According to them they only obtained a grant of the land recently as a result of negotiations which started towards the end of 1963 and ended early in 1964. The land was granted to them on condition that they paid the cost of the disused public bath situate on the land, computed at £G16. In addition to that amount which they duly paid, they paid an amount of £G2 in respect of the grant. Receipts covering these payments were tendered in evidence. The defendants called the clerk of council, one Mr. Tandoh, who supported their evidence as to the mode of acquisition. How the local council got on to the land in dispute to erect the public bath some thirteen years prior to the institution of this action is unexplained by the evidence. The council does not claim any proprietary interests in the land. All the clerk of the council deposed to is how the grant came to be made and how and by what authority it was made.

The local court magistrate dismissed the plaintiff's claim and gave judgment for the defendants. The reason for the judgment of the local court is mainly that the local council had been in long occupation of the land for twelve years without disturbance and that during the said possession they had converted the same into a sanitary area and erected a public bath thereon. According to the local court magistrate the long occupation had ripened into a sort of right in the local council from which the council should not be ousted. This right the magistrate classifies as "the right of control and management." The local court magistrate called in aid the Limitation Act, 1939, and cited Dr. Danquah's Akan Laws. On the question of the validity of the transfer of the plot to the defendants, the magistrate held the view that the transaction was above board as it had due publicity and also because it had the blessing of the regional commissioner who acted for the Minister of Local Government in approving the transaction.

As I have indicated above there is no evidence on the record which indicates how the local council came on the land. There is, however, one undeniable fact, and that is that they did not get there by purchase. At least they were licensees and acquired not an alienable right therein. I do not consider the principle of abandonment, a purely customary concept to be applicable to legal relationships between the plaintiff a "native" and the "foreign" institution of the local council which is purely a juristic creation of statute law.

Learned counsel for the plaintiff then moved on and argued the original ground that the judgment is against the weight of evidence. He submitted that there is ample evidence on record to support the ownership of the plaintiff and that the court should have entered judgment in favour of the plaintiff. To be in a position to balance the equities between the parties in this case we must know exactly what rights were acquired by the defendants with respect to the land in dispute. We have concluded as regards the rights of the plaintiff that

the land is his ancestral property. If the defendants derived their title from the local council then we must go a step further and direct our inquiry to the rights the council had therein. I pointed out that the trial magistrate fought shy of classifying the said rights. He called them "the right of control and management thereof." I think the magistrate is right there because the local council had no alienable rights in the subject-matter which it could transmit to the defendants. The land in dispute is stool land and by section 1 of the Administration of Lands Act, 1962, the management of all stool land is vested in the Minister of Local Government. Such a right did not confer any rights of ownership. As Akainyah J. (as he then was) aptly put it in his judgment in the case of B.P. (West Africa) Ltd. v. Boateng:

"That power, in my view, was limited to the keeping of records of existing grants made by the stool, the concurrence of the local council in new grants and the collection of rents and other stool revenue fixed by the stool through the state council but did not include the right in the said local council itself to make any grants or other dispositions of stool lands nor to vary the terms and conditions of grants made by the stool through the state council."

In the above quoted case, the learned trial judge was adjudicating upon a case in which the Kwahu Local Council purportedly made a grant of a portion of stool land situate at Nkawkaw to the plaintiffs, an expatriate company of petrol dealers. The said plot of land had been granted some years earlier to the defendant by the stool owner and the local council, and through them the plaintiffs sought to defeat the rights of the defendant therein. The Kwahu Local Council purportedly made the grant by virtue of the powers of management of stool lands vested in the said council. The local court magistrate, in the present case, based his judgment partly on the ground that the council's right to alienate is also based on the fact that the lay-out of the town of Sefwi-Wiawso was by the local council. He said, "Now the town of Sefwi Wiawso has had a new-look as a result of the new layout affected by the local council." But that fact is an incident of management and not of ownership. See the case of Poku v. Akyereko where in the judgment of the court Akufo-Addo J.S.C. discusses this very point.

From the foregoing the following facts emerge:
(1) That at best, the right that the Sefwi-Wiawso Local Council had over the land, the subject-matter herein, was that of management.
(2) That the said right did not confer rights of ownership on the said council. The rights of ownership were still vested in the stool owner.
(3) That therefore the purported grant made by the council to the defendants passed nothing, since nemo dat quod non habet.
(4) The fact that a town is being laid out did not take away any right originally vested in any person. On this see the cases of Ashiemoa v. Bani (supra) and Donkor v. Danso.
(5) The defendants are, if any thing at all trespassers on the land in dispute. In this action, sounding in trespass, the plaintiff had to establish a better title or a better right to possession. I am satisfied that the plaintiff satisfactorily established a better title, the right of the true owner against whom the possession of a trespasser cannot avail. The local court therefore erred in dismissing the plaintiff's claim. The possession of the defendants, apart from not being undisturbed, is not of such duration and quality as to attract in its favour equitable protection. See the case of Thomas v. Holder. In the result I allow the appeal. The judgment of Sefwi Wiawso Local Court is set aside together with the order as to costs. In the place thereof I enter judgment for the appellant on his claim and award him damages of £G50. The costs of this appeal are assessed at 30 guineas. Costs in the court below in favour of the appellant to be taxed. Costs of the court below, if paid to be refunded. Court below to carry out.

SCHANDORF V ZEINI AND ANOTHER [1976] 2 GLR 418-444
COURT OF APPEAL, ACCRA
17th MAY 1976

See ??????????

In Abude v. Onano [1946] 12 WACA 102-105

The appellants as " Elders of the Labadi Stool for themselves and on behalf of the quarters of Abese, Abafum, Nmati Abonase and Krana " sued the " first defendant-respondent as La Mantse and the other defendants as trustees of the La Benevolent Society ".
The Statement of Claim alleged that the first defendant as La Mantse as been the custodian of moneys paid to the Labadi Stool and had deposited the said Stool money in Post Office Savings Bank in the name of a " La Benevolent Society " of which first defendant is a member and the other defendants trustees; that the first defendant has constituted himself and the other defendants custodians of the said Stool money; that the defendants were using the said Stool money for their private purposes and for other purposes prejudicial to the interest of the Stool.

On these grounds, the plaintiffs-appellants as Elders of Labadi Stool claimed
(a) An injunction restraining the defendants from making any further withdrawals from the said account except with the consent and approval of the Elders of the Stool.
(b) An account of all moneys that have come into the possession of the defendants or any of them for the Labadi Stool.

It is an accepted principle of Native Customary Law that neither a chief nor the head of a family can be sued for account either of state or family funds, Counsel for appellants admitted before us that he could not quote one case which has been brought in the Supreme Court against a chief and/or his elders and councillors to render account of Stool funds or Divisional Council funds;
There is evidence on record which proves that whenever a member of the Council is of the opinion that either the chief and/or some of his elders have misappropriated State funds, the proper course is to bring the matter before the local Council or the Ga State Council which alone has jurisdiction to enquire into such matters the enquiry the chief and/or some of the elders so charged are found to have misappropriated public funds they are as a rule deposed or removed from the positions they held in the State. No individual member or even a section of the community is entitled to institute an action foraccount. This native law is in our opinion reasonable and not contrary to natural justice or good conscience.

B.A. OWIREDU & ORS. vrs. MAMAH MOSHIE & ORS. [10/1/52]
Native Law and Custom—Fanti Customary Law—Alienation of Family Land.
This was a dispute about land belonging to the Effia Stool. The appellants as plaintiffs claimed on a lease given them by one Chief; the defendant in occupation claimed on a lease given him and his people by the predecessor of that Chief and had the support of the co-defendant, who said in regard to the plaintiffs that the consent of the Family's representatives had not been obtained and the lease to them was unauthorised, and in regard to the defendant, that his people were recognised by the Family as the tenants. The plaintiffs admitted that the said consent had not been obtained but contended that it was not necessary on the ground that the Family had delegated all authority to alienate land and divested itself of its interest by virtue of the election and installation as chief of the person who gave the plaintiffs their lease. The evidence on the record proved, however, that the consent of the head and principal members of the Family was needed in Fanti Customary Law and also the approval of the

Paramount Chief, the overlord of the Effia Stool. The trial judge dismissed the claim and the plaintiffs appealed.
Held: The lease given to the appellant's was given them without the consent of the head and principal members of the Family and without the approval of the overlord of the Effia Stool, as required in Customary Law; that lease was therefore not binding on the Stool Family.
CASE CITED:—
Mary Barnes v. Chief Quasie Atta, 17th July, 1871, Sarbah Fanti Customary Law, p.169, and pp. 78-9.
Appeal by plaintiffs : No. 22/50.
F. Awoonor-Williams, with him K. A. Bossman, for Appellant.
C. C. Lokko for Respondents.

JUDGMENT
The following judgment was delivered:
KORSA, J.
This is an appeal from the decision of Lingley J., in a suit in which plaintiffs-appellants claim that by virtue of a document dated 16th February, 1948, executed by Chief Brempong Yaw III of Effia and three others, they are lessees in possession of a piece or parcel of land, which includes the area described as Eflia Zongo, occupied by defendant-respondent Mamah Moshie together with the Moshie Community, and to be entitled to rents and mesne profits from the said defendant-respondent. It is admitted that the said Mamah Moshie and his people had been put in possession of the said land by the predecessor of the said Chief Brempong Yaw.

Petteh Esson, head of the Effia Stool family was upon his application made a co-defendant, on the grounds that the said Stool family who he contends are owners of the said land, had not authorised Chief Brempong Yaw and or any persons to grant the said land to plaintiffs-appellants, nor had his consent and concurrence or the consent arid concurrence of the accredited representatives of the Stool family been obtained in respect of the grant alleged to have been made by Chief Brempong Yaw to the plaintiffs-appellants. He further stated that the family recognised defendant-respondent and his people as their tenants, consequently they are not liable to pay rents to plaintiffs-appellants or to be ejected from the said land at the request of plaintiffs-appellants.

It is contended on behalf of the plaintiffs-appellants that Petteh Esson is not the head of the said Stool family, and even if he is, his consent and concurrence, and the consent and concurrence of other principal members of the family are not necessary to a valid transfer of family land by Chief Brempong Yaw to whom it is alleged, the Stool family had delegated all authority with respect to the alienation of family land and divested itself of its interest by virtue of Chief Brempong Yaw's election and installation as Chief of Effia.
This contention, however, is not supported by statements on Native Customary law recorded in Sarbah's Fanti Customary Law, nor by the judgment of any Court of competent jurisdiction. In the case of Mary Barnes v. Chief Quasie Atta (1), Chalmers Judicial Assessor said "not even the regular occupant (of a Stool) could alienate property without some concurrence by the people of the Stool who have an interest in it and are usually consulted on such a matter ".
Sarbah states at pages 78-9:—
" The head of the family cannot without the consent of all the principal members of the family, or the greater part thereof, that is the Ebusuafu, alienate the immoveable ancestral or family property.
Although alienation may be necessary for solve family purpose, or for the discharge of family obligation, nevertheless unless confirmed by the senior or principal members of the family, such alienation is revocable.

"Neither the head of the family acting alone nor the senior members of the family acting alone, can make any valid alienation or give title to any family property whatsoever."
It is not denied that the alleged grant by Chief Brempong Yaw to the plaintiffs-appellants was made with the knowledge that the said land had been previously granted to defendant-responclent and his people by the predecessor of the said Chief. It is admitted that he did not consult the head of the family nor did he obtain the consent and concurrence of the principal members of the family.
There is evidence on record which proves that not only is it necessary to obtain the consent and concurrence of the head and principal members of the Effia Stool family but it is also necessary to obtain the approval of the Paramount. Chief of Dutch Sekondi who is the overlord of the Effia Stool whenever the said Stool family desire to alienate Stool land.
The learned Judge found that in these circumstances the Stool family is not bound by the lease to plaintiffs-appellants. In my opinion the judgment of the Court below is supported by evidence of Native law on record and by previous decisions. This appeal should be dismissed.

AGBLOE II v. SAPPOR. HARRAGIN, C.J. [1947] 12 WACA 187-190
The respondents are the children of the late G. A. Sappor and are the lawful successors of their father's estate.
The late G. A. Sappor was a member of the Tettey-Ga Family whose head by name of Pobee had pledged the family lands to one Amartey who would appear to have been an exacting pledgee.

The Tettey-Ga Family urged their head Pobee to redeem the property but this he either could not or would not do with the result that one of the more enterprising members of the family, to wit, G. A. Sappor, raised money himself and paid off the pledge on behalf of the family. As a reward for this action " some of the principal heads of the Tettey-Ga Family held a meeting and decided to reward G. A. Sappor for his generous efforts in the redemption of the Tettey-Ga Family land " and they granted to him the area of land now in dispute.

The method of conveyance was by way of a written document (Exhibit " B ") which was signed by four of the principal heads of the Tettey-Ga Family. The number of the principal heads of the family at that time was six and two abstained from signing the document, one of them being, incidentally, the head of the **[p. 188]** family Pobee. The respondents admit that these two persons either abstained deliberately or were not approached as they did not approve or would not have approved of the gift.
G. A. Sappor, after taking possession of the land in question in 1912, amongst other things, proceeded to set up a market thereon and he and his children after him collected tolls from the market Lip to the 10th October, 1940, when the market was handed over to the Native Administration Treasury under an Agreement whereby the Sappor Family were paid by the Native Administration Treasury one-third of the gross takings. All went well until May, 1943, when the respondents, as they were being pursued by the Medical Officer of Health to repair market stalls, which duty should have been performed by the Native Authority, suddenly decided to stop the Manche's collector and collect the market tolls for themselves.

The Manche then took steps to acquire rights over another property or which to set up a new market which was in fact done and the Manche forbade his people to sell in the old market any more. This brought the respondents to their senses and they approached the Manche with the result that a " pacification " took place, the respondents offering an apology, paying a certain amount of money and undertaking to permit the Manche to have slaughtered two sheep in the old market for purification purposes. Not unnaturally the owners of the new

market, who happened to be another branch of the Tettey-Ga Family, were furious and they went on to the lands of the respondents and prevented the emissaries of the Manche from slaughtering the sheep, a necessary preliminary to the opening of the market, and at the same time alleged that the land on which the old market was built was part of their family land and the respondents had forfeited all right to it if in fact such right had ever existed. The respondents thereupon filed this action against both the Manche and the present appellants. As the result of an amendment of the claim the relief sought amounted to (a) a declaration of title, (b) £150 damages for interference with the said market as against the appellants, and (c) specific performance of the Agreement dated the 10th October, 1940, against the other defendants.

In the result the judgment of the Court was that the respondents were the owners of the land in dispute and the appellants ordered to pay £60 as damages for unduly interfering with the land and preventing the holding of the market on it and as against the first defendant (the Manche) who has not appealed, tile Court declared that the Agreement of the 10th October, 1940, was still subsisting and should be carried out. Against this judgment the second defendants—appellants have appealed to this Court.

There are therefore two points for serious consideration in this case. The first is whether the so-called conveyance by four of the principal members of the family did in fact, according to native law and custom, convey the land to the respondents' predecessor in title. In other words, was the learned trial judge correct when he stated as follows:
" I am satisfied from the evidence that Exhibit ` 13 ' was signed by the Headman at the time when there was a split in the family and I agree with the evidence of Akumia who was called by the Court and I hold the Heads who granted the land to Sappor were entitled to do so according to Native Custom and under the circumstance's, which existed in the family. If the defendants' contention is correct, how can they explain the reason why all these years no one has challenged G. A. Sappor's right to deal with the market as his own property and to grant portions of the land even to a Nigerian who is a total stranger ? "
When the learned trial judge refers to " the circumstances which existed in the family " we can only presume that he meant to refer to the fact that the head of the family Pobee and one other principal member were at variance with the other four members. It would therefore appear that the question for consideration is whether, because the head of the family is at variance with **[p. 189]** the majority of its members, this automatically gives the majority the right to dispose of family lands.
It should here be noted that Counsel for the respondents contends that there is some difference in native law and custom between the procedure necessary for the transfer of title in land to a stranger and to a member of the family. He was, however, unable to produce any authority to support this statement nor have we been able to find any, so that the question is confined to the simple decision as to whether the majority of the principal members of the family can dispose absolutely of family lands without the consent of the head of the family if they so desire.

In the first place we can find no authority for the statement that the principal members of the family can give any title in a conveyance of family land without the head of the family joining in the conveyance, even though he may be in agreement.
So long ago as 1899 it was held in the case of Insilhea & Others v. Simons & Others (1) that " family property cannot be sold except by the head of the family with the concurrence of the elder members of the family " and all through Sarbah's book on the principle of Fanti customary law it is assumed that, in every case, the land is alienated by the head of the family, vide page 78. The only question that is dealt with at length is the only or ie principal members of the family to concur in the alienation.

In the judgment of the Privy Council in Kuma v. Kuma (2) at page 8, their Lordships quote with approval a portion of the judgment of Rayner, C.J., which reads as follows:
" The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger."

We, with great respect, entirely agree with the statement in the above quotation that the head of the family may be considered to be in an analogous position to a trustee from which it follows that it is quite impossible for land to be legally transferred and legal title given without his consent. The alleged deed Exhibit "B " was therefore void ab initio, and the respondents derive no right of absolute ownership by virtue thereof.

GYAMFI AND ANOTHER v. OWUSU AND OTHERS [1981] GLR 612–633
COURT OF APPEAL, ACCRA
16 APRIL 1981

ARCHER, CHARLES CRABBE JJ.S.C. AND MENSA BOISON J.A.

CHARLES CRABBE J.S.C.

This appeal arises out of three cases consolidated into one. The actions were instituted for the recovery of about ¢1.5 million. It is in respect of compensation paid by the Government of Ghana for the "acquisition" of certain lands for the creation of a national park and a game reserve. The lands are on the Afram Plains in the Ashanti Region. The lands acquired formed part of the area known as the Digya-Kogyae. The lands are reputed to belong originally to the Kumawu stool.

The plaintiffs-respondents (hereinafter referred to as the plaintiffs) sued "for themselves and also on behalf of the Oman of Kumawu." The co-defendant-appellant (hereinafter referred to as the co-defendant) asked to be joined to the action in his capacity as the Omanhene of Kumawu. He was joined in his personal capacity as William Kore.

The plaintiffs say that the co-defendant, in collusion with the three defendants, subordinates to the Kumawu stool, aided by some other persons, fraudulently claimed the compensation. By so doing, moneys meant for the paramount stool of Kumawu—the lands being stool lands—were paid, not to the paramount stool, but to certain individuals including the second defendant-appellant (hereinafter referred to as the second defendant) and the co-defendant. The plaintiffs also contend that the receipt of the moneys by all the appellants, i.e. the second defendant and the co-defendant, (because they were not entitled to them) made them constructive trustees. The extent of the trusteeship of each of them depended upon the moneys which each of them had received. At all times, it is asserted, the oman of Kumawu are those who should benefit from the moneys paid as compensation.

It does not appear that there has been an acquisition properly so-called in this case. Hence the use of the word acquisition in quotation marks at the beginning of this judgment. Under section 7 of the Administration of Lands Act, 1962 (Act 123):
"7. (1) Where it appears to the President that it is in the public interest so to do he may, by executive instrument, declare any stool land to be vested in him in trust and accordingly it shall be lawful for the President, on the publication of the instrument, to execute any deed or do any act as a trustee in respect of the land specified in the instrument.
(2) Any moneys accruing as a result of any deed executed or act done by the President under subsection (1) shall be paid into the appropriate account for the purposes of this Act."
The first requirement then for the acquisition in this case is the making of an instrument to declare that the Digya-Kogyae lands or a specified portion of them (a) are required in the public interest, and (b) are vested in the President in trust. The second requirement is that a deed should be executed or an act is done in pursuance of the vesting instrument made in accordance with the provisions of section 7 (1). It does not appear that the requirements of section 7 of Act 123 were complied with in this case. I would find it very difficult to believe that the Lands Department were not aware of these statutory conditions. It calls in question the honesty and sincerity of the public officers of the Lands Department involved in the payment of this compensation.

Under section 1 of the State Lands Act, 1962 (Act 125):
"1. (1) Whenever it appears to the President in the public interest so to do, he may, by executive instrument, declare any land specified in the instrument, other than land subject to the Administration of Lands Act, 1962 (Act 123), to be land required in the public interest; and accordingly on the making of the instrument it shall be lawful for any person, acting in that behalf and subject to a month's notice in writing to enter the land so declared for any purpose incidental to the declaration so made.
(2) An instrument made under the preceding subsection may contain particulars in respect of the date on which the land so declared shall be surrendered and any other matter incidental or conducive to the attainment of the objects of the instrument including an assessment in respect of the compensation that may be paid.
(3) On the publication of an instrument made under this section, the land shall, without any further assurance than this subsection, vest in the President on behalf of the Republic, free from any encumbrance whatsoever."
The requirements of this section are that:
(a) the section can be relied upon where the lands involved are not stool lands—stool lands being subject to the Administration of Lands Act, 1962 (Act 123);
(b) an instrument is made;
(i) declaring that the land concerned is required in the public interest, and
(ii) specifying the particular land in the instrument;
(c) particulars of the date for the surrender of the land concerned are indicated, as well as other matters incidental or conducive to the attainment of the objects of the instrument;
(d) the instrument is published.
Under section 2 of Act 125, a copy of the instrument made under section 1 is required to:
"(a) be served personally on any person having an interest in the land; or
(b) be left with any person in occupation of the land; and
(c) be affixed at a convenient place on the land; and
(d) be published on three consecutive occasions in a newspaper circulating in the district where the land is situate."
These provisions are too clear and plain for any comment.
There is evidence in the record of the proceedings that an instrument was published. There is evidence on the record that there was a newspaper publication. The instrument in question is the Wildlife Reserves Regulations, 1971 (L.I. 710). There was a publication in one of the

national newspapers of 17th December 1976. That newspaper publication was a mere reproduction of L.I. 710. The Wildlife Reserves Regulations, 1971, were made under a power conferred, neither by Act 125 nor by Act 123. They were made under a power conferred by the Wild Animals Preservation Act, 1961 (Act 43).
Again I do not think that the officers of the Lands Department dealing with the matter of the payment of the compensation can claim that they did not know of the existence of Act 125. One finds it extremely difficult to believe the evidence of the Lands Department officer who, called as a witness for the plaintiffs, i.e. the fifth plaintiff witness, told the trial court that the instrument, that is L.I. 710, "in fact amounted to an acquisition of the land." He continued:

> "Our procedure at the Lands Office in respect of such acquisitions is that claims are invited by publication under Act 125 in the gazette and later on in local papers. Under Act 43 there is no provision for publication in local papers. Administratively, we advise the Chief Wildlife and Game Officer to have L.I. 710 and others published in the local papers."

It is obvious that the officer was not being honest with the trial court. He could not claim to be unaware of the requirements of section 1 (1) of Act 125. Under what publication in the gazette under Act 125 do they invite claims? This shows that the officer was very well aware of Act 125, if not of Act 123. And yet he did not see to it that Act 125 was complied with. They chose to ignore what the law says. Administratively, they would circumvent the law. And if he was aware of Act 125, reference is made in that Act to Act 123. This is the source of all the fraudulent deals in all the compensation claims, an example of which shows itself in this case. There can be no doubt but that there was collusion between some public officers in the Lands Department and those who made the claims for compensation. And were it in my power so to do, I would call for a commission of inquiry into the circumstances of the payment of the compensation in this case.

Be that as it may, this piece of evidence is significant. It reinforces the belief that no instrument for the acquisition of the land was, in fact, made, as required by the provisions of section 7 of Act 123. Nor was one made under the provisions of section 1 of Act 125. The relevant provisions of the law had not been compiled with. There is then no acquisition in law for which compensation could have been paid.
But there is the fact that the sum of about ¢1.5 million had been paid as compensation for an acquisition. It is being contended that the amount paid was not paid to the party or person or authority entitled to be paid. The evidence clearly shows that whatever may have been the fraudulent designs of the defendants and the co-defendant in obtaining the moneys, all are agreed that the lands concerned were stool lands. Being stool lands, the provisions of Act 123 were applicable. Thus counsel for the second defendant and co-defendant raise the issue of locus standi. And they rely on the statute law and on Kwan v. Nyieni [1959] G.L.R. 67, C.A.
For my purposes, the further perambulations of this case are not relevant. What is appropriate for me is the decision of the Court of Appeal (as stated in the headnote at pp. 68-69):
"(1) as a general rule the head of a family, as representative of the family, is the proper person to institute a suit for recovery of family land;
(2) to this general rule there are exceptions in certain special circumstances, such as:
(i) where family property is in danger of being lost to the family, and it is shown that the head, either out of personal interest or otherwise, will not make a move to save or preserve it; or
(ii) where, owing to a division in the family, the head and some of the principal members will not take any steps; or
(iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.

In any such special circumstances the Courts will entertain an action by any member of the family, either upon proof that he has been authorised by other members of the family to sue, or upon proof of necessity, provided that the Court is satisfied that the action is instituted in order to preserve the family character of the property."
The soundness, in our state of affairs, of the acceptation of this general principle of the customary law is obvious. As the Ashantis say, Abusua dua, wontwa meaning one does not destroy the family tree. When you hold the head of the snake the rest is a mere rope. So we do not wash our dirty linen in public. That does not mean that we condone wrong-doing. For one, the head of the family can be deposed as such. Once that is done, the aura that clothes him is destroyed. In his nakedness he loses his immunity because the head of the family only acts or is supposed to act by the authority of the members of the family. So the courts maintain that unless there are special circumstances—such as have been stated in Kwan v. Nyieni (supra)—we uphold that principle of the customary law. For afterall, custom is the distillation of the mature will and experience at any moment of time of a people.

In this case, an extension of the principle to stool lands is being sought. In the first place, it is contended that legislation had made inroads. The Constitution, 1969, by article 164 (1), had vested "All stool lands . . . in the appropriate Stool on behalf of, and in trust for, the subjects of the Stool." It went further and provided by article 164 (2)-(4) that:
"164.(2) There shall be established for each Stool or Skin a Stool Lands Account into which shall be paid all rents, dues, royalties, revenues or other payments whether in the nature of income or capital from any such stool land.
(3) An assurance of stool land to any person shall not operate to pass any interest in or right over any stool land unless the same shall have been executed with the consent and concurrence of the Lands Commission; and where the Commission fails or refuses to give any such consent or concurrence any person aggrieved by such failure or refusal may appeal to the High Court for Justice.
(4) There shall be paid, out of the Stool Lands Account,
(a) to the Stool through the traditional authority for the maintenance of the Stool in keeping with its status,
(b) to the traditional authority, and
(c) to the Local and District Councils established pursuant to the provisions of article 156 of this Constitution,
within whose area of authority are situate the stool land concerned such moneys and in such proportions as may be determined by the Regional Council of the Region."
These constitutional provisions could all not be considered as being declaratory of the customary law. Chiefs in this country—kings indeed they were—and an English king could do no wrong—had always held land on behalf of their subjects. In that regard, one could say that the Constitution, 1969, introduced nothing new. This had been the system until about 1958 when, by the Akim Abuakwa (Stool Revenue) Act, 1958 (No. 8 of 1958), and the Ashanti Stool Lands Act, 1958 (No. 28 of 1958), attempts were made by the government of the day to control the revenue and property of those stools. It was sought to administer the stool lands on behalf of the stools.

The Constitution, 1969, thus sought to reverse that trend. It sought in that regard to restore to the chiefs "their traditional holding of land in trust for their people." Yet the administration of the revenues were left in the hands, not of the chiefs themselves in trust for the benefit of their subjects, but in the hands of some other authority. The Constitution, 1969, did supersede the Administration of Lands Act, 1962, and the State Lands Act, 1962, but only to the extent that those two pieces of legislation were inconsistent with, or contained anything that was in contravention of a provision of the Constitution, 1969.

A look at article 164 (4) of the Constitution, 1969, shows that certain payments, determined by the regional council were to be made. Which authority makes the payment? Who is the person who makes the payment? That has not been stated. Recourse would thus have to be made to the Administration of Lands Act, 1962, to determine the authority which shall make the payment. The Lands Commission under article 164 (3) and (5) had only the responsibility (a) to consent and to concur in an assurance of stool land, and (b) to exercise an appellate jurisdiction to determine the proportions of moneys payable under clause (4).
Hence the relevance of sections 17 and 21-23 of Act 123. Under section 17 the minister is the proper person to collect the revenue. When the revenue has been collected, payment to the stool, to the traditional authority, to the local and district councils, are governed, not by sections 19 and 20 of Act 123, but by the provisions of article 164 (4). The application of all other stool revenue would fall to be governed by sections 21-23 of Act 123.
Again the Ashantis say, ohene bi bere so wohu, na obi bere so woayere, meaning in one chief's reign skins are treated by having the hairs signed off, in that of another the skins are spread in the sun. And the Romans say, O mores, O tempora. The moral is that times and manners change. And we are being asked to change with them. But can this court effect a change in the face of legislation? Is not legislation part of the change?
Anterkyi J. was disgusted when this case came before him. He was disgusted with the conduct of the defendants. He stated:

> "The principle that a member of a family cannot sue the head of family to recover family property when the head is committing waste is long overdue for an explosion. It is . . . contrary to equity and good conscience to cling to that principle."

Korsah J. was equally indignant. I share fully their concern. It is a concern which the facts of this case justify in an extreme degree. Yet, where the customary law conflicts with the statute law, it cannot be over-emphasised that the statute law should prevail. This is no longer open to discussion. The authority of the customary law cannot override the authority of what Parliament has decreed.

It is contended that the constitutional provisions—article 164—are merely declaratory of the customary law. That is indeed true. And by that declaration the customary law has ceased to be customary law. It has become, in the words of Littledale J. in Re Islington Market Bill (1835) 3 C1. and Fin. 513 "embraced and confirmed." A right thus confirmed becomes a statutory right. The lower becomes merged in the higher, that is to say, the statute. The provisions of article 164 (4) of the Constitution, 1969, clearly abrogated the previous customary law on the matter. Custom thus gives way and the statute law on the matter holds sway. The intent is clear. There is no other conclusion.
I freely admit that the circumstances of this case require that the appellants, i.e. the second defendant and co-defendant, the occupant of the Kumawu stool, be called upon to account. More so, the co-defendant. I freely admit that his conduct is reprehensible, if not sordid. Yet, I am of the view that perhaps the Supreme Court, but certainly not this court, is the proper forum for the explosion called for. And at best, in the language of Megarry V.C., in 68 L.Q.R. 379 at p. 389, "legislation not litigation is the only satisfactory way of delimiting the bounds of so complex a subject."

In view of this, I do not accede to the request that this court extend the principle of Kwan v. Nyieni to chiefs. I would hold therefore that under the statute law as it is now, the minister is the proper person to maintain the action for the recovery of the moneys paid to the co-defendant and his vassals. On that ground the appeal succeeds.

Having held that the plaintiffs had no locus standi to bring the action, I do not think it necessary to go into the other matters canvassed in this case, such as whether compensation is revenue or capital or otherwise. I will only content myself in saying that section 7 (2) of

the Administration of Lands Act, 1962, refers to "Any moneys" without any distinction. Under section 17 (2) of the same Act, "revenue" is defined as:
"includes all rents, dues, fees, royalties, revenues, levies, tributes and other payments, whether in the nature of income or capital, from or in connection with lands subject to this Act."

I would emphasise the words "other payments whether in the nature of income or capital." It is difficult to deny that compensation paid to, or payable into a stool lands account is not income to that account. Subsection (2) is so wide that, in my view it emphasises the use in section 7 (2) of the words "Any moneys."

There is also the argument, which I think I should deal with, that the second defendant received only ¢4,000 and therefore, i.e. the amount he ought to have been ordered to refund. This argument is sound; but only sound to an extent. Commonsense demands that a man should not be asked to refund more than he had got. But, what are the circumstances of this case? The second defendant alone among the three defendants is literate. And yet it would appear that, from the beginning he was hand in gloves with the co-defendant to obtain moneys by methods which he knew or ought to have known, were not in accordance with the law—at least which were fraudulent. He is one of the original conspirators. In my view he shares a greater responsibility, certainly more than the two illiterate defendants who showed their honesty when they realised that there was, at least, an element of fraud in the whole transaction. Because of his active participation in the original design and in the whole of the transaction, as for example the sharing of the "loot," I do not think that the amount "over-paid" by him should be refunded to him. That amount should remain in court. It is contended that the co-defendant admits having received all the moneys. Until all the moneys received by him are paid into court, I would not order that the "over-payment" made by the second defendant be refunded to him.

I would order, however, that the amounts of money paid into court should remain in the custody of the court. There is no acquisition in law, strictly, for which compensation should have been paid. The moneys shall remain in the custody of the court until the total sum ordered to be paid into the court is paid. The order of the court below for the payment into court of the compensation paid would therefore stand. On the payment into the registry of the court, by the co-defendant, of the total amount of the compensation paid, the court shall make an order for the "over-payment" by the second defendant to be refunded to him.
I have already stated that there was no acquisition in law for which compensation should have been paid. Acquisition under the Administration of Lands Act, 1962, is a compulsory acquisition of land. It is therefore essential that all the provisions of the law leading to the acquisition be strictly observed—and according to the language of the Act. Therefore until a valid instrument is made and published, as required by law, vesting the lands in the Republic for the public interest, the compensation paid shall remain with the court. When the instrument is published the amount of compensation paid into court shall then, upon the request of the Administrator of Stool Lands, be paid into the appropriate stool land account. And I so order.

ARCHER J.S.C.
I have had the opportunity of reading beforehand, the exhaustive judgment just delivered by my brother Charles Crabbe J.S.C. and I agree with his reasoning and conclusions. However, I wish to make a short contribution in view of certain novel propositions of law advocated by learned counsel for the plaintiffs.

The settled law in this country is that an occupant of a stool, i.e. a chief, cannot be called upon by his subjects to account during his reign as a chief. The advent of the Anglo-Saxon

system of jurisprudence into this country did not affect this principle of law. Since then no court of law has entertained legal proceedings claiming an account from a reigning chief. The reasons for this doctrine are founded on ancient customary concepts and principles which cannot be down-trodden by ex cathedra statements from the courts, however obnoxious and obsolete these concepts may now appear in the light of modern trends in thinking and changes in social strata. The courts have always respected the doctrine in its pristine purity. Although I have great admiration for the two learned judges in the High Court who thought the time was ripe for this doctrine to be debunked, yet I think the learned judges, with respect, had no jurisdiction, inherent, statutory or otherwise, to alter the existing customary law regarding chieftaincy in Ghana—an institution which carries in its train an unadulterated concentration of totems and taboos, prohibitions and prescriptions, consecrations and sanctities "which passeth the understanding of the ordinary courts of law." It seems to me that the courts in Ghana should keep clear off such incomprehensibles. In this respect, I have grave doubts as to whether or not the Supreme Court as the highest appellate tribunal has constitutional power to alter this law since article 177 (1) of the Constitution, 1979, guarantees the institution of chieftaincy as established by customary law and usage. Even Parliament has no unfettered powers in view of article 88 (3) of the Constitution, 1979, which provides that no bill affecting the institution of chieftaincy shall be introduced in Parliament without prior reference to the National House of Chiefs.
If there is to be any eminently desirable change in this aspect of customary law as regards chieftaincy, then I think only the chiefs themselves through their own enlightenment, dignity and reserve, with the welfare of their subjects at heart and in mind, can alter the law to be in consonance with this age and the spirit of accountability as enshrined in the present Constitution. Indeed, section 43 of the Chieftaincy Act, 1971 (Act 370), enables the chiefs themselves to initiate proceedings (outside the court room) to alter customary law by legislative instrument. The plaintiffs therefore have no legal right at customary law to call upon the co-defendant to account either directly or indirectly by suing the original three defendants.

Has any of the plaintiffs capacity according to customary law to sue in respect of stool property? Each of them has no such capacity because only the occupant of the stool can sue in respect of stool property. It was urged before us that we should extend the exceptions adumbrated in the case of Kwan v. Nyieni [1959] G.L.R. 67, C.A. (a case dealing with family property) to stool property. I do not think that family property with its incidents can be safely equated with stool property. This court would therefore decline the invitation to extend the exceptions in Kwan v. Nyieni (supra) to stool property.
It was submitted further that article 164 (1) of the Constitution, 1969, vested all stool lands in the appropriate stools on behalf of, and in trust for the subjects of a stool. Accordingly, the subjects of a stool became the beneficiaries of this constitutional trust, and by relying on English common law, the beneficiaries were entitled to sue the trustee, that is the occupant of the stool for an account. The answer to this submission is that article 164 (1) of the Constitution, 1969, intended no such thing. The article merely declared what the customary law has been for ages. If in fact before the Constitution, 1969, came into force, stool lands were vested elsewhere, the article would have decreed that all stool lands shall "revest in the appropriate stool." I do not therefore think that article 164 of the Constitution, 1969, invalidated sections 7 and 17 of the Administration of Lands Act, 1962 (Act 123).

Who can now claim compensation moneys in respect of stool lands? In Owusu v. Manche of Labadi (1933) 1 W.A.C.A. 278 it was held that only the occupant of the stool has the right to claim compensation in respect of stool land. The basis for the claim no doubt stems from the fact that the occupant of the stool has title to stool land. Thus he has an interest in the land and as such he has the legal right to claim compensation for the acquisition of stool

land. However, as from 14th June 1962, when Act 123 came into force, this unrestricted right to receive compensation moneys was fettered by section 17 of the Administration of Lands Act, 1962, which imposed a statutory duty on the minister designated by the President to manage all stool lands and to collect all moneys accruing from stool lands. The minister was not vested with any title by Act 123. Title still vested in the occupant of the appropriate stool until the President under section 7 (1) by executive instrument vested the land in himself in trust for the stool. The Constitution, 1969, substituted the Lands Commission for the minister. That substitution was the only or ostensible drastic alteration in the existing practice and nothing more. Revenues from stool lands were not collected by the chiefs themselves but by representatives of the Lands Commission which paid the moneys collected into the appropriate stool land account for the particular stool. This practice has been retained by article 190 of the Constitution, 1979. It becomes obvious from these various statutory provisions that only the co-defendant as the occupant of the Kumawu stool, has the legal right to put in a claim for the compensation. But as soon as his claim has been accepted, he is not entitled to receive the money because statute provides that someone else, that is the Lands Commission or the administrator of stool lands, should collect the money. It therefore follows that the plaintiffs have no legal claim to the compensation moneys paid in the present case and their claim should be dismissed.

My last point is how was the land acquired? All parties agree that the land is stool property. If that is the case, then the State Lands Act, 1962 (Act 125), cannot be invoked by the government to acquire the land because section 1 (1) of that Act clearly excepts land subject to the Administration of Lands Act, 1962 (Act 123), from the operation of Act 125. In any case, there is no evidence on record that Act 125 was applied in acquiring the land. There is also no evidence that the President by virtue of section 7 of the Administration of Lands Act, 1962, ever vested the lands in question in him in trust for the Kumawu stool. It must also be pointed out that the Wild Animals Preservation Act, 1961 (Act 43), and the regulations made thereunder, do not make any provision for acquisition of land and for the payment of compensation. Section 11 (1) of Act 43 merely enables the President to establish reserves within which it shall be unlawful to hunt, capture, or kill any bird or other wild animal except those which shall be specially exempted for protection.

The result in the present appeal is that compensation for land acquisition has been paid while the legal estate has yet to be vested in the Republic. It seems to me, it would be improper to allow the administrator of stool lands to collect the compensation money while the land has not been vested in the Republic. I agree therefore the moneys should remain in court until the Lands Commission has taken steps to vest the lands in the Republic. I also agree that in view of the conduct of the second defendant, the amount paid by him into court under the order of the court below should not be paid out to him until the co-defendant has paid all the compensation moneys into court.

Subject to these conditions, I would allow the appeal.

JUDGMENT OF MENSA BOISON J.A.

When is a trustee not a trustee? That is the question. It would appear its meaning and incidence depends on the convenience of what the case law is in a particular context and judicial views would seem to have no more relevance on the question than those of the man in the street at Kejetia or on the Tata bus in Accra.

I have had the privilege beforehand of reading both the leading and the supporting judgments now delivered respectively by my Lords Charles Crabbe and Archer JJ.S.C. I do not feel that I can usefully say much more than that. I am entirely in agreement with the judgments and their reasoning.

OWUSU AND OTHERS v. AGYEI AND OTHERS [1991] 2 GLR 493
SUPREME COURT, ACCRA

Sometime in 1971, the Government of Ghana was minded to acquire two parcels of land at Digya and Kogyae in the Kumawu Traditional Area, for the purpose of establishing a national park and a game reserve. Acquisition processes were set in train and the park and the reserve respectively were acquired on 20th September 1971, and subsequently established. But the modalities for the said acquisition have not gone unquestioned, and the circumstances surrounding the lodgment of claims and the payments thereon have neither passed without protest nor criticism. The protest which took the form of a legal suit mounted by some citizens of Kumawu, as the plaintiffs representing the Oman of Kumawu, attempted to halt an illegality perpetrated by the chiefs and traditional title holders of Kumawu in enriching themselves at the expense of the state. The plaintiffs' concern seems to have revolved round the illegality that made the said chiefs beneficiaries in their personal right, of claims arising out of the acquisition of the said lands, to the detriment of the oman itself. They consequently urged the disgorgement of all payments made to the said chiefs; and a refund of the said moneys to the stool's coffers.

The initial success of the plaintiffs in the High Court: see Owusu v Agyei [1980] GLR 1 per Roger Korsah J suffered a reverse at the Court of Appeal. The plaintiffs foundered mainly on the attack

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on their representative capacity and the fundamental viability of the acquisition itself.

It seems to me that the issues provoking serious debate are within a very small compass. They relate firstly, to the validity of the acquisition, and secondly, to the credentials of the plaintiffs, ie whether they possessed the requisite representative capacity to sue. Lesser issues like fraud and illegality would be discussed in the course of this judgment.

The record of this appeal is contained in four massive tomes distinguished only by extensively indifferent typescript and the prolixity of matter not essential to the resolution of the dispute. The first inquiry is to ascertain whether there was a viable acquisition of Digya and Kogyae lands. There is no doubt that the enabling legislation for a valid acquisition was either under the Administration of Lands Act, 1962 (Act 123) or the State Lands Act, 1962 (Act 125). Since both could not be employed at the same time, it is necessary to restate the essential provisions of these enactments to ascertain the appropriateness of choice. Section 7 of Act 123 is as follows:

"7. (1) Where it appears to the President that it is in the public interest so to do he may, by executive instrument, declare any Stool land to be vested in him in trust and accordingly it shall be lawful for the President, on the publication of the instrument, to execute any deed or do any act as trustee in respect of the land specified in the instrument.

(2) Any moneys accruing as a result of any deed executed or act done by the President under subsection (1) shall be paid into the appropriate account for the purposes of this Act."

(The emphasis is mine.)

Section 1 (1) of Act 125 provides as follows:

"1. (1) Whenever it appears to the President in the public interest so to do, he may, by executive instrument, declare any land specified in the instrument, other than land subject to the Administration of Lands Act, 1962 (Act 123), to be land required in the public

interest; and accordingly on the making of the instrument it shall be lawful for any person, acting in that behalf and subject to a month's notice in writing to enter the land so declared for any purpose incidental to the declaration so made."
(The emphasis is mine.)
A cursory reading of the two Acts would suggest that the acquisition of undisputed land could be readily accomplished by invoking Act 123, while Act 125 was more apposite where contentious claims
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equiring the determination of ownership, among other things, arose. It would be noticed that Act 125 excepts from its purview "land subject to the Administration of Lands Act, 1962 (Act 123)." This singular phraseology has generated diverse statutory interpretations. It is said that by excluding Act 123 in the body of Act 125, the latter Act could not deal with stool lands. The alternative contention is that the section only relieves the President from publishing an executive instrument where the land is stool land within the meaning and intendment of Act 123.
The trial judge, Roger Korsah J, in a painstaking analysis of the two Acts and the evidence before him, came to the conclusion that a proper acquisition had taken place. Had the defendant-respondents not made initial claims to the lands at Digya and Kogyae as their personal properties, the Lands Department might have proceeded under Act 123 to acquire them as uncontroverted Kumawu stool lands. The said chiefs having perpetrated the illegality could not be permitted to take advantage of their fraud.
The Court of Appeal while not condoning fraud, thought differently. It felt that no viable acquisition of the two parcels of land had taken place. The court held that the modalities for a proper acquisition under Act 123 had not been performed. Act 125, according to the court, was completely ruled out since the subject of acquisition was stool land. Again, the instrument giving legal sanctity to the acquisition was the WildLife Reserves Regulations, 1971 (LI 710) which was made under a power conferred not by Act 123 or Act 125 but by the Wild Animals Preservation Act, 1961 (Act 43).To the court, then, there should have been the strictest compliance with the requirements of Act 123 or Act 125. The court held that:
"No instrument for the acquisition of the land was, in fact made, as required by the provisions of section 7 of Act 123. Nor was one made under the provisions of section 1 of Act 125. The relevant provisions of the law had not been complied with. There is no acquisition, in law, for which compensation could have been paid."
Under Act 123, the management of stool lands was placed under the control of a minister (now Lands Commission) who by section 17(1) and (2) was empowered to collect all revenues from stool lands and initiate actions to accomplish this end. On the basis that where an Act prescribes the modalities for its operation, no other avenue is available for obtaining the same end, the Court of Appeal, per Charles Crabbe JA (as he then was) held:
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"Under the statute law, as it now is, the minister is the proper person to maintain the action for the recovery of the moneys paid to the co-defendant-appellant and his vassals."
In effect, if the minister did not exercise the statutory duty imposed on him of gathering all revenue due to the stool from whatever source - including capital gains - no one else could do so.
This interpretation dealt a death blow to the plaintiffs' capacity to represent the oman, as the plaintiffs' stance suffered from the fatal defect of usurping ministerial functions.
With respect, and with deference to the Court of Appeal, I do not share their enthusiasm to dismiss the plaintiffs' case on the grounds that the acquisition of Digya and Kogyae failed from procedural incompetence, or that the plaintiffs lacked capacity to sue. The paramount objective of the acquisition of the said parcels of land was to transform them into a strict nature reserve and a national park respectively. On the ground this objective was largely achieved with a physical transformation of the two parcels of land despite any shortcomings

that bedevilled the exercise of acquisition en route. Moreover, the government for its part has substantially honoured its obligations by paying compensation after claims had been lodged in due compliance with LI 710. That the claims were irregularly made or that the sums fell into wrong hands, are different issues altogether which should not becloud the validity of the acquisition.

It is said that there is no principle of justice, convenience or logic which should permit procedural law to encroach upon substantive rights: see Dicey and Morris, Conflict of Laws (8th ed), p 883. That statement is supported by equally potent expressions of legal presumptions. For instance the maxim, "that which ought to have been done, is presumed to have been done": see its illustration in Engineering Industry Training Board v Samuel Talbot [1969] 1 All ER 480 at 482, CA per Denning LJ (as he then was): ". . . we no longer construe [Acts of Parliament] according to their literal meaning. We construe them according to their object and intent [omnia praesumuntur rite esse acta]." The principle is restated in our own Evidence Decree, 1975 (NRCD 323), s 37(1): "It is presumed that official duty has been regularly performed."

The question whether provisions in a statute are directory or mandatory is generally resolved by examining the known objectives of the statute. The court will not permit the mischief of splitting hairs on the true construction of a statute to undo accomplished objectives of the statute. Thus was it held in Montreal Street Railway Co v Normandin [1917] AC 170 at 175, PC:

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"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

(The emphasis is mine.)

It seems to me also clear that the Court of Appeal somehow overlooked the amendment to section 1 of Act 125 by the State Lands Act, 1962 (Amendment) Decree, 1968 (NLCD 234).That amendment states:

"Provided that where the National Liberation Council is satisfied that special circumstances exist by reason of which it appears to the Council to be expedient that any particular land which is subject to the Administration of Lands Act, 1962 (Act 123) should be declared under this subsection to be land required in the public interest, the Council may by writing declare that it is so satisfied and thereupon it shall be lawful for the said land to be declared under this subsection to be land required in the public interest and the Administration of Lands Act, 1962 shall not apply to any such land in respect of which an executive instrument has been made in accordance with this subsection."

(The emphasis is mine.)

It will be noted that in NLCD 234 as also in Acts 123 and 125 the permissive "may" has been employed in relation to the President's discretionary powers of publication or declaration of a necessary public acquisition or utility. In the instant case, the President did declare and publish the government's intention, but by a legislative instrument, ie LI 710, rather than an executive one. If my reading and understanding are not faulty, the legislative instrument became a permissive alternative to an executive expression which could by presidential discretion have remained silent and unpublished.

The criticism of LI 710 by the Court of Appeal, consequently does not appeal to me even if that legislation came under the aegis of Act 43. The observations on the presumptions of regularity and the ambit of discretionary powers which negate any strict application of mandatoriness are more potent arguments for conferring viability. Indeed, the wide discretionary powers conferred on the President

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by Acts 123 and 125 to do any act for the furtherance and legitimisation of an acquisition, seems, with respect, to have been missed. Accordingly, I find legal validation of the acquisition from statute law, ie the amendment to Act 125 by NLCD 234, by statutory presumption, as also by case law. In my view, the factum of acquisition of the Kumawu lands, Digya and Kogyae, cannot be assailed with any degree of success.
The Court of Appeal overturned the decision of the High Court also on another ground, namely a disabling incapacity in the plaintiffs to launch their claim. The court felt they had no locus standi and could not urge the ground of necessity to clothe them with capacity, under the exceptions in Kwan v Nyieni [1959] GLR 67, CA. It was the court's view that such an extension could only be by judicial fiat, ie by legislation. Moreover, since under section 17 of Act 123 the management of stool lands was assigned to a minister, it was only the minister who had authority to bring an action concerning revenue from stool lands. It was the court's view that such revenue would be held in trust by the minister for the stool and since the minister performed his duties as a public rather than a private trustee, it was only the Attorney-General who could enforce the trust, or permit a relator action.
Turning first to the principle as set out in the headnote in Kwan v Nyieni (supra) at 68-69, the following are the criteria for its application:
"(1) as a general rule the head of a family, as representative of the family, is the proper person to institute a suit for recovery of family land;
(2) to this general rule there are exceptions in certain special circumstances, such as:
(i) where family property is in danger of being lost to the family, and it is shown that the head, either out of personal interest or otherwise, will not make a move to save or preserve it; or
(ii) where, owing to a division in the family, the head and some of the principal members will not take any steps; or
(iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.
In any such special circumstances the Courts will entertain an action by any member of the family, either upon proof that he has been authorised by other members of the family to sue, or
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upon proof of necessity, provided that the Court is satisfied that the action is instituted in order to preserve the family character of the property."
The principle is not confined to land. It is applied where the assets of a family are being dissipated and the inactivity of the head of family has provoked an extreme exigency calling for unusual measures to redress the wrong. Nor is it confined to monetary assets. A dignity or status that is being sullied to the detriment of the family as a whole, because those entrusted with authority to curb the wrong lack the enthusiasm to do so, may be appropriately dealt with by those family members more conscious of the evil and possessing the necessary will to abate it. Thus in Sarkodee I v Boateng II [1977] 2 GLR 343, CA (full bench) the majority opinion while restating the principle that a single kingmaker could not file destoolment charges, still held, as stated in the headnote at 344, that where it was uncontroverted that the essential prior consultations had taken place:
"but that the majority of the kingmakers had unreasonably withheld their support or that they had been actuated by oblique motives, the single kingmaker must be deemed to have satisfied the requirements of the customary law as to acquire the right to commence proceedings under section 33 of the Chieftaincy Act, 1971 (Act 370)."
The cases seem to illustrate the commonsense view of the customary law. Where those clothed with authority to protect family interests fail to do so, and as it were, form an unholy alliance or conspiracy to damage the interests of the family, an urgent situation must be

deemed to have arisen allowing for a relaxation of rules and permitting more responsible members of the family to protect the endangered family interests.
I find in this appeal that the three exceptions to the Kwan v Nyieni (supra) rule may fruitfully be pressed into service to clothe the plaintiffs with capacity. The respondents who should have protected Kumawu stool revenue, formed an unholy alliance to enrich themselves at the expense of the state. Their conduct, amounting to fraud, disabled them from performing their duty in preserving Kumawu stool revenue. It could hardly be expected that they would take steps of their own volition to refund moneys they had illegally appropriated or rather misappropriated. A more apposite example of the application of the exceptions to the Kwan v Nyieni (supra) principle would be hard to find. In my view, the categories of the
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application of the exceptions have yet to be exhausted. They may never close.
It seems to me also that the provisions of Act 123 transform moneys arising from the acquisition of stool lands into a trust fund. Section 7(2) of Act 123 requires moneys accruing from the President's act of vesting stool land in himself upon trust "to be paid into the appropriate account." It follows that whoever holds such trust funds can be proceeded against to disgorge the sums for payment into the "appropriate account."
Trust funds can be followed and retrieved wherever they are illegally diverted under the equitable doctrine of following or tracing trust property. I am yet to learn that barricades can be legally erected to sustain rank or status, while subverting and undermining this trust principle.
The co-defendant-respondent makes no secret that he has retained and applied the trust fund for purposes of his own and in defiance of statutory directions. He has failed to deposit the sum in the appropriate account as ordained by law. He can receive no protection for his illegal conduct by relying on the traditional immunity from accountability. That principle cannot be urged as a cloak for fraud.
Since it is a statutory imperative that moneys from stool land acquisition should be lodged in a designated fund, it would be improper for this court to overlook a defalcation that illegally subverts this rule. The principle of non-accountability cannot be projected above statutory requirements to afford a viable protective umbrella.
Above all, the co-defendant-respondent entered the fray not as a chief, but in a private personal capacity. The dichotomy is useful, since it insulates the stool while at the same time permitting the money to be traced to him and recovered without any breach of constitutional proprieties.
In my view, the traditional rule of not proceeding against a reigning head on issues of accounting has not been violated. An issue of accounts imports some legitimacy in the use of part of a sum demanded, albeit in questionable proportions. The claim for accounts then seeks to straighten out the books and set the record of legitimate income against legitimate expenditure on an unimpeachable basis. That is not the issue in this case. Here, it is the recovery of an entire sum which the law requires to be lodged in an "appropriate account." But if the circumstances may be construed as affording an example of such a violation, then it is, in my view, sanctioned under the authority of Act 123 and the legally permissible quest to restore trust funds where they belong.
Another hurdle upon which the plaintiffs stumbled in the Court of Appeal related to their locus of representing the oman. Banahene
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v Hima [1963] 1 GLR 323 defines oman in a legal constitutional context. It also explains Order 16, r 9 of the High Court (Civil Procedure) Rules, 1954 (LN 140A) which deals with representation. Three ingredients of common interest, common grievance and common benefit must be abundantly present to validate a representation of the oman. In the Hima case (supra), the representation was only of farmers who were pursuing a peculiar interest, namely a breach of contract relating to felled timber trees. In the present case, however, it is

the citizens of the town who have a fundamental, traditional role to play in constitutional issues of the state, and who by virtue of their citizenship have a stake in all moneys payable on the acquisition of stool land and its proper utilization, who have issued out a writ.
In the special situation where the natural rulers have disqualified themselves by permitting fraud to stain their hands, it is only the plaintiffs who are the remaining entity capable of championing the rights of the state. I find the tests of representation in this regard amply satisfied.
Finally, there is the issue of section 17 of Act 123. Is the minister or the Lands Commission the sole vehicle for pursuing revenue claims in respect of stool lands? The question has only to be formulated to provoke an answer in the negative. There are often contested claims between various stools. How does the minister or the Lands Commission achieve the split entities necessary to deal dispassionately with competing claims of various stools?
In my view, section 17 of Act 123 seeks to regulate and promote the orderly management of stool revenues. It does not encroach on inalienable rights of stools to their title to land. I differ from those who think title to stool properties has been effectively sequestrated by legislation. Section 17 only maps out revenue administration but does not edge out rights appertaining to ownership of stool lands. It should not be forgotten that NLCD 234 erodes the force of Act 123 by making that latter Act inapplicable in certain acquisitions, and consequently abating the force of section 17.
In the result, I see no warrant for disturbing the judgment of the High Court. I shall restore the decision of Roger Korsah J and allow the appeal.

OKWAN AND OTHERS v. AMANKWA II [1991] 1 GLR 123-135
COURT OF APPEAL, ACCRA
30 JANUARY 1981

APALOO C.J., CRABBE J.S.C. AND WIREDU J.A.

EDWARD WIREDU J.A.

The parties to this suit are all members of the same family, namely the Kona family of Barko near Breman-Asikuma in the Central Region. The plaintiff is the odikro of Barko village. On the writ of summons issued , he is described as "the chief of Barko and of the Kona family of Barko". The first defendant is the head of the said family whilst the second and the third defendants are on the pleadings described as members of the family.

The facts before the court show that this family owns lands in the Ajumako Traditional Area on portions of which are abusa farm tenants. The facts further show that these tenant farmers obtained their grants from the family and that members of this family are the exclusive beneficiaries of rents collected from the tenants including the felling of palm trees on the lands.

According to the plaintiff it had been the established practice in the family for the occupant of the family stool to take charge and manage the said family lands and that all rents accruing from the tenant farmers are collected on his authority and later distributed in accordance with established practice in the family.

The defendants deny the plaintiff's claim to be the custodian of the family lands. The first defendant contends that as the head of the family he is by custom the custodian of all the family lands. The defendants in their statement of defence do not deny (a) that the lands in question are the private family lands of members of the Barko Kona family, (b) that members of the family are the exclusive beneficiaries of rents collected from stranger farm tenants working on portions of the family land granted them on abusa basis and (c) the proportions in which rents collected from tenant farmers working on the lands are shared as pleaded by the plaintiff. The only area of difference between the parties as to the sharing of rents is who takes and keeps the share of the family stool.

It is thus clear from the pleadings that the main issues joined between the parties at this stage of their pleadings are:
(a) Who controls and manages the Barko Kona family lands? Is it the plaintiff as the occupant of the family stool and therefore the chief of the family or the first defendant as head of the family?
(b) Who keeps the one-third portion of proceeds from the family lands which goes to the family stool?
On or about 27 November 1979, on the application of the plaintiff, Osei-Hwere J, as he then was, granted an interim injunction restraining the parties from collecting rents from the abusa tenants farming on the family lands. The registrar of the court was appointed receiver and manager to take over the collection of the rents.
A statement in the ruling on the application for the appointment of a receiver and manager that the lands on which the abusa tenants were farming "are family stool lands" provoked an amendment to the statement of defence as follows:
"(30A) The defendants will contend further and in the alternative that if the land of the Barko Kona family is stool land then the plaintiff's action contravenes section 17 of the Administration of Lands Act, 1962 (Act 123) and further that this court has no jurisdiction to entertain the plaintiff's suit.
This amendment was settled as an issue on summons for directions and was set down at the hearing of the summons for legal arguments under Order 25, r. 2 of the High Court (Civil Procedure) Rules, 1954 (L.N. 140A).
After hearing arguments from counsel on the above issue and after a careful examination of the case law on the matter the learned High Court judge (Okunnor J.) in what appears to me a well considered ruling, overruled the objection holding that the plaintiff's action related to a private family stool land and was therefore not caught by section 17 of the Administration of Lands Act, 1962 (Act 123) and was therefore maintainable.
It is from this ruling dismissing the objection to the plaintiff's capacity that the present appeal has been brought on three main grounds as follows:
On the issue whether Act 123 recognises a distinction between oman stool lands on the one hand and private family stool lands on the other hand, there is a considerable body of case law on the matter. A recognition of this distinction by the court is evidenced by cases like Asuon v. Faya (supra) and Republic v. Assuah; Ex parte Blewey (supra). A careful reading of the judgments in these cases reveal that in deciding whether the lands which formed the subject-matter of a dispute were stool lands within the true intendment of Act 123 the court have always gone to great lengths to consider whether the lands involved were oman stool lands or private family stool lands and have come to conclusions one way or the other after deciding the status of the land involved.

The courts have always excluded private family stool lands from the operation of Act 123. The rationale underlying the view taken by the courts is not far to find. The main purpose for enacting Act 123 was to streamline the administration and revenue collection of "oman" or public stool lands to be used for maintaining the stool and the development of the areas where such stool lands are situate. In this regard it is such lands as are in common use by the subjects of the area that will be within the contemplation of the legislature for achieving that purpose. The objective envisaged did not stretch to cover private family lands the enjoyment and control of which are the exclusive rights of members of the family concerned. "Family" in this context is used in the narrow acceptation of the word. Were it otherwise, the burden on the Administrator of Stool Lands would be very heavy and his duties will be impossible to perform. The fallacy in any other interpretation than the above will be that whenever an individual owning land died intestate his land which should devolve on his family would become a stool land within the language of Act 123. Finally, were it not so then section 17

(1) of Act 123 will be otiose since all lands in Ghana will be taken as stool lands within the language of Act 123.

The only new point taken before us by Mr. Mercer was his submission on the definition of stool land as contained in article 213 of the Constitution, 1979 which reads:
"stool land" includes any land or interest in, or right over, any land controlled by a stool, the head of a particular community or a family for the benefit of subjects of that stool or the members of that community or family; 'stool' includes a skin and the person or body of persons having control over skin or family land."

The above definition governs the provisions of article 190 of the Constitution, 1979 which deals with stool lands. I would under normal circumstances have ignored that definition. For the general rule of interpretation is that where an enactment has clearly defined particular words in its interpretation section it is uncalled for and most unnecessary to look elsewhere for the meaning of those words. Since the objection taken by the defendants was based on the provisions of Act 123 I would have limited them to the definition of "stool land" as given in that Act but for the fact that the Constitution, 1979 is the supreme law of the land and that all enactments must be brought within its provisions to avoid inconsistencies. Both article 190 and Act 123 deal with administration of stool lands. It is necessary therefore to see that the provisions of the latter do not conflict with the former.
Article 190(2)(a) of the Constitution, 1979 imposes on the Administrator of Stool Lands the duty of collecting rents, revenues, etc accruing from stool lands in place of the Minister responsible for Lands as provided by section 17 of Act 123. The beneficiaries specified under clause (5) of article 190 provide a clue as to the nature of the land envisaged under the provisions of the article. The imposition of the duty of collecting rents from stool lands on the Administrator of Stool Lands by the present Constitution demands that the defendants' amendment would need a further amendment by substituting the Administrator of Stool Lands in place of the minister. Article 190(5) reads as follows:
"(5) There shall be paid out of the stool lands account,
(a) to the stool, through the traditional authority, for the maintenance of the stool in keeping with its status,
(b) to the traditional authority, and
(c) to the councils established pursuant to article 182 of this Constitution, within whose area of authority are situate the stool lands concerned such moneys and in such proportions as may be determined by the Lands Commission."
It is clear from the above provision of article 190 that private family lands are not intended to provide the funds for the maintenance of institutions which are of a public nature as specified under it.

Section 31 of Act 123 defines stool land as follows:
"'Stool land' includes land controlled by any person for the benefit of the subjects or members of a Stool clan, company or community, as the case may be and all land in the Upper and Northern Regions other than land vested in the President and accordingly 'Stool' means the person exercising such control."
It does not mention "family land," but contains "stool, clan." The definition under article 213 of the Constitution mentions "family land," and not "clan." Clan ordinarily means larger family. I am of the view that to interpret "family land" in the narrow acceptation of that word as the true meaning of that word within the language of article 190 would produce a palpable injustice.

When the provisions of article 190 are read together with provisions of Act 123, the true intent of the enactments will be defeated by giving a narrow interpretation to "family land" as

contained in article 213 (1) of the Constitution, 1979. The public status or nature of the property sought to be administered in the interest of the general community would be made applicable to such family land and that would arbitrarily deprive individual families of control and management of their lands, a situation which is not envisaged under the Constitution, 1979. In my view, it would be a case of injustice to resort to their family lands. Where a word is capable of two interpretations one producing an injustice and the other conducive to a just result, the courts have held on to the interpretation that does not produce injustice. In the case of R. v. Tonbridge Overseers (1884) 13 Q.B.D. 339 at 342, C.A. Brett M.R. said:

> "If an enactment is such that by reading it in its ordinary sense you produce a palpable injustice, whereas by reading it in a sense which it can bear, although not exactly its ordinary sense it will produce no injustice, then I admit one must always assume that the legislature intended that it should be so read as to produce no injustice".

Again in the case of Barlow v. Ross (1890) 24 Q.B.D. 381, C.A. Lord Esher M.R. in the course of delivering his judgment said at 389:

"But it is a familiar rule of construction that, although the Courts are prima facie bound to read the words of an Act according to their ordinary meaning in the language, if there are other circumstances which show that the words must have been used by the legislature in a sense larger than their ordinary meaning, the Court is bound to read them in that sense."

I am of the view that "family land" as referred to in article 213 (1) of the Constitution, 1979 must be interpreted in its broadest sense to connote the public nature of the subject-matter or to the same genus as the specific words which precede it, i.e. "community land" and "stool lands" commonly enjoyed by all subjects of the stool. Family as used here connotes a wider clan.

The facts of this case show that the land the subject-matter of dispute in this appeal is a private family property of the parties and it will be unjust to construe "family land" contained in article 213 of the Constitution, 1979 in its narrowest sense to deprive the family of its control and management. Being a private family stool land it is not a stool land within the language of either the Constitution, 1979, art 213(1) or Act 123, s. 31.

I am of the view therefore that the ruling appealed from is sound and unimpeachable, and ought to be affirmed. The appeal fails and I accordingly dismiss it.APALOO C.J.

I also think the ruling appealed from was right and ought to be affirmed. Had the complaint against the ruling been founded only on the fact that the occupant of a family stool is bereft of capacity from maintaining an action to enforce his rights to the revenue or other income from the land by the provisions of section 17 of the Administration of Lands Act, 1962 (Act 123), I would have contented myself with merely dismissing the appeal and adopting the learned judge's reasoning. It seems to me basically sound.

But before us, a further ground was found to impeach his conclusion. It is article 213(1) of the Constitution, 1979 which gives some definition of "stool land." There is clearly in customary law jurisprudence, a distinction between stool lands properly so-called and family lands. Lands owned by the stool family belong to this latter category.

The problem posed by this case is to consider whether the present Constitution, 1979 has done away with the distinction between stool lands and family lands by the somewhat wide definition it gave to stool land by clause (1) of article 213. The Constitution, 1979 dealt broadly with two types of lands, namely "public lands" which by definition are government lands and secondly, "stool lands." Clause (1) of article 190 provides that the latter "shall vest in the appropriate [p.134] stool on behalf of and in trust for the subjects of the stool."

While in either case title to these lands vested in the government or stools as the case may be, the Constitution, 1979 sought to vest their management and control in one case in a Lands

Commission and in the other case an Administrator of Stool Lands. The object seems to secure their efficient management.

It seems clear the Constitution, 1979 has no truck with family lands. It did not seek to regulate their enjoyment and made no provision for their management. The right to manage, control and alienate property is an inseparable incident of ownership. Family lands in this sense being private property are protected against expropriation without compensation by article 24 of the Constitution, 1979. Public and stool lands are in fact trust properties held in one case, for all the people of Ghana and in the other case, for all the subjects of a stool. One can therefore see the rationale in the statutory regulation of their alienation and enjoyment. It is difficult to think of one for family lands.
It is against this background that one must consider the definition of stool land in clause (1) of article 213. It says:
"Stool land includes any land or interest or right over any land controlled by a stool, the head of a particular community or a family for the benefit of the subjects of that stool or members of that community or family."
Unlike stool lands which enure for the beneficial enjoyment of all the subjects of a stool, family lands are exclusively enjoyed by the members of a family and as I said, are in their truest sense, private properties. Should such properties now be deemed stool lands and subject to the statutory regulation and controls imposed on stool and public lands? It is hard to think that the makers of our Constitution, 1979 sought to convert family lands into stool lands by mere definition with such far-reaching consequences.

I have looked in vain at the proposals placed before the 1979 Constitutional Commission for any material on which it could have taken such a decision. The significant difference between a stool land and a family land was nowhere adverted to. Contrariwise, the 1968 Constitution Commission showed itself alive to this difference. It said at 193, para. 712 of its Memorandum on the Proposals for a Constitution for Ghana, 1968.

"712. In making these proposals we have taken into consideration the fact that certain lands are designated as stool lands which in fact are not stool lands but family property which have come to be associated with a particular stool through a member of the family becoming the occupant of the Stool and using such property in the interests of the Stool. It may be argued that once family land has been used for the benefit of the subjects of a Stool it tends to become stool land. There is the other argument that as long as the members of the family concerned are keen on keeping family property away from the Stool the danger of such family property becoming stool land will be minimal indeed . . ."

The Constitution, 1979 then provided by clause (1) of article 172, a definition of stool land which omits any reference to family land. The 1979 Constitutional Commission adopted, in the main, the provisions on lands in the Constitution, 1979. It said expressly in paragraph 274 of its proposals, that it was doing so and made changes only in three areas which are not relevant for present purposes. It saw no reason to equate family lands with stool lands and I accordingly agree that to interpret article 213 (1) in a manner which suggests that family lands are conterminous with stool lands with the same legal consequences, would produce a plainly unjust result. It so ill-fits the scheme of things that it cannot be the true intention of the makers of the Constitution."

The only way to interpret "any land controlled by the head of a family for the benefit of the members of that family" as used in article 213(1) to conform with the law, established usage and avoid an injustice, is to give it the same meaning as "land held by the head of a community for the benefit of members of that community."

I appreciate that this interpretation makes the special mention of "family land" in the definition of stool land otiose and from that point of view, unsatisfactory, but it is a more satisfactory course than to impute to the Constitution makers an intention to convert, by mere definition and without more, all family lands into stool lands.

In the result, I agree with the trial court that the plaintiff's family lands are not stool lands and are not affected by section 17(1) and (2) Act 123, and that the result of this case is not affected by the definition of stool land contained in article 213 of the Constitution, 1979.
I also think this appeal fails and ought to be dismissed.
JUDGMENT OF CHARLES CRABBE J.S.C.

REPUBLIC v. SAFFOUR II [1980] GLR 193-206
HIGH COURT, CAPE COAST
23 JANUARY 1979

OKUNOR J.

The respondent, then accused, was, in the judgment,of the circuit court acquitted and discharged on four counts of "unlawful receipt of stool land revenue" contrary to sections 17 (1) and 27 of the Administration of Lands Act, 1962 (Act 123).

The prosecution had alleged that on diverse dates in 1975, the respondent , the chief of Assin Bereku, had collected various sums of money from persons to whom he granted portions of Assin Bereku stool lands for farming and that such moneys were "revenue" as contemplated by the Act, and collectable only by the minister; receiving the moneys therefore without the authority of the minister amounted to an offence for which the court was requested to convict the appellant. This request the learned trial judge refused to accede to; after examining the evidence and the law on the matter he came to the conclusion that "there was no offence committed by the accused for which he could be lawfully convicted."
It is against this decision that the Republic has appealed to this court. Two original grounds of appeal were filed on 30 August, i.e. one day after the aforesaid judgment was delivered. They read:
"(1) That the learned circuit judge was wrong in holding that the moneys collected by the accused were 'customary drink' moneys and not 'revenue' as defined in section 17 (2) of the Administration of Lands Act, 1962 (Act 123).
(2) That having regard to the provisions of section 17 (2) of Act 123, the learned circuit judge was wrong in holding that the prosecution has a duty to prove that the moneys collected by the accused were not 'customary drink' moneys."
I think that the crux of the matter, as indeed the learned trial judge stated in his judgment, is whether or not the moneys collected by the appellant amounted to "revenue" from stool lands, having regard to the definition of "revenue" stated in section 17 (2) of the Act. That definition reads:
"(2) Revenue for the purposes of this Act includes all rents, dues, fees, royalties, revenues, levies, tributes and other payments, whether in the nature of income or capital, from or in connection with lands subject to this Act."
It is the contention of the prosecution that that definition is wide enough to include the moneys collected by the accused whilst it was argued on behalf of the accused that the moneys were mere "drinks" and not the type of revenue collectable by the minister.
A close study of section 17 shows that a transaction which contravenes that section would be a transaction to which the minister is not a party and which has the effect of denying the minister the right to receive moneys he is entitled to, or which purports to give a good discharge for any liability in respect of such moneys, or one in which any person exercises either of those specific rights concurrently with the minister. The converse of this must be true, i.e. any transaction which leaves the minister free to exercise his specific rights under

the section unchallenged and unimpeded cannot amount to an offence under the section, no matter what other pecuniary benefits it brings to third parties, i.e. there must be either complete usurpation or at least, concurrent exercise, of the specific rights reserved to the minister.

In developing his argument that the moneys collected by the appellant amounted to "revenue," the learned senior state attorney addressed the trial court thus:

> "Perhaps it will be appropriate at this stage to consider whether the moneys which the accused collected were 'drinks.' Your honour may wish to take judicial notice of the practice among chiefs to ask for 'drinks.' If a chief wants a 'drink,' he says so in clear, unmistakable terms. Yet all the persons to whom the accused carved out portions of Assin Bereku stool lands said that what they gave to the accused was not 'drinks,' but payments in connection with the lands given to them. These witnesses are simple folks who should know the difference between 'drinks' and other payments, and yet they were positive that what they paid was not 'drinks.' I also wish to invite your honour to consider the fact that the accused issued receipts for the payments made by them. Your honour may wish to take judicial notice of the fact that chiefs do not as a rule, issue receipts for 'drinks' which they ask for in connection with land. 'Drinks' are normally small amounts taken before the land is inspected; receipts are not issued for drinks as in respect of other payments for which formal receipts are issued. If the accused intended to collect 'drinks,' he would have made it known to the first, second and third prosecution witnesses that what he was asking them was 'drink' money. The evidence indicates that he asked for initial payment for the lands which he gave out—the rest of the payments to be made on the maturity of the abusa tenancy. In my view, the whole purport of the Act would be frustrated if persons who have no authority to collect stool land revenue are allowed to escape the law by merely describing valuable sums received by them as 'drinks.' This is the reason why, the definition of 'revenue' under section 17 is made to cover even such payments as 'drinks' provided that they are in connection with land. . .”

It is not clear to me whether the great pains taken by the learned senior state attorney to distinguish between "drinks" and "other payments in connection with land" and to establish that what was paid was not "drinks" (which is evident in the early portions of the extract) is meant to mean that "drinks" are allowed under section 17, but "other payments" are not or whether, as the last sentence clearly indicates, all payments including drinks received "in connection with land" are illegal unless made to the minister. If the latter is the case for the prosecution, then section 17 would have the most absurd effects: it would mean that even the traditional bottle of schnapps plus three guineas offered to the chief in connection with the acquisition of land could land the chief in the criminal courts; it could also mean that the little fee paid to the chief's little nephews who, with cutlasses in the right hand and little stalves in the left, hack a boundary in the thick forest for the prospective grantee would make the recipients liable to the risk of being arraigned before the criminal courts for receiving illegal payments.

If the former is the prosecution's case, it is my view that the criteria by which "drinks" are sought to be distinguished from “other payments" are so narrow as to make them unsafe and inconclusive. If it is accepted that "drinks" are only the customary mode of saying "Thank you" to a benefactor, or of acknowledging an offer, then it should not be too difficult to appreciate a proposition that the size of drinks will bear some relationship with the size or value or quantum of the object for which thanks are being offered or the offer of which, is being acknowledged. Consequently, a general proposition that "drinks" are as a rule "small" could be misleading. The object in connection with which the accused received the moneys in each case in the present case is land for cocoa farming. Such land is, if I may use a metaphor, a gold mine.

As to whether or not payments cannot be "drinks" only because they are covered by receipts, I agree entirely with the opinion expressed by the learned trial judge on the matter. He said:

> "The learned senior state attorney submitted that the fact that the accused issued receipts shows that the moneys could not be customary drink. I respectfully disagree with that submission. . . I see nothing wrong (I could say I see nothing strange) with a receipt being issued to evidence the cash payment of customary drink."

At the hearing of this appeal before me, however, the learned senior state attorney stressed another aspect of the evidential value of the receipts. He made the point that it was not so much the fact that receipts were issued which made the payments illegal as the inscription on the receipts. The receipts speak for themselves, he submitted. All the receipts bore the following inscription "Received with thanks from (name of payer) the sum of (amount) being released a land for abusa basic." I do agree with the learned senior state attorney that the receipts speak for themselves. I shall return to this point later in this judgment.
It was also part of the case for the prosecution that the grantees who paid the moneys were simple rural folks who should know the difference between "drinks" and "other payments" and they all said what they paid was not "drinks."

This submission seems to suggest that whether or not the moneys paid were "drinks" or "other payments" was a matter for evidence. This is misleading. Lindley L.J. said in the case of Chatenay v. Brazilian Submarine Telegraph Co. [1891] 1 Q.B. 79 at p. 85, C.A.:
"The expression 'construction,' as applied to a document, at all events as used by English lawyers, includes two things: first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law."
(The emphasis is mine.) The ascertainment of the scope of the expression "other payments" in section 17 (2) need a little more effort than the evidence of simple rural folks can provide. Now to a close look at the definition of "revenue," as contained in section 17 (2): It is the case for the prosecution that the words "and other payments, whether in the nature of income or capital, from or in connection with lands subject to this Act" which appear in the definition are so wide and so general as to accommodate and include the moneys collected by the accused. I must say, straightaway, that this submission is only half the battle won. When such general and rather sweeping expressions as have been used in the definition under discussion stand by themselves they carry their full complement of meaning and effect; but when, as in the present case, they follow a series of specific and particular words, such general words shed a good measure of their popular meaning, and only bear that portion of it which would make them consistent with the specific words to which they are appended. This is the rule of construction popularly referred to as the ejusdem generis rule. Maxwell on Interpretation of Statutes (12th ed.) explains the operation of this rule of construction at pp. 297-298:
"In the abstract, general words, like all others, receive their full and natural meaning, and the courts will not impose on them limitations not called for by the sense or objects of the enactment ...
But the general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words ... In other words, the general expression is to be read as comprehending only things of the same kind as that designated by the preceding particular expressions, unless there is something to show that a wider sense was intended ... as where there is a provision specifically excepting certain classes clearly not within the suggested genus."
Thus there is this limiting rule of construction applicable when there is a particular description of objects, sufficient to identify what was intended, followed by some general or omnibus

description. The latter description will be confined to objects of the same class or kind as the former.

Lord Campbell in the case of R. v. Edmundson (1859) 2 El. & El. 77 at p. 83 formulated the rule more succinctly "where particular words are followed by general words, the latter must be construed as ejusdem generis with the former."
I have said earlier that the rule is only a rule of construction; that being so, it will only be resorted to when there is some difficulty with the interpretation of a piece of legislation. Rules of construction have been laid down only because of the obligation imposed on the courts of attaching an intelligible meaning to unclear or misleading, or ambiguous or unintelligible sentences or expressions. Reading the two main grounds of appeal filed by the prosecution there is no doubt that the whole of this appeal is substantially, if not wholly, a frontal attack on the interpretation put on, or omitted to be put on, the definition of revenue as appears in section 17 (2) of the Act by the learned trial judge; consequently, that is an instance which, in, my view, calls for the application of the appropriate rule or rules of construction.

The definition of "revenue" in section 17 is a piece of legislation which readily lends itself to the application of the ejusdem generis rule. It has generated controversy, and it consists of a series of specific words followed by a general expression.

All the specific words employed belong to the same genus. The question to answer then is: What is the genus to which they belong and to which all other words sought to be included under the definition must, necessarily also belong? I do not think there is much difficulty in coming to the conclusion, on a close study of the specific words used in that definition, that they all refer to periodic payments for the use of another's property, particularly, landed property. The mode of making the payments is absolutely irrelevant. What is vital is the nature of the payment. If my view of the matter is correct then the next point to consider is whether the moneys admittedly received by the accused are of the same kind or nature and consequently, belong to the same category as those specified in the definition as to make it permissible to be included in the prescribed list.

On the evidence, the moneys received by the accused and for which act of receiving he stood his trial were moneys paid and received in connection with the initial arrangements for the release of land by the accused and not for its user by the grantees. Payments in connection with user of land are not of the same nature as payments in connection with its grant or release. I did say earlier in this judgment that I would return to the value of the receipts later. Those receipts state in clear, unmistakable terms that the payments received by the accused were only in connection with the release of land. At that point the accused washed his hands off the transaction; all further transactions including, of course, arrangements for the use of the land and payments connected therewith were to be handled by the omanhene whose duty it would then be to draw up a suitable conveyance embodying the proposed user for submission to the Lands Department for concurrence, and it is moneys which become payable on the conveyance that fall in line with the specific words used in the definition, namely: rents, dues, fees, royalties, revenues, levies and tributes and consequently, moneys collectable only by the minister. Anyone who then receives any such moneys either alone or concurrently with the minister, commits an offence. I think the Chief Lands Officer made this quite clear when he said:

> "As far as I know, anyone who wants land must consult the accused and if there is land available and it is agreed that it should be granted, the terms of the agreement are embodied in a deed and submitted to our office for the purpose of obtaining the concurrence of the lands commissioner who, collects all revenue which accrues from the conveyance of the land."

I am mindful of the submission by the learned senior state attorney that the accused could collect before the conveyance what should rightly be collected after the conveyance but it should be noted that such payments in advance do not, by the fact of their mode of payment, change the nature of the payment. In other words, whether they were received by the accused before or after the conveyance; whether they were received in bulk or in instalments did not make them moneys received for user to qualify them for admission into the definition.

I have indicated earlier that the ejusdem generis rule will not apply if upon a wider inspection of the entire document there is reason to believe that general words must bear a general meaning. The aim of Act 123 under which the appellant was charged is sufficiently stated in section 1 of the Act. It reads, "The management of Stool Lands shall be exercised by the Minister." That Act therefore divests stools of the control, and to a large extent, the beneficial enjoyment of stool lands; but there is no deprivation of ownership and the trappings that go with ownership; and it is imperative that the Act be not interpreted in such a way as to give an effect which it admittedly did not intend.

I am further fortified in my view that the definition in section 17 (2) was not meant to cover all payments made in connection with land by looking at other sections of the Act. Section 7 (2) which, like section 17 (2) provides that moneys shall be paid into a specified account lays bare its scope in clear, unambiguous terms. It provides: "Any moneys accruing as a result of any deed executed or act done by the President under subsection (1) shall be paid into the appropriate account for the purposes of this Act." (The emphasis is mine.) Similarly section 18 also provides, "All sums collected by or transferred to the Minister under this Act shall, subject to the provisions of this Act, be paid into a Stool Lands Account." (The emphasis is mine.)

If Parliament intended, as the learned senior state attorney contended that the definition of "revenue" in section 17 (2) should cover all payments—even such payments as "drinks" provided that they are in connection with land, I, on my part, see absolutely no reason why Parliament should not have used similar words in section 17 (2) merely by omitting the specific words so the definition would begin with the words "all payments" and end with the words "to this Act." It should be remembered that the sole aim of preceding general expressions with particular and specific words is to enable the court to identify the particular genus to which the piece of legislation applies which itself presupposes that other related genii are excluded. What is more as Lord Westbury made quite clear in the case of Ricket v. Directors & c. of Metropolitan Railway Co. (1867) L.R. 2 H.L. 175 at p. 207, "... the general rule is, that a deliberate change of expression must be taken prima facie to import a change of intention." See also Evans v. Evans [1948] 1 K.B. 175 and Ex parte Haines [1945] K.B. 183. Lord Tenterden C.J. put it this way in the case of R. v. Inhabitants of Great Bolton (1828) 8 B. & C. 71 at p. 74, "Where the Legislature in the same sentence uses different words, we must presume that they were used in order to express different ideas."

When therefore both before and after section 17, the legislature used such expressions as "all moneys" and "all sums" but in section 17 (2) it changed the provision to "revenue" and then went on laboriously and meticulously to define what it meant by that expression, and it did that by employing the ejusdem generis form of legislation, it is my firm belief, that there must be a very good reason to support a contention that the expression has the same meaning, effect and scope as its predecessor and its successor. No such reason was given me, and I am unable to find any. Back to the receipts, it is worthy of note that each one indicated an abusa. Under the abusa system of tenure the landowner does not part with ownership of the land. There is no sale—the landowner merely lends to another, the use of his (landowner's) land, and gets paid for user. This means that any moneys paid him cannot be the purchase

price. If, as I have indicated, it also cannot be moneys received by the accused for user, then what else can it be but customary acknowledgement of the grant or the "Thank you" for it, albeit enormous, and formally acknowledged by receipts.

There is a dearth of decided cases on the scope and effect of section 17 of Act 123. Such as there are, only few in number, only deal mostly with the right to sue for moneys under the Act, and the more I read that Act, the more I am attracted to the view held by the learned trial judge that section 8 would probably be the appropriate section to apply to the transaction disclosed by the evidence for the prosecution.
For reasons given above, I am of the view that this appeal should fail and it is hereby dismissed. I would affirm the acquittal.

BEKOE v. SEREBOUR AND ANOTHER [1977] 1 GLR 118-123
HIGH COURT, SUNYANI
5 JULY 1976
MENSA BOISON J.

By his writ of summons the plaintiff claims against the defendants jointly and severally:
"(a) A declaration that by the custom of Seikwa, the Seikwa stool is entitled to one-half of all the proceeds accruing from palm trees in the area commonly known and called Ako-Atta on Seikwa stool land.
(b) A declaration that the piece of land bounded by the properties of [XYZ] and now occupied by the defendants forms part of the area commonly known and called Ako-Atta referred to in paragraph (a).
(c) An order that the defendants do account to the plaintiff as the occupant of the Seikwa stool for all proceeds of palm trees felled or sold by the defendants from September 1974 up to the date of judgment and to pay one-half of the said proceeds to the plaintiff."
The statement of claim was as follows:
"(1) The plaintiff is the chief of Seikwa and he brings this action for and on behalf of the Seikwa stool.
(2) The piece of land, the subject-matter of this suit, is situate at a place called Ako-Atta on Seikwa stool land.
(3) About 50 years ago there was a dispute between the Seikwa stool and Suma stool over the land at Ako-Atta.
(4) The dispute ended in favour of the Seikwa stool and thereafter the land at Ako-Atta was attached to the Seikwa stool.
(5) There were palm trees on the land at the time of the dispute.
(6) After the said dispute some citizens of Seikwa were permitted to farm on portions of the land at Ako-Atta.
(7) The palm trees thereon however remained the property of the Seikwa stool.
(8) The plaintiff says that about 40 years ago one Nana Kofi Tano of Buni was granted permission by the Seikwa stool to occupy and farm on a portion of the land at Ako-Atta.
(9) The said piece of land was bounded by the properties of Kwadwo Donkor, Sulage, Kwasi Mensah, the Seikwa stool land and the Ako-Atta stream.
(10) Nana Kofi Tano later cultivated cocoa on the land.
(11) The plaintiff says that it is the customary practice that anybody who felled palm trees on the Ako-Atta land has to account to the Odikro of Tanokrom, the caretaker for the Seikwa stool, and the stool is entitled to 50 per cent of the proceeds thereof.
(12) The late Nana Kofi Tano did comply with this practice until he died about 30 years ago.
(13) Since the death of Nana Kofi Tano the first defendant has been in possession of the land and for many years the first defendant did render accounts of the proceeds of the palm trees to the Seikwa stool and paid the portion due to the occupant of the stool.

(14) In or around September 1974, the first defendant felled 40 palm trees on the land but he failed to render accounts to the plaintiff.
(15) Upon inquiry the first defendant alleged that the second defendant had asked him the (first defendant) to stop accounting to the Seikwa stool as he the (second defendant) owns the land in dispute.
(16) Subsequently the second defendant consistently laid claim to the land in dispute and all the palm trees thereon.
(17) The first defendant again felled 70 palm trees on the land.
(18) The plaintiff therefore claims the reliefs endorsed on the writ of summons."
Lands subject to the Administration of Lands Act, 1962 (Act. 123), (hereafter referred to simply as the Act) are stool lands defined by section 31 of the Act to include:
"land controlled by any person for the benefit of the subjects or members of a Stool, clan, company or community, as the case may be and all land in the Upper and Northern Regions other than land vested in the President and accordingly 'Stool' means the person exercising such control."

The title of the action on the face of it shows the action is on behalf of the stool. It is not the plaintiff in his private capacity who sues — but in the capacity of his office as occupant of the Seikwa stool. As the pleadings show, the subject-matter is in respect of land the nature of which is stated to be land attached to the Seikwa stool. Mr. Akoto has, however, contended that the Ako-Atta land is owned by the stool family consequently it may be said to be private property of the stool family as distinct from public or communal stool land.
It is a common notion that the ruling family of any community or tribe in Ghana like other individual families of the community may themselves possess lands in their private capacity as members of the ruling family; in which case the land is family property of the stool family. This will be distinct from the communal land of the entire community properly called stool land of which the occupant of the stool is head. The conception is well illustrated by the case of Okyere v. Boye Adjei [1961] G.L.R. 34 on which Mr. Akoto relies to sustain his contention that the subject-matter here is stool family land. As it was stated at pp. 36-37 in that case:
"It appears clear therefore that although the property was, during the course of the trial, sometimes referred to as 'Mrontoh family stool property', it was not stool family property in the sense of belonging to the chief's immediate stool family. It was not 'stool family land' as was the subject-matter of the reported case Yaw Akyirefie v. The Paramount Stool of Breman-Esiam per Nana Kwa Bom III ((1951) 14 W.A.C.A. 331).

Coussey, J. in the course of the judgment said as follows: 'The evidence establishes that the Nsona Stool family is the family from which the occupant of the paramount Stool of Breman-Esiam is elected and that the family is composed of three sections, each with its abusuapenin or head. The land of the family is Stool family land and, according to well-known principles of native customary law, it may be farmed upon and used by members of the family so far as they do not interfere with the occupation of other members, under the direction of the senior head of the three sections'."

Thus the distinction has long been recognised; and in that case the land was held to be stool property in its fullest and true sense. The case would appear to illustrate also that where evidence shows the real substance of the nature of the land to be stool property the claim will be defeated by the Act. Having examined the pleadings I am satisfied that the point of law set down in the summons for directions may properly be taken and examined at this stage within the compass of the pleadings. The point was issue (k) namely: "Whether the plaintiff is the proper person to institute this action on behalf of the stool."

Now the land in question appears from paragraph (3) to have been acquired by the Seikwa stool as a result of litigation with the Suma stool, and the grant to Nana Kofi Tano of Buni was from the Seikwa stool. On this premise I hold that the land is such land as defined in section 31 of the Act as stool land. As the claim itself is for rents or tribute or accounts out of profits of palm trees felled on the land, that is covered by section 17 of the Act. By section 17 (1) of the Act, "All revenue from lands subject to this Act shall be collected by the Minister and for that purpose all rights to receive and all remedies to recover that revenue shall vest in him…"

The question then is are rents or accounts of profits from felling of palm trees included in that revenue? I have been treated to an exposition of the rights incidental to the holder of a determinable estate by counsel for the plaintiff. In particular that rights in palm trees are reserved to the determinable estate or usufructuary title. That of course is the correct statement of the law as cited by Mr. Akoto from the Principles of Customary Land Law in Ghana by Ollennu, where the distinguished author at p. 59 states: "Another important incident of the determinable title is the right to palm and cola nut and other economic trees of the land" — being such as were not produced by the industry of a tenant but as fruits of nature.
I am in some doubt myself if the right of the Seikwa stool was a determinable title; but the point is of no importance here. The right to palms is reserved to the owner of the determinable title as against the tenant who takes his grant from him, where the land is not subject to the Act. But the right of the Minister under the Act is not like such grant to the tenant. The original rights of the determinable title, and I would add the absolute title to the profits of the land vest in the Minister. So as against the Minister no reservation avails the owner of the determinable title or absolute title.

I myself tried to discover whether some produce of the land is excepted from the operation of the Act. But section 17 (2) appears to be all embracing when it provides:
"Revenue for the purposes of this Act includes all rents, dues, fees, royalties, revenues, levies, tributes and other payments, whether in the nature of income or capital, from or in connection with lands subject to this Act."
Unfortunately what is excepted from revenue under section 17 (2) is produce of land as defined by section 2 (excluding subsection (5) thereof) of the Forests Ordinance, Cap. 157 (1951 Rev.), which goes to the Chief Conservator of Forests. That does not avail the plaintiff here.

The authorities are numerous and certain that where the land is stool land the person who has capacity to institute action to recover any revenue is the Minister as defined under the Act, as provided by section 17 (1). I would refer only to Asani II v. Atta Panyin [1971] 1 G.L.R. 166 where a counterclaim for payment of tribute was dismissed on that ground.
Accordingly as a matter of law the point succeeds, that the plaintiff here has no locus standi and his action is misconceived. The action will be struck out. There will be costs of ¢75.00 against the plaintiff. There will be a stay of execution on this ruling for three months pending any notice of appeal.

DECISION
Preliminary objection upheld.
Action struck out accordingly.

NANA ASANI II v. ATTA PANYIN AND ANOTHER AND ATTA PANYIN AND ANOTHER v. ESSUMANG (CONSOLIDATED) [1971] 1 GLR 166-175
IN THE HIGH COURT, CAPE COAST
1 MAY 1970
OWUSU J.

OWUSU J.

In 1958 the first defendant, as the head of the stool family of Ewumaso in the Breman Asikuma Traditional Area and as the representative of the stool and the oman of Ewumaso, and the second defendant as the Omanhene of Breman Asikuma Traditional Area instituted an action against the plaintiff in suit No. 21/63 as the ohene and representative of the stool and the oman of Bedum also in the Breman Asikuma Traditional Area, claiming as follows:

"(1) For defendant to declare his title to all that piece or parcel of land situate at Bedum in the Cape Coast (2) For defendant and his people, servants, agents, tenants and workmen and all others claiming right of access to the said piece or parcel of land derived from the defendant to be restrained on Oath from interfering or in anyway dealing with the land the subject-matter of the dispute."

Earlier in 1943, the predecessor of the second defendant, the Omanhene of Breman-Asikuma had obtained judgment in respect of this same Bedum land against the Omanhene of Breman-Essiam in a case heard by the Judicial Committee of the Provisional Council of Chiefs, Cape Coast. The judgment was confirmed by Divisional Court, Cape Coast. The Ewumaso stool is a sub-stool to Breman-Asikuma and the caretaker of the Bedum land. In the late 1950's the Bedum stool began to allocate portions of the Bedum land to strangers without reference to the defendants and claimed that the Bedum stool was the owner of the land. This action of the Bedum stool resulted in the 1958 action.

That action commenced at the Native Court B of Breman-Asikuma, but was transferred in 1959 to the Land Court, Cape Coast. At the hearing of this transferred suit the plaintiff, then defendant, counterclaimed for title relying inter alia on a gift of the land by the defendants confirmed by a document dated 23 April 1943. This document was executed during the 1943 litigation by the accredited representatives of both defendants and purported to make an out-right gift of the land to the plaintiff. Judgment in that suit entitled Atta Panyin v. Asani II [1961] G.L.R. 305 which was delivered by Adumua-Bossman J. (as he then was) on 9 June 1961, granted the defendants herein a declaration of title to the Bedum land, but their claim for possession and an injunction was refused. The headnote to the report at p. 306 reads:

The judgement of Assumang B. has led to the two consolidated suits now before this court. For convenience I shall consider first suit No. 21/63.

There is another aspect of the counterclaim which needs consideration. The defendants are seeking by way of counterclaim: "An account of all moneys received by plaintiff from strangers on the said land." By the Administration of Lands Act, 1962 (Act 123), "Stool land" is defined in section 31 to include:

"land controlled by any person for the benefit of the subjects or members of a Stool, clan, company or community as the case may be ... and accordingly 'Stool' means the person exercising such control."

By this definition the land in dispute is obviously stool land and it is affected by section 8 (1) of the Act.

Section 17 provides:

"(1) All revenue from lands subject to this Act shall be collected by the Minister and for that purpose all rights to receive and all remedies to recover that revenue shall vest in him and, subject to the exercise of any power of delegation conferred by this Act, no other person shall have power to give a good discharge for any liability in respect of the revenue or to exercise any such right or remedy.

(2) Revenue for the purposes of this Act includes all rents, dues, fees, royalties, revenues, levies, tributes and other payments, whether in the nature of income or capital, from or in connection with lands subject to this Act."

The counterclaim contravenes the provisions of section 17 (1) of Act 123. Neither counsel directed his mind to the provisions of the Act, but it is clear from those provisions that the only person who can sue for account of all moneys whether tributes or rents or purchase price, is the minister responsible for stool lands. No evidence was adduced by the defendants during the hearing to the effect that the minister has so delegated any power to them to sue and be sued in respect of Bedum lands. That part of the counterclaim offends against section 17 (1) of Act 123 and on that alone I shall dismiss the counterclaim for accounts by the defendants.

The plaintiff did not call any evidence in support of his contention that the first and second defendants by themselves and their subjects have been molesting the plaintiff and his subjects and people. He also never supported his claim that the defendants are demanding that the plaintiff and his subjects and those who farm on the land enter into a fresh tenancy agreement with them. The defendants deny molesting the plaintiff and his subjects or any one else, but admit, however, that they have asked all strangers on the land to attorn tenant to the two stools and have sued some of these tenants. By the defendants' own admission there has been some molestation, though not physical, to strangers on Bedum lands. The question to be determined here is whether the defendants are entitled to demand these strangers attorn tenant to them. It must be reiterated that from the evidence there have not been any more strangers on the land since 1958, that is, before Adumua-Bossman J.'s judgment in 1961. The problem, therefore, centres on the very tenants or strangers who were on the lands before the 1961 judgment. These stranger farmers were on the land when this very court refused to grant possession to the defendants in 1961. If there was any need for the stranger farmers to attorn tenant to the defendants the defendants would have asked for the same in 1961. In my considered view the defendants are estopped from demanding any fresh tenancy agreements from the tenants on the land before Adumua-Bossman J.'s judgment and for this reason alone the plaintiff shall be entitled to an order of injunction restraining the defendants from molesting the old stranger farmers either by way of a court action or otherwise.

I am, however, to consider whether the plaintiff can after the 1961 judgment grant any new lease or sell any more land to stranger farmers without the consent and concurrence of the defendants who have been adjudged the owners of Bedum lands. In Kotei v. Asere Stool [1961] G.L.R. 492, P.C., Lord Denning delivering the opinion of the Board stated at page 495: "Native law or custom in Ghana has progressed so far as to transform the usufructuary right, once it has been reduced into possession, into an estate or interest in the land which the subject can use and deal with as his own, so long as he does not prejudice the right of the paramount stool to its customary services. He can alienate it to a fellow-subject without obtaining the consent of the paramount stool: for the fellow-subject will perform the customary services. He can alienate it to a stranger so long as proper provision is made for commuting the customary services. On his death it will descend to his family as family land except in so far as he has disposed of it by will, which in some circumstances he lawfully may do."
In Addai v. Bonsu II [1961] G.L.R. 273, S.C., one Yadiga inherited a usufructuary interest in a cocoa farm from his maternal brother; he was paying yearly tribute to the Kenyasi stool, which was a caretaker for the Hiawuhene as overlord. Yadiga sold the cocoa farm to the plaintiff with the consent of the overlord but the Kenyasi stool refused to accept the plaintiff's title. It was decided by the Supreme Court that despite the use of the words "fee simple" in the deed of conveyance executed by Yadiga the conveyance operated to transfer to the plaintiff whatever interest Yadiga had inherited from his brother, that is, a usufructuary right or possessory title. Again in Baidoo v. Osei (1957) 3 W.A.L.R. 289 it was decided by Ollennu J. (as he then was) that the determinable estate acquired by a stool subject was alienable without the necessity for consent by the stool so long as the alienation carried with it the

obligation for the transferee to recognise the superior title of the stool and to perform the customary services due to the stool from the possessor of the land.

Again in Total Oil Products Ltd. v. Obeng [1962] 1 G.L.R. 228, it was decided that a stool subject would forfeit his usufructuary title to stool land in his possession if he denied the title of the stool. The only way in which a subject could be said to have denied the title of his stool was where he claimed that the land he occupied belonged to a stool other than the stool to which he was subject, and that he held the land as a grantee of that stool. It was further decided that a lease by a stool subject of land in his possession did not constitute an alienation of his usufructuary title in the land and the stool subject did not require the consent of the stool.

A string of decided cases in addition to those above cited support this view of mine that so long as the Bedum stool continues to pay the annual tribute and recognises both Ewumaso and Breman-Asikuma stools as its overlord, it can deal with the Bedum land to the extent of its title. The Bedum stool can lease parts of the Bedum land not only to its subjects but also to strangers, it can even sell to strangers but the sale cannot confer more than the Bedum stool's determinable interest. See Sasraku v. David [1959] G.L.R. 7, C.A. where it was stated in the headnote (at p. 8) that: "(5) the estate passing on a sale, as between natives, of Stool Lands is not an unqualified ownership, but a possessory right to enjoy the land and the usufruct thereof." In James v. Oyewale, Court of Appeal, 14 January 1969, unreported, the Court of Appeal confirmed the judgment of Koranteng-Addow J. sitting at Sekondi on 10 March 1966: "I would rather hold that the people of Sefwi Bekwai by the grant made to them acquired a determinable estate or title in the land which is both inheritable and alienable." This view is equally supported by Ollennu J. (as he then was) in his book Principles of Customary Land Law in Ghana at pp. 54-55 where he states:

> "The determinable estate, as already stated, is just a qualification or burden on the absolute or final title. It has co-existence with the absolute ownership. It is the most perfect estate which a subject or member of the family or community may have in communal, tribal or stool land. Its existence is concurrent with the existence of the absolute ownership, which latter is generally dependent upon the occupation or possession by the subject.

So long as the subject acknowledges his loyalty to the stool or tribe, his determinable title to the portion of stool land he occupies prevails against the whole word, even against the stool, community or tribe."

And see Thompson v. Mensah (1957) 3 W.A.L.R. 240, C.A. In Bentsi-Enchill's Ghana Land Law at p. 11 7 it is stated:

"Furthermore, it is necessary to observe that whoever purchases land within a certain polity necessarily places himself under the jurisdiction of that polity in respect of the land purchased. The welcome given to stranger settlers on community land in the past was based in large part on the expectation and assurance of the assistance obtainable from them in times of emergency, such as war. Strangers not obliging in this way would cease to be welcome. Strangers could not therefore escape from making some sort of contribution to the community on whose territory they had now come to settle. The services rendered formerly, however, varied from place to place; and, in modern times, have ceased to be significant in many areas, at least for the generality of the populace, except in the form of stool levies or taxation for various communal purposes. Now that the jurisdiction of the old indigenous states is being ousted by the new machinery of local and central government with its new machinery of taxation, it has become less necessary to presume the existence of any unexpressed restrictions or reservations in grants to strangers."

These views of Ollennu and Bentsi-Enchill supported by the numerous cases referred to above fortify and indeed sanctify the possessory title in the Bedum stool. Had the Bedum stool even denied the title to Bedum land by the Ewumaso and Breman-Asikuma stools, a fact that was not supported by any evidence, it would not automatically forfeit the right of the Bedum stool and its people to the land unless and until proceedings had been initiated.

BOATENG ALIAS BEYEDEN v. ADJEI AND ANOTHER [1963] 1 GLR 285-302
IN THE SUPREME COURT
13TH MARCH, 1963

SARKODEE-ADOO, MILLS-ODOI AND AKUFO-ADDO JJ.S.C.
AKUFO-ADDO J.S.C.

The Nsenifuor stool family is a large family in New Juaben and owns a stool the occupant of which is one of the principal elders of the paramount stool of New Juaben. This family has its seat at Koforidua which is also the seat of the paramount stool, and has branches at Effiduasi and Gyegyeti. The Effiduasi branch calls itself the Agona family of Effiduasi and it is the branch to which the plaintiffs and the late Kwasi Baah aforesaid belong Kwasi Adei (the first plaintiff was a brother and the successor of the said Kwasi Baah, and Yaw Kobi (the second plaintiff) is the head of the Effiduasi branch. Kwasi Baah was by local standards a well-to-do person who acquired a good deal of property by his own exertions. About 25 years ago when the Nsenifuor stool fell vacant, the said Kwasi Baah was invited by the Nsenifuor family to accept the occupancy of the stool. He accepted the invitation, and he occupied the stool for about twenty years. He died in February 1957 and the first plaintiff Kwasi Adei was then elected to occupy the stool. He occupied the stool for about three weeks and abdicated before the final ceremonies for his installation had been performed, because, in his own words, he "chose to retain or inherit the deceased's private properties." The first plaintiff was thereafter elected the successor of Kwasi Baah by Kwasi Baah's immediate family (i.e. the Effiduasi branch). Another member of the Nsenifuor family, Kwabena Gyang, was placed on the stool, but was destooled after about two-and-a-half years, and defendant was enstooled in his place.

Meanwhile, the properties of Kwasi Baah had passed through Kwabena Gyang to the defendant who claimed to be entitled to them on the ground that these properties, for reasons that will be discussed later, had become stool properties. The plaintiffs, on the other hand, claimed that since the properties were the self-acquired properties of Kwasi Baah, they devolved on the death intestate of Kwasi Baah upon his immediate family and not upon the wider family or the ancestral family, that is the Nsenifuor stool family.

The defendant claims that the properties of Kwasi Baah became stool properties on his death because, as he put it in the trial court, "the stool of our family would take the occupant's self-acquired or private property at the death of the occupant. This has been the practice for long," and again, "It is our custom on the stool that a person's property emerged [meaning is merged] into stool property at his death. This is a custom in New Juaben in all stool families." The defendant further contended that when the Omanhene of New Juaben was not favourably disposed to accepting Kwasi Baah as Nsenifuorhene, the plaintiff, in order to persuade the Omanhene to so accept his brother, publicly declared that his brother's accession to the stool would benefit the stool as he (Kwasi Baah) was bringing all his properties to the stool.

This alleged declaration was construed by the defendant and his witnesses to amount to a public acknowledgment by the first plaintiff of the custom of New Juaben as contended by the defendant or to a virtual gift to the stool of Kwasi Baah's properties made by the plaintiff on behalf of Kwasi Baah.

The defendant also contended that the plaintiff was estopped by conduct from claiming these properties because he had acquiesced in the properties being handed over to Kwabena Gyang as stool properties upon the installation of the said Kwabena Gyang and had, by several other acts of his, acknowledged the fact that the properties were, or had become, stool properties.

The trial local court magistrate gave judgment for the defendant on the ground that the plaintiffs had acquiesced in the properties being treated as stool properties since the death of Kwasi Baah and were therefore estopped by conduct from making their claim. The plaintiffs appealed from this judgment to the High Court, Accra, where Adumua-Bossman J. (as he then was), reversed the decision of the local court magistrate and entered judgment for the plaintiffs granting them the reliefs sought by their writ of summons, namely, a declaration that the properties of Kwasi Baah enumerated in the writ of summons were the properties of the immediate family of Kwasi Baah (i.e. the Agona family of Effiduasi), and not those of the Nsenifuor stool family (i.e. wider or ancestral family), and an order for possession. It is from that judgment that the defendant has appealed to this court.

Apart from the issue of the alleged acquiescence on the part of the plaintiffs a more important point fell to be considered by Adumua-Bossman J. in the High Court, namely, the law relating to the self-acquired or private property of an occupant of a stool.
Before dealing with the points raised in this appeal, I would like to make some general observations on the law which I hope will not only be pertinent to the present case but also help in clarifying the law on the subject.

A stool according to the law of this country as contained in judicial decisions on the subject, is a corporation sole. As Deane C.J. said in Quarm v. Yankah II:
". . . the conception of the Stool that is and has always been accepted in the Courts of this Colony [meaning Ghana as it then was] is that it is an entity which never dies, a corporation sole like the Crown, and that while the occupants of the Stool may come and go the stool goes on for ever."

Deane C.J. goes on in the same judgment to say that the occupant of a stool is "not. . . the successor of the previous holder but only as the person for the time being representing something that has never changed." See also Hammond v. United Africa Company Limited. In other words an occupant of a stool is not the successor of the previous occupant in the sense of his being his legal personal representative, and he is not by reason merely of his occupancy of the stool in succession to the previous occupant entitled to the private possessions of the previous occupant unless in addition to being the successor-in-office he is also elected by the family as the personal successor of the previous occupant.

It follows that a stool has a legal personality quite distinct from the individual (including the stool occupant) and the various branch families that make up the wider or the ancestral family that is the stool family. It follows further that the individuals and the branch families are in law capable of holding properties in their own right that are not in any way affected by the incidents attached to properties of the stool family, and in this respect a stool family is in no different position from an ordinary (or a non-stool) family.

Sarbah, in the second edition of his Fanti Customary Laws at page 99 says; "A person may make valid testamentary disposition of self-acquired property as distinct from stool property," and I may add "or family property."
That the customary laws of Ghana uphold the sanctity of self-acquired properties owned by individual members of a family or by the branch-families of a wider or an ancestral family is not now open to doubt, if it ever was.

Individuals whether as ordinary members or as heads of families, where they own properties of their own, have always striven to maintain the identity of their self-acquired properties distinct from family properties, and when a dispute has arisen in the courts between a member or the head of a family on the one hand and the family on the other as to whether a particular property is or is not the self-acquired property of the party claiming, the courts, in adjudicating on the issue, have always done so on the basis of proof by evidence adduced by the party alleging that the property is self-acquired or family-owned. But more simply, it is a matter of evidence at every stage in the history of a given property, whether that property is self-acquired or family-owned. In this respect, I am not aware of any principle of customary law which lays down different principles for the purpose of determining the true nature of any given property where the claimant to property as being self-acquired is an ordinary member, and where he is the head of a family, nor is there any principle which in this respect distinguished between the head of a family and a stool occupant whose position vis-a-vis property owned by him is analogous to that of the head of a family.

Unfortunately, early judicial enunciations of the principle of customary law relating to this subject have sought to place a stool occupant in a different category from that of the head or an ordinary member of a family, and such enunciations, probably in the interest of brevity, have been couched in such language as to create in the passage of time a certain degree of complexity and confusion wholly unwarranted by a proper understanding of basic principles.

The first judicial declaration of the customary law on the subject is contained in the judgment of Gardiner Smith J. in the case of Antu v. Buedu.4 In that judgment the learned judge said: "It is a basic principle of native law, as I understand it, both in the Colony and in Ashanti, that, unless a Chief's private property is earmarked when he ascends the stool, it becomes mixed up with the stool property, and cannot be claimed by him on his deposition."

This famous dictum appears to declare a principle of substantive customary law which lays down a condition precedent to the continued maintenance of a stool occupant's ownership of his self-acquired or private property to the apparent exclusion of all other considerations." Earmarking" here amounts to a declaration by a newly installed chief in the presence of witnesses (usually elders of the stool) that certain identified and identifiable properties are his private or self-acquired properties. Such public declarations in the days when there were no effective means (like documents of title or other paper-writings) of perpetuating the testimony of existing facts were the only means, or perhaps the most effective means, known to customary law for securing the necessary evidence at some future time for the proof of the facts so declared. Viewed in the light of this principle, the dictum of Gardiner Smith J. amounts to no more than a declaration of a rule of evidence as known to customary law, and not a rule of substantive customary law.

The courts in later cases have, however, felt disinclined by the compelling circumstances of those cases to apply Gardiner Smith J.'s declaration in all its grandeur. But the courts in doing so have unfortunately acknowledged this declaration as a statement of a principle of substantive law and have described their decisions as "exceptions" to the general law. Some of these so-called "exceptions" have been founded on what the courts have described as local variations of the general customary law.

Except in the special case of forfeiture for breach of conditions of limited ownership, I know of no principle of customary law which operates to terminate the ownership of property save by the voluntary act of the owner of property, and there is no principle of customary law which in this respect distinguishes property owned by a stool occupant from that owned by the head of a family or by any other member of a family. When therefore a stool occupant like any other person lays claim to property as being his self-acquired property the criterion for adjudication must be, "is there proof that the property is the self-acquired property of the claimant?" and not, "was the property claimed earmarked upon the claimant's accession

to the stool? " Where any question of earmarking falls for consideration, it can only be considered as some evidence, not the only evidence, supporting the claim. Were the principle of customary law otherwise there would be no end to injustice. Take a simple example of a man who before his accession to a stool has acquired properties in respect of which he holds valid documents of title, and not only does he not earmark his properties on his enstoolment, but also throughout his occupancy of the stool he has kept his ownership of the properties a complete secret from everybody. Suppose such a person were to be destooled, or to make a will in respect of his properties, and upon his destoolment or death the stool family gets to know of the existence of these properties and lays claim to them as stool properties on the ground, following the Antu v. Buedu declaration, that he did not earmark the properties on his accession and they have therefore become "mixed up with stool properties," one can hardly imagine any court in this country declaring such properties stool properties in the face of proof provided by the documents of title. And yet if the Antu v. Buedu dictum is to be regarded as a declaration of substantive customary law such properties must be adjudged stool properties. This then is the reduction ad absurdum of the rule in Antu v. Buedu regarded as a rule of substantive law.

It is very pertinent to note that in the view of Ollennu J. (a view affirmed by this court) the failure on the part of a stool occupant to declare or earmark his private properties does no more than raise a presumption that any such properties unknown to the stool elders are stool properties. But it is only a presumption of fact which, like all other presumptions of fact, is susceptible to rebuttal by evidence to the contrary, and when such evidence is available and accepted the failure to earmark is of no consequence whatsoever.

I find support in this statement of the law by Ollennu J. for the view that the rule in Antu v. Buedu is a rule of evidence and not of substantive law. Ollennu J. however appears to have obscured this very salutary interpretation of the rule in Antu v. Buedu by feeling himself obliged to follow the precedent (which I have demonstrated, I hope, to be founded on wrong premises) in Yamuah IV v. Sekyi in treating this case as an exception to the general rule of customary law enunciated in Antu v. Buedu which he says applies only to "ancestral stools which have accumulated properties" or to "stools to which definite properties were attached upon their creation." Undoubtedly, Ollennu J. was constrained to this view by the words "mixed up with the stool property" appearing in the statement of the rule in Antu v. Buedu, the inference being that there must logically be a pre-existing stool property with which the property of the stool occupant could become mixed up. But if the issue whether a given property is or is not the private property of a stool occupant is determinable upon proof of an averment in the ordinary way by evidence (whether such evidence be one sanctioned by customary law or by the rules of court), what does it matter whether the stool concerned has or has not property already attached to it, except that it may be said that proof by a stool occupant making a claim to property is in the nature of things bound to be much easier where the stool has no property attached to it than otherwise.

I have discussed these two most important cases relating to the private property of a stool occupant, not with the object of questioning the conclusions arrived at by the judgments therein, but only with the object of bringing out in bolder relief the basic principles upon which, in my view, those conclusions proceeded but which do not become apparent because the courts concerned felt themselves obliged to confine their reasoning strictly within the framework of the interpretation they had placed on the Antu v. Buedu rule as being a rule of substantive law.

In the present case the plaintiffs had no need to adduce evidence to prove that the properties concerned were the self-acquired properties of the deceased Baah. This fact was admitted

by the defendant whose case was based essentially on three grounds which as already stated were briefly as follows: first, that the self-acquired properties of an occupant of the Nsenifuor stool became stool properties upon his death by reason of his occupancy of the stool; secondly, that the deceased Baah made in effect a gift of his properties to the stool upon his accession; and thirdly, that the plaintiffs were estopped by conduct amounting to acquiescence from claiming the properties for their immediate family; and the defendant stated the details of the plaintiffs' conduct upon which he relied, but more about this later.
The local court magistrate had no difficulty in disposing of the first ground in the following words:

> "The court is of the opinion that, the only just or right conclusion which can be arrived at is that the self-acquired properties are for the inheritor and the after-acquired properties are for the stool. But it may be that, in certain localities different presumption apply in the case of self-acquired properties of a deceased chief merging into stool properties. On this doctrine this court thinks it right to state that it would be contrary to the principles of equity and good conscience to allow this native customary law in its entirety. It is plain that according to the contemplation of the native customary law as embodied in numerous decisions in courts as well as indicated by the strong evidence of the plaintiff, there is no such law as I understand it, that the self-acquired property had on one's own exertions shall become a stool property at the death of the stool holder-and not the after acquired ones."

Omitting reference to "after acquired properties" and to "different presumptions" in "certain localities" this finding of the local court magistrate in addition to being fully justified by the evidence is a fair statement of the position at customary law which is of general application to Ghana as a whole, and it is substantially in conformity with the view which I have endeavoured in this judgment to express, namely, that it has never been a principle of the customary laws of Ghana that the self-acquired properties (whether acquired before or after his accession to the stool) of a stool occupant become merged into stool properties by the mere reason either of the owner of such properties occupying a stool or of the absence of a pre-enstoolment declaration or earmarking of such properties.

Although the local court magistrate made no specific finding on the second ground it is clear from the evidence that no such gift was made, and that this ground was put forward by the defendant in an ungainly attempt at a reargued action, no doubt in view of the patent untenability of his first ground, and counsel for the appellant in the High Court did not appear to have relied very much on this allegation.

Dr. Danquah contended that the evidence amply supported the finding that the plaintiffs were estopped by conduct amounting to acquiescence.

Adumua-Bossman J.'s exhaustive analysis of the evidence demonstrates very clearly that that finding is not supported by the evidence. What is more Adumua-Bossman J. went further in the consideration of this issue to assume the truth of the facts alleged to constitute the conduct on the part of the plaintiffs which it was contended operated to estop them, and to subject those facts to the test provided by the case of Willmot v. Barber15 The result of Adumua-Bossman J.'s examination of the facts in the light of the test aforesaid was his finding that the alleged conduct of the plaintiffs

> "falls very far short of satisfying the conditions and/or test necessary for invoking and/or applying the equitable doctrine of acquiescence laid down not only by the English case of Willmot v. Barber but the local cases to which we have already made reference."

Dr. Danquah in attacking this finding submitted that the first plaintiff by his conduct induced in the Nsenifuor family the belief that the properties were stool properties. The particular conduct to which he referred was the allegation that in the discussion in the Omanhene's

house the first plaintiff made on behalf of Baah, and with the latter's tacit approval, a gift of Baah's properties to the stool. The fact relied on by the defendant in putting forward the allegation of a gift was that when the Omanhene was reluctant in accepting the election to the stool of Kwasi Baah, the first plaintiff, in order to persuade the Omanhene to accept his brother, said that his brother Kwasi Baah was ascending the stool with all his properties. Dr. Danquah did not contend that there was a gift in law, but he argued that the statement attributed to the first plaintiff somehow confirmed the Nsenifuor family in their belief, erroneous though it might be, that the properties of a person occupying the Nsenifuor family stool became stool properties on his death. Counsel went on in his submissions to find support for this contention in the fact that for two-and-a-half years after the death of Kwasi Baah, the first plaintiff, acquiesced in these properties being treated as stool properties.

The short answer to this argument is that the Nsenifuor family, a family whose head is one of the principal elders of the New Juaben Paramount Stool, ought at least to know the customary law relating to the private property of a stool occupant, and if they were prepared to allow themselves to be inveigled into the belief that their rights under the law were different from what the law actually conferred on them, in my view, they can have no cause for complaint if they are rudely awakened to the stark realities of the law. Further, the contention that the first plaintiff acquiesced for two-and-a-half years in the properties being treated as stool properties is not borne out by the evidence, for the evidence shows that during that period he was at various times protesting vigorously his rights, but somehow in the initial stages of his struggle he did not get the full support of his branch of the family. He was therefore obliged in military parlance to retreat and to re-form, and when the opportunity presented itself favourable to go on the attack again. Adumua-Bossman J. in describing this stage of the first plaintiff's fight for his rights said:

> "Apparently it was after this rejection of this claim by the wider family at a time when he does not appear to have been formally appointed successor nor openly supported by the immediate family group at Effiduase to claim the properties, that he appears to have decided to be philosophical enough not to press his claim for the time being but to join or rather co-operate with the other elders of the family in electing and enstooling chief Djan, but with the intention no doubt to await a favourable opportunity for raising again and pressing his claim at a more favourable or opportune time."

Dr. Danquah has seized upon the expression "appears to have decided to be philosophical enough not to press his claim" as supporting his contention that the first plaintiff, in representing to the Nsenifuor family during this period of "philosophic" calm that the properties were stool properties, was perpetrating a fraud on the Nsenifuor family and that the [p.302] expression just quoted was a euphemism of Adumua-Bossman J.'s for the plaintiff's dishonesty. This may be a good exercise in logical argumentation, but nowhere in the judgment did Adumua-Bossman, J. find that the first plaintiff had been dishonest, nor was Dr. Danquah able in this court to establish any fraudulent conduct on the part of the first plaintiff.

Dr. Danquah relied on the case of Rafat v. Ellis, in which the plaintiff was held to be estopped by conduct from making a claim for possession of land with a building thereon constructed by the defendant while the plaintiff kept discreetly silent. The ratio decidendi in that case was that the plaintiff by his silence had encouraged the defendant to spend money in constructing a building on the land in the belief that the land was his, and he (the plaintiff) could not be permitted to take advantage of what amounted to fraudulent conduct on his part. In this case Dr. Danquah has not been able to show that whatever the conduct of the first plaintiff, the Nsenifuor family was led by that conduct to spend money or to prejudice their position in any way in the belief that the properties were stool properties. The ground of appeal relating to this issue fails. In conclusion I am satisfied that there was ample evidence not amounting to

earmarking to support Adumua-Bossman J.'s finding that the properties were not stool properties and that the immediate family of Kwasi Baah, i.e. the plaintiffs, were entitled to the possession and enjoyment of the properties involved in the action. Such evidence being that Kwasi Baah's ownership of these properties was well known to the Nsenifuor family, that he made no gift of the properties to that family and that during his occupancy of the stool and to the knowledge of the stool family he kept these properties separate and distinct from the stool properties which were handed over to him on his accession.

ADJUBI v. MENSAH [1974] 1 GLR 93-100
COURT OF APPEAL, ACCRA
31 JULY 1973

AZU CRABBE C.J., LASSEY AND ARCHER JJ.A.

LASSEY J.A.

The plaintiff and the defendant are both hereditary members ofthe same family. The plaintiff is the personal successor appointed in the family to succeed to a deceased ancestor, while the defendant is the person selected to succeed to the public office of linguist which was founded in the family by a common ancestor, one Opanin Kwaku Osei, deceased. The dispute is over the right of ownership and possession of certain properties comprising a double-barrelled gun and a house which it was admitted were self-acquired by Opanin Kwaku Osei, who also later became the first linguist of the oman stool in the Effiduase traditional area.

Traditionally, the Effiduase area of Ashanti had never possessed a linguist stool, but in recent times, during the reign of one Chief Kwame Mensah of Nkwamkwam, one such post was created, and the common ancestor, Opanin Kwaku Osei, became the first linguist to occupy it. Although he hailed from the neighbouring village of Nkwamkwam, yet the chief of the town invited him to be linguist and he agreed. This event marked the creation of the linguist line in the family of the parties, and was also the beginning of the institution of the office of linguist in the traditional set-up in the area.

Before he agreed to become linguist, Opanin Kwaku Osei was known in private life to have possessed considerable property and wealth all of which he acquired by dint of his own efforts or labour. That being the character of his properties, including the properties in dispute, it follows that upon his death intestate the properties should devolve according to the custom of his matrilineal descent upon the hereditary members of his family who would automatically be vested with their ownership and the right to possession.

It so happened that Opanin Kwaku Osei did not die as an ordinary member of the family. He died while a linguist to the oman stool. He died without having taken steps to earmark his identifiable self-acquired properties. In such a situation, strict customary law requires that the properties he possessed should become forfeited to the linguist stool or office and not devolve upon the hereditable members of his family.

The question is: as between the plaintiff and the defendant, who has the better right to take possession of the properties concerned? The plaintiff advances her claim of ownership to the properties on the ground that upon the death of their owner, the late Opanin Kwaku Osei, by force of customary law the said properties became family property, and so in her capacity as the present successor in the family, she is entitled to their enjoyment and occupation. The line of defence of the defendant is that upon the death of Opanin Kwaku Osei, the said properties enured for the benefit of the linguist stool which he founded because he died possessed of the properties while still a linguist stool occupant. The defendant, therefore, contends that as the present linguist he has the right to use the properties.

In this conflict, efforts by family members to resolve the deadlock between the two contestants proved to be of no avail, and the result of it is that the plaintiff was obliged to institute two

separate actions against the defendant, claiming recovery of the properties. The two actions were consolidated and tried together. Judgment went against the plaintiff. She appealed on the ground that the conclusion of the judge is against the weight of the evidence. At the hearing, counsel for the plaintiff told the court that the object of bringing the appeal is to set aside the judgment of the court below so as to enable the plaintiff to recover possession of the double-barrelled gun only from the defendant.
The conclusion of the learned judge involves consideration of questions of fact and law. Learned counsel for the plaintiff presented and persuasively developed two points in his submissions to the court. The first point made by counsel concerns the weight of the evidence in the case. He submitted that, on a proper appreciation of the evidence, the correct conclusion was for the learned judge in the circuit court to have found in favour of the plaintiff. He contended that there was no good ground shown on the evidence adduced which provides justification for the court to conclude that "the defendant, the present linguist in the family, having been appointed to the said office after the death of Kofi Boadi, the last linguist . . . the gun and house automatically devolved on the defendant." Counsel further pointed out that the evidence showed that throughout his assumption of office as linguist, the late Opanin Kwaku Osei, the common ancestor of the parties, dealt with his self-acquired properties as if they were privately owned and regarded them as such.

In my view, the learned circuit judge might have thought that the defendant was legally entitled to keep the properties in question because the evidence showed that after the death of their original owner, some of the properties admitted to have been self-acquired by him were made available for free use by members of his family, including the successive holders of the office of linguist in the family. There was evidence that after the death of the common ancestor and founder of the linguist stool in the family, his various successors-in-office were also appointed as personal successors in the same family. Thus after the death of Opanin Kwaku Osei, he was succeeded by Kweku Maase, both as personal successor and also as the next linguist. Similarly, after Maase's death, Kofi Boadi succeeded and had the double role. The evidence was that he was chosen as the personal successor by the family, and later was appointed by the chief of the town as linguist. All these individual persons had the free use of the double-barrelled gun and resided in the house in question without protest by the family. It seemed there might well have been objections by the family if the individual members had attempted to use the properties in question or deal with them in a manner which was inconsistent with the family's ownership. But as the evidence led now shows, it seems it is the present linguist who now asserts a right adverse to that claimed on behalf of the family by the plaintiff, hence the present litigation.

That being the factual position, I cannot conceive of any rule of law which operates so as to terminate the family's ownership or entitlement to the properties and convert them into a sort of public ownership of the linguist stool, save by the voluntary act or consent of the family itself. In my opinion, it appears the defendant is enabled to advance this claim of ownership and possession to the properties by reason of the fortuitous circumstances that their original owner happened at the same time to be the founder of the linguist stool and used them while a linguist.

As already indicated, the conclusion of the learned circuit judge also involves a consideration of the application of the principle of customary law as enunciated in Antu v. Buedu (1929) F.C. `26-`29, 474. Although it does not seem that any of the cases decided by the courts since Antu v. Buedu (supra) were cited before the learned judge or brought to his notice, yet the reasoning behind the conclusion indicates that the judge might have been influenced to some extent by the decision in which the applicability of the rule had been canvassed and given sufficient judicial determination.

The question now is: under what legal right has the defendant declined to surrender the properties in dispute to the plaintiff who demanded their restitution by right of her being the present successor appointed by the family of the deceased? It seems to me that the defendant argues that he is entitled to hold on to the properties by operation of the rule of customary law as sanctioned by the decision in Antu v. Buedu above. His reason seems to be that as the original owner of the properties concerned died possessed of them while still a linguist and failed to declare their nature or identity prior to his enstoolment, the said properties after his death became attached to the office which he founded. In this way, the rule of customary law operates to divest the ownership of the self-acquired properties of Opanin Kwaku Osei who failed to make a pre-enstoolment declaration of his properties prior to his death. In so far as the final conclusion in the case seems to have been influenced to some extent by the rigid application of this rule as enunciated in early times, it is therefore, necessary to consider the correctness of the basis of the decision appealed from, and the circumstances of the application of the principle of customary law in so far as it was relevant. I think that in the absence of any evidence that the common ancestor of the parties intended to make a customary gift or did make an outright gift of these properties to the customary office he created in the family, it seems no principle of law can divest his family of the ownership of the properties after his death. The learned judge obviously was wrong in holding that the said properties "had consistently devolved on all other members of the family who had held the office of linguist." From the fact that the particular properties were freely available for the purpose of the stool holders who were also members of the family it does not follow that they are the legal owners thereof, unless by force of customary law. It seemed the reason for the forebearance on the part of the family in not suing for the recovery of the properties in the past was because the former successive linguists, since the death of Opanin Kwaku Osei, made no adverse assertion of ownership or occupation of the properties as against the family. But the present defendant, by his conduct in refusing to acknowledge the exclusive ownership of the family in regard to the properties concerned, and also to deliver up possession of the double-barrelled gun in particular, might have provoked the present plaintiff to sue to assert the family's ownership and lawful right of occupation in respect of the said properties.

The rigid application of the rule of customary law relating to a stool occupant's self-acquired properties after death has been found to reveal disturbing features and worked great injustice in practical cases, and so the courts have felt the need to impose some qualification in its application in certain respects. Thus in a case in which it can be shown that the new chief has by word or conduct indicated that he intends to keep his privately-owned properties, effect is now given to the evidence as a matter of fact, instead of the court acting on a general principle of customary law that property belonging to a chief while on the stool belongs to the stool upon his death or deposition. As I have shown, it is plain from the evidence that throughout his tenure of office as linguist, the late Opanin Kwaku Osei dealt with the properties in dispute as his privately-owned properties even though the evidence showed that he used them at the same time while on the linguist stool. It seems that the view of the courts now as shown in some of the decided cases such as Yamuah IV v. Sekyi (1936) 3 W.A.C.A. 57, Acquah III v. Ababio (1948) 12 W.A.C.A. 343 and Serwah v. Kesse [1960] G.L.R. 227, S.C. is that henceforth the courts must seek to dismiss the stringent application of the rule, in favour of attaching much importance to the weight of the evidence, and make a finding of fact as to whether the intention is to keep the properties in the family or give them up to the traditional office or stool. By departing from the application of the content of the rule of customary law as rigidly applied before, the courts have introduced into the law relating to the status of a chief's privately-owned properties after death, a new guiding principle of the relevant customary law of fundamental and far-reaching importance which is bound to affect

and influence the action or conduct of persons eligible to ascend traditional offices in relation to their private possession. In my view, from their recent decisions on the subject, it is clear the courts have evolved and laid down the other side of the general rule of the customary law in the sense that if in a particular case the weight of the evidence is that the stool occupant desires to keep his privately-owned properties distinct from the rest of the property of the stool he occupies, it is the duty of the court to give effect to that instead of automatically applying the view of native law as in early times.

The essence of these decisions is that the application of the rule in its original form or otherwise depends upon the facts in each case. In my judgment, the recent decisions on the topic I have referred to have the support of reasonableness in the application of the particular principle of customary law, and show authority and consistency, and I would add good-sense, in their qualification of the strict principle. As the criterion for adjudicating the ownership and possession of the properties in dispute in this appeal is the weight of the evidence and not the strict application of the relevant rule of the customary law, the ground for the decision of the learned judge of the court below seems to me to be untenable in law, therefore, it follows that the appeal must succeed and it is allowed. The judgment of the court below is set aside together with any order as to costs
DECISION
Appeal allowed with costs.

SERWAH v. KESSE [1960] GLR 227-231
IN THE SUPREME COURT
28TH NOVEMBER, 1960

VAN LARE, SARKODEE-ADDO AND AKIWUMI, JJ.S.C.

VAN LARE JSC
The plaintiff was enstooled Queen Mother of New Juaben in 1948 and destooled in 1952. The defendant succeeded her on the Stool in 1952. Between 1948 and 1952 the Department of Agriculture paid rehabilitation grants in respect of 28 farms known as Koforidua North, Koforidua South and Akwadum to the plaintiff and after her destoolment the grants were claimed by her successor the defendant, on the ground that the farms were stool property and the grants were paid to the plaintiff between 1948 and 1952 as stool occupant and not as beneficial owner of the property. In the circumstances the plaintiff brought an action claiming declaration of title to the farms, the recovery of any payments made by the Department of Agriculture to the defendant, an account and also an injunction.
The action was tried in the Land Court, Accra, by Ollennu, J. who held on the evidence that the farms in dispute were family property of the plaintiff and gave judgment in her favour. The defendant appealed to the Supreme Court on the grounds (1) that the plaintiff had not proved title beyond all reasonable doubt, (2) the Land Court had no jurisdiction to hear the case as it related to the recovery of property alleged to be stool property, and (3) the plaintiff had not declared the farms as private family property on her enstoolment and therefore by customary law the farms merged with and attached to the stool properties of the Queen Mother of Juaben.

On the evidence as a whole the appellant does not appear to have any answer to the strong case made by the respondent nor has she put forward for consideration any case in opposition to that made by the respondent. On the other hand from the evidence of the appellant and her witnesses one is bound to be led to the conclusion that the disputed farms are not stool properties nor could they possibly be attached to the office as alleged. There is no wonder therefore in my view for the trial judge's conclusion that the disputed farms belong to the

respondent's family—Kua family. This decision is in accordance with the principle of our customary law that among the Akans the immediate beneficial interest in a woman's self-acquired property descends to her children and their children—children's children meaning the children of daughters only—see the judgment of Ollennu, J. in Mills v. Addy (3 W.A.L.R. 357).

Learned counsel relies on the law laid down in Antu v. Buedu (F.C. 1926-29, 474), which is that unless a chief's private property is earmarked when he ascends to the stool, it becomes mixed up with the stool property and cannot be claimed by him on deposition. He further submits that the principle of law so enunciated has no exception and there can be no instance when it cannot apply. He has argued that in the absence of evidence that the respondent earmarked her said family property, that is to say, the disputed farms when she became Queenmother of New Juaben, by customary law her said property became merged and the said property must be deemed to have become a property attached to the stool of the Queenmother of New Juaben.

I am unable to agree. The exception to the general rule has been laid down by a later decision of Yamuah VI v. Sekyi (3 W.A.C.A. at p. 58) when the West African Court of Appeal accepted and attached great importance to the evidence that:
"the private property of a man put on the Stool as Ohene does not go to the Stool and he can dispose of it as he likes, and that if he is trading whilst on the Stool he can do what he likes with what he makes by his trading if he is trading with his own money."
In my view the following statement of the law which I quote from the judgment appealed from relating to the position appears to me to be wholly correct:
"There are many exceptions to that rule one of them is that where the stool holder has to the knowledge of the elders of the stool, kept his self-acquired property distinct or where whilst he is on the stool he engages in his private business to the knowledge of the elders, from which he earns an independent income, his failure to make pre-enstoolment declaration of his self-acquired property will not make his self-acquired property stool property.
The general rule of customary law referred to by counsel applies either to ancestral stools which have accumulated properties over the generations or to stools to which definite properties were attached upon their creation. The occupant of such stool is expected to use part of the proceeds of such stool property for his upkeep and to apply part in acquiring more properties for the stool. Therefore if an occupant of a stool has a private source of income which is not known to the elders of the stool it is presumed that he maintains himself from the stool property he met, and that any property he acquires whilst on the stool was acquired with funds of the stool and are therefore stool property".

In the present case the stool of the Queenmother of New Juaben is found to be of recent creation and not an ancestral one and as the stool had no property which could possibly be mixed up with any self-acquired property of its occupant, there was no necessity for the respondent or for the deceased member of the respondent's family who occupied the said stool to declare her or their private property prior to or upon installation, as no presumption could arise that such private property became mixed up with stool property by operation of customary law.

In the result I am of the opinion that the learned judge came to a correct conclusion on the facts and on the law involved and I would therefore dismiss the appeal.

DECISION
Appeal dismissed.

HAMMOND v. ODOI AND ANOTHER [1982-83] GLR 1215-1313
See under Allodial Interest

MECHANICAL LLOYD ASSEMBLY PLANT LTD v. NARTEY [1987-88] 2 GLR 598–649
SUPREME COURT, ACCRA
19 JULY, 1988
ADADE, TAYLOR, FRANCOIS, WUAKU AND AMUA-SEKYI JJ.S.C.

See

REPUBLIC v. KWADWO II [1991] GLR 1-12
COURT OF APPEAL, ACCRA
17 JANUARY 1991
AMPIAH, OFORI-BOATENG AND ADJABENG JJ.A.

OFORI-BOATENG J.A.

The respondent, Nana Osei Kwadwo II, is the Omanhene of Bekwai. Under him is a village called Fahiakobo. Fahiakobo is a stool land and is controlled by an odikro or an agent of the respondent, for ruling or controlling Fahiakobo.

It is the practice in the area that the stranger farmers on the land, pay some money to the respondent and the other "odikro." But with special regard to Fahiakobo the practice as alleged by the appellant(the Republic) is that, whenever any stranger farmer wants land for cultivation he has to consult the Bekwaihene, i.e. the respondent. The respondent will then refer him to the odikro of Fahiakobo, who will demarcate the land to the interested person. Any money paid in consideration of the transfer of the land is called "asikano," and it goes to the benefit of the Bekwaihene in his capacity as the Omanhene. After the "asikano" has been paid the stranger farmer does not have any obligation to pay any other moneys to the Bekwaihene.

The respondent's contention is that with regard to the lands of Fahiakobo, the "asikano" does not mean only the money a stranger farmer pays when he first acquires a part of the Fahiakobo stool lands. It includes all the revenues which accrue from the lands, such as tributes from cocoa farms, rice farms, etc. because of the peculiar history of the Fahiakobo lands. The history is that many years ago a boundary dispute arose between the Dwebisohene and the Twafohene, both being sub-chiefs under the Bekwaihene, the respondent. To avoid a civil war the respondent asked the Ehurenhene to settle the dispute. Each disputant showed his boundary, and when the boundaries were well demarcated, it was noticed that there remained a piece of land not claimed by any of the parties. This piece of land, now known as Fahiakobo was given to the respondent to rule directly. Fahiakobo alone has all the revenues on its lands collected and sent directly to the respondent as the Omanhene. This story appears to be accepted by the appellant.

The contention of the appellant is that the respondent is entitled only to the money which a fresh stranger farmer may pay on acquiring his land. Every other money payable by way of revenue should be paid to the Lands Commission. The State had information that the respondent was collecting nearly every revenue from Fahiakobo and keeping it for himself. He was warned against the practice. He insisted that every Omanhene of Bekwai had done this so-called illegal collection without getting into trouble. That even Fahiakobo was not on the list of the stool lands from which the government collected stool lands revenue, and he had a claim of right to continue to collect the revenue. He was accordingly charged with stealing various sums of money from stranger farmers by way of tribute. He was convicted by the Circuit Court, Kumasi. He was acquitted on appeal by the High Court; and hence this appeal.

The grounds of appeal by the State are essentially on points of law, as the facts of the case are not in dispute. The Chief State Attorney indicated the authority to whom is given the power of collecting and administering all stool lands. He referred the court to section 17(1) of the Administration of Lands Act, 1962 (Act 123) which provides:
"17. (1) All revenue from lands subject to this Act shall be collected by the Minister and for that purpose all rights to receive and all remedies to recover that revenue shall vest in him and, subject to the exercise of any power of delegation conferred by this Act, no other person shall have power to give a good discharge for any liability in respect of the revenue or to exercise any such right or remedy."

It was argued further that the collection of the various revenues by the respondent other than the "asikano" was tantamount to usurpation of the work of the minister by a person who was not the agent of the minister, and failure to pay the money collected to the minister was tantamount to wrongful collection and stealing of the money thus collected. The Chief State Attorney submitted that the learned High Court judge misdirected himself as to the meaning of section 17(1) of Act 123 and the meaning of dishonest appropriation under section 120 of the Criminal Code, 1960 (Act 29) and so came to the wrong conclusions.
It was further pointed out that although section 27 of Act 123 prescribes an offence for the violation of the provision, there was nothing wrong with charging the offender under any other Act which the offender might also have violated. Furthermore, the offences preferred against the respondent were in strict compliance with section 112 of the Criminal Procedure Code, 1960 (Act 30).

The learned High Court judge found that the trial judge convicted the accused without particularising the counts on which he was convicted, and passed one sentence for all the several counts. According to him this procedure was incurably bad. The learned Chief State Attorney submits that such errors are mere irregularities that can be corrected by the appellate court and could have been corrected by the High Court judge himself.
Also, the defence of the respondent that he acted on a bona fide claim of right was attacked by the Chief State Attorney. According to him the claim of right was not bona fide, because the respondent had been warned that he was usurping the power of the Stool Lands Secretariat.

The reply of counsel for the respondent to the appeal is essentially the same as his defence throughout the whole case. That is, because of the special history of Fahiakobo, the paramount chief of Bekwai as of right, is entitled to all dues collected from the stool lands of Fahiakobo. In other words, he is exempt from the revenue laws on stool lands. And if he is mistaken, then he claims a bona fide claim of right.

This appeal may be dealt with under the following broad issues. The first issue to be considered is the extent to which the administration of stool lands revenue affects Fahiakobo stool lands. Section 1 of Act 123 states that "the management of Stool lands shall be exercised by the Minister"; and section 17 (1) of Act 123 referred to above together with section 1 have been modified by section 48 of the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982 (P.N.D.C.L. 42). The part of section 48 which is relevant to this appeal is section 48 (1) which provides:
"48. (1) There shall be in the Secretariat of the Lands Commission an Administrator of Stool Lands who shall be responsible for—
(a) the management and disbursement of all existing funds held on account of stools by the Government;

(b) the establishment of a stool land account for each stool into which shall be paid all rents, dues, royalties, revenues or other payments whether in the nature of income or capital from stool lands;
(c) the collection of all such rents, dues, royalties, revenues or other payments whether in the nature of income or capital and to account for them to the beneficiaries specified under subsection (2) of this section."
To my mind, it is indisputable that the management of stool lands and the collection of moneys itemised under section 48 (1) (c) of P.N.D.C.L. 42 is the monopoly of the Secretariat of the Lands Commission through the Administrator of Stool Lands.
It is not in dispute that Fahiakobo lands are stool lands; therefore despite the history behind how Fahiakobo became part of the stool lands of the respondent, those lands are under the management of the Stool Lands Commission Secretariat, and it is only the Administrator of Stool Lands or his duly appointed agent who can lawfully collect revenue from stranger farmers on those stool lands, in accordance with section 48 (1) (c) of P.N.D.C.L. 42.
The provisions of section 48 (1) and (2) of P.N.D.C.L. 42 are so comprehensive that I am unable to see how it can be said to exempt any stool land from their control. I am also unable to see how any of the various accounts identified under section 48 (1) (b) and (c) can be exempted from the operation of the section. The burden of proving an exemption is on the respondent. The basic evidential principle is that whoever claims that he has a licence or exemption from complying with the law, has the burden on him to prove that licence or exemption. The standard of proof is just to create a reasonable doubt: see R. v. Spurge [1961] 2 Q.B. 205 at 212-213, C.C.A.

I have examined the evidence as a whole and that of the respondent in particular very carefully, and I am satisfied that there is no evidence which creates any exemption which takes Fahiakobo stool lands from the jurisdiction of the Administrator of Stool Lands as provided under section 48 (1) (b) and (c) of P.N.D.C.L. 42.

If Fahiakobo lands fall under the control of the Lands Commission Secretariat and under the direct control of the Administrator of Stool Lands, then the collection of the revenue by the respondent or his agents, which the respondent does not deny, is an unlawful collection.
The next point to be considered is whether the unlawful collection of the stool lands revenues by the respondent amounts to stealing under Act 29. On this issue, the respondent, supported by the learned appellate High Court judge, stated that the Lands Commission Secretariat did not have Fahiakobo stool lands on its list of stool lands for revenue collection. Therefore there was no evidence that the farmers or the persons from whom the revenues were due would have refused to pay if the secretariat had demanded the payment from them, even though the respondent would have already made his "unlawful" collection. Also as such collection, even if improper, would have been made under a bona fide claim of right it would not be a basis for a criminal action.

There is evidence that officers or agents of the Lands Commission Secretariat informed the respondent that he should desist from collecting revenues from Fahiakobo stool lands because revenues from those lands were under the control of the secretariat. Thus when the respondent ordered the collection of the revenues he appropriated the revenues, "with a knowledge or belief that the appropriation (was) without the consent of some person . . . who is owner of the thing." (See section 120 (1) of Act 29 for the explanation of misappropriation). In the face of this evidence, it would really not be any defence to the respondent if the farmers either through fear or ignorance paid again after the unlawful collection. Each collection by the respondent would be unlawful, whenever made with the knowledge that he was collecting somebody's revenues against that person's wishes.

Claim of right in good faith appears to be a sound defence if the act was done mistakenly but the mistake was an honest one. I think that defence is deceptive and should be used extremely carefully. This defence is in section 29 of Act 29:

"29. (1) A person shall not be punished for any act which, by reason of ignorance or mistake of fact in good faith, he believes to be lawful.
(2) A person shall not, except as in this Code otherwise expressly provided, be exempt from liability to punishment for any act on the ground of ignorance that the act is prohibited by law."
Section 29 of Act 29, as I have always understood it, draws a rigid line between a conviction and punishment. It is not a shield against a conviction. It only provides an occasion when a person who has been found guilty will nevertheless be exempted from punishment, by being given absolute discharge, such as "cautioned and discharged" or "bound over to be of good behaviour," as none of these pronouncements count as punishment under section 294 of Act 30, the provision that defines what constitutes punishment under our laws. If section 29 is to become a defence it means the respondent has to agree to be guilty of stealing but is pleading to be exempted from punishment because in good faith he thought, as all his predecessors had violated the stool lands revenue laws without any complaints from the State, as of right, he also could collect the revenues from Fahiakobo for himself and refuse to pay them to the Administrator of Stool Lands.

But can this mistaken belief fall under section 29 (1), i.e. is the error an error arising out of ignorance or mistake of fact? To my mind whether a person is entitled to keep for himself revenue accruing from stool lands to the exclusion of the Administrator of Stool Lands, contrary to P.N.D.C.L. 42, is not a question of fact. It is certainly a question of law.
If it is a question of law, then the respondent falls under section 29 (2), and has to establish that somewhere under Act 29, he is exempted from punishment for stealing through ignorance. There is no evidence of that defence available on record in favour of the respondent. I accordingly hold that this partial defence under section 29 of Act 29 does not avail the respondent.

The next issue to be examined is the question of submission of no case at the end of the prosecution's case. The learned High Court judge rightly pointed out that there was no evidential support for counts 12 and 13 against the accused. The Chief State Attorney also concedes that point. On examining the evidence on record I have also come to the same conclusion. The appeal against conviction on counts 12 and 13 must therefore be dismissed, and I would dismiss them.

The learned High Court judge raised the question of whether or not there was proper evidence to convict on count 10. In his opinion as the receipt which was apparently used as part of the evidence to convict the accused was only an identification and was never tendered as evidence, it could not count as evidence. The law here is settled that in trials, particularly where the accused is defended by counsel, facts wrongly admitted as evidence should be protested against at the earliest possible opportunity; and in a case such as this, the point should be specifically raised as one of the grounds of appeal. This point cannot therefore be raised belatedly and obliquely here by the appellate High Court judge.

The final legal point that needs considering is the failure of the trial circuit judge to convict the respondent on the number of offences on which he was found guilty, as well as his one general sentence covering all the counts without specifying which count was awarded what sentence. The learned appellate High Court judge made a close analysis of the law governing

such situations, citing some relevant Court of Appeal decisions which are quite opposite to the present position. He said:

> "I finally come to the more serious part of the conviction of the appellant. I have already in this judgment quoted what the learned circuit judge pronounced on the conviction in these terms;
> 'I find the accused person guilty of the charges and accordingly proceed to convict him. In this case however, even though as many as thirteen counts were preferred, general evidence of stealing was led and only a few particulars were proved . . .'

Assuming that a few particular counts were proved; he should have mentioned those counts and convicted the accused on them. Again, in imposing sentence, he should have stated to which the fine related, and whether concurrent . . ."

The learned appellate High Court judge cited the case of Biney v. The Republic, Court of Appeal, 14 April 1969; digested in (1969) C.C. 70, a case whose situation is very much like the present one. In that case the accused was tried on two counts of pretending to be a public officer. The magistrate did not formally convict him on any of the counts, but proceeded to sentence him by giving him one sentence of two years' imprisonment with hard labour without stating the sentence for each count. The learned judge then set out in extenso the judgment of the Court of Appeal in that case, per Azu Crabbe J.A. (as he then was):

"A failure to convict, therefore, unless there is a sufficient reason to the contrary, is a breach of the mandatory provisions of section 171(2) of Act 30. And as the court said in Agbettoh v. Commissioner of Police [1963] 2 G.L.R. 413 at 416, S.C.:

'. . . where the irregularity complained of relates to a breach of a mandatory statutory provision, such as in this case, it is no excuse to say that the irregularity had occasioned no substantial miscarriage of justice.'

In this case the appellant was charged upon two counts, but the learned district magistrate passed only one sentence which was quite ambiguous. There should have been a sentence on each count . . .

In our view, the failure to convict the appellant on each count before sentence, and the other irregularities, constitute such a grave departure from the administration of criminal justice as to render the proceedings null and void. Consequently, we do not think that this case can be brought within the ambit of section 406 of Act 30.

For the above reason, we allowed the appeal and annulled the sentence of two years unlawfully passed by the learned district magistrate."

On the basis of this Court of Appeal decision, the learned High Court judge allowed the appeal in this case.

Section 406 of Act 30 which is regarded inapplicable in the face of such errors states:

"406. (1) Subject to the provisions hereinafter contained, no finding, sentence, or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or review on account —

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment, or other proceedings before or during the trial or in any enquiry or other proceedings under this Code; or . . .

unless such error, omission, irregularity, or misdirection has in fact occasioned a substantial miscarriage of justice."

It may be reiterated that in the decision of Biney v. The Republic (supra) the Court of Appeal stated that where an irregularity violates mandatory statutory provisions such as relating to convicting on each count and sentencing on each convicted count, such violations will nullify the verdict on appeal even though the violations might have caused no substantial miscarriage

of justice. If Biney v. The Republic (supra) which was decided in 1969 is the authoritative statement of the law at that period then the position of the law has drastically changed with the coming into force of the Courts Act, 1971 (Act 372).
Under Act 372, the only basis for allowing a criminal appeal, no matter what, is the causing of a substantial miscarriage of justice. Section 26 (12) of Act 372 provides:
"(12) The appellate Court on hearing any appeal before it in a criminal case shall allow the appeal if it considers that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment in question ought to be set aside on the ground of a wrong decision of any question of law or fact or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:

Provided that the said Court shall notwithstanding anything to the contrary in this subsection dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or that the point raised in the appeal consists of a technicality or procedural error or a defect in the charge or indictment but that there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the accused could have been convicted upon that charge or indictment."
(The emphasis is mine.) The first part of section 26 (12) of Act 372 is mandatory if the court thinks that the decision was unreasonable or wrong in law or fact. The proviso also says the proviso must mandatorily apply and in spite of whatever is said in section 26 (12) of Act 372 no appeal should be allowed unless a substantial miscarriage of justice has been caused by the conviction.
Also an appeal should not be allowed where all that has happened is a technical error or procedural error. Also if there is a defect in the charge or indictment but there is evidence on record upon which the defective charge can be supported or another charge can be supported, the accused cannot be discharged or acquitted simply because these technicalities or procedural defects exist in the charge, without causing actual substantial miscarriage of justice.

On the authority of the proviso of Act 372, therefore, if a trial court sentences an accused person without first convicting him, or finds him guilty on a number of counts without indicating which counts, and pronounces only one sentence to cover the undisclosed counts, that court would have erred; but so long as there is evidence on record to indicate on which count the accused could be convicted, the appellate court in so far as its action does not cause a substantial miscarriage of justice, is compelled to dismiss the appeal and substitute the appropriate convictions and of course the sentences.

To my mind, to acquit on appeal, a person against whom there is undoubted evidence beyond reasonable doubt, because before sentencing him the trial court forgot to announce the incantation of "you are hereby convicted on counts 1, 2, 3, etc. and sentenced to a fine or imprisonment on each count concurrently" is being unduly technical without paying sufficient attention to the real question of doing justice. The holding of the balance of justice between the accused and the public by the appellate courts and the veering of criminal justice from technicalities to the real essence of justice is, to my mind, the policy behind the Courts Decree, 1966 (N.L.C.D. 84), s. 13, which eventually became Act 372, s. 26 (12). Applying the law as it is now to the present case I would allow the appeal of the Republic.
JUDGMENT OF AMPIAH J.A.
I agree.
JUDGMENT OF ADJABENG J.A.
I also agree.

Memmuna Amoudy v. Kofi Antwi (2006) MLRG 183

REPUBLIC v. BOATENG; EX PARTE ADU-GYAMFI II [1972] 1 GLR 317-337
IN THE HIGH COURT, ACCRA

19 NOVEMBER 1971

HAYFRON-BENJAMIN J.

The applicant is the abusuapanyin of the Abrade family of Akwatia and a principal kingmaker. He claims that with the queenmother, Obaapanyin Adjoa Dankwa II, he is responsible for the election and enstoolment of the chief of Akwatia. He claims that the application is for himself and on behalf of the Abrade family of Akwatia. This is denied by the respondent who states that "it is not true that the applicant is the head of the Abrade family or a principal kingmaker of the Akwatia stool, or that he brings the action on behalf of the said family. The respondent claims that the head of the Abrade family of Akwatia is Opanyin Kofi Tuda II."

Lengthy litigation over the enstoolment or the purported enstoolment of the respondent as Akwatiahene was decided by the chieftaincy committee appointed by the National Liberation Council under the provisions of the Chieftaincy Act, 1961 (Act 81), and presided over by Mr. Justice Siriboe. The decision of this committee as confirmed by the National Liberation Council was published in No. 39 of the Local Government Bulletin of 6 September 1968. It reads:

"Entitled: Ohemaa Adjoa II and Others, Plaintiff applicants versus Gyasehene Kwasi Boateng and Asafoatse Kwame Dapaah, Defendant respondents.

Notice is hereby given under subsection (5) of section 39 of the Chieftaincy Act, 1961 (Act 81), that the following findings of the Committee consisting of J. B. Siriboe, Esq. (Chairman), J. B. Braimah, Esq., (Kenyasewura) and I. K. Agyeman, M.B.E., Esq., given on the 7th March, 1968 has been confirmed by the National Liberation Council:

(i) that the appeal is allowed and the proceedings and judgment of the Akim Abuakwa Traditional Council given in favour of Kwame Boateng, are hereby set aside as being null and void;

(ii) that the Obaapanin be given the chance as custom demands, to make fresh nomination of a suitable candidate bearing in mind that at least she has three chances to do so;

[p.322]

(iii) that since the Akim Abuakwa Traditional Council made no order as to costs, a similar order is made in this appeal (No costs).

By command of the National Liberation Council. 2nd September, 1968."

The applicant in his affidavit in support of his application has given the full title of the causes which came before the chieftaincy committee. The title is:

"Obaapanyin Adjoa Darkwa II & Ors. Plaintiffs, versus Gyasehene Kwasi Boateng and Defendants, Asafoatse Kwame Dapaa and Baffour Asare Amankwa II Plaintiff, versus Gyasehene Kwasi Boateng and Kwame Dapaah Defendants, and Opanyin Kwaku Ampofo Plaintiff, versus Opanyin Kofi Tuda II Defendant."

The applicant states on oath in his affidavit that at the time of the said actions, Kwaku Ampofo was the abusuapayin or head of family, but he has since died. He further states that he, the applicant, represented the said Kwaku Ampofo at the litigation and was after his death appointed successor to him and made abusuapayin of the Abrade family of Akwatia, a position he has since held. The respondent nowhere denies that the applicant was appointed a successor to Kwaku Ampofo, he only denies that the applicant is the head of the Abrade family.

Kwaku Ampofo it is clear was a party to the dispute, and the applicant is his successor. The person who the respondent claims to be the head of the Abrade family was also a party to the litigation. It is not shown in the title of the case in what capacities either of these two persons took part in the litigation. However it is clear that the applicant as a representative of Kwaku Ampofo was on the queenmother's side and litigated in the same interest while Kofi Tuda II was on the respondent's side and fought in the same interest. It would be unreasonable, to say the least, to require the said Kofi Tuda, even if it is conceded (which is not) that he is the abusuapanyin of the Abrade family to initiate these proceedings. The rule that only the head of the family can sue or be sued on behalf of the family has been subjected to several exceptions over the years.

In any event I am satisfied and so hold that the applicant having represented Kwaku Ampofo in the earlier litigation and having been elected his successor has sufficient interest in the subject-matter of these proceedings as to vest in him the necessary locus standi to bring and maintain this application.

[p.323]

The gravemen of the applicant's complaint can be found in paragraphs (13), (14) and (15) of his affidavit. These state as follows:

"That in spite of the judgment (findings) of the Chieftaincy Secretariat which is still subsisting and without any authority and that of the queenmother [sic.] the respondent has been put on the stool as chief of Akwatia.

(14) The respondent has gone to live in the palace, he calls himself the chief of Akwatia under the stool name of Barima Kwame Boateng II and purports to exercise the functions of the chief of Akwatia contrary to custom and the judgment/findings of the secretariat aforesaid.

(15) That this act is against the finding of the Chieftaincy Secretariat and the act is calculated to bring and is bringing disruption in the town of Akwatia in general and in the Abrade family in particular."

"These grounds have been summarised in the statement filed on behalf of the applicant in compliance with the Supreme [High] Court (Civil Procedure) Rules, 1954 (L.N. 140A). Order 59, r.2. The grounds on which relief is sought are given as:

"That there is a subsisting judgment against respondent debarring him as chief of Akwatia and that the respondent did not appeal against the judgment and no court of competent jurisdiction has set aside or reviewed the judgment. And that without the consent of the applicant and the queenmother Nana Adjoa Darkwa of Akwatia respondent has occupied the stool and purports to exercise the functions of chief of Akwatia contrary to the judgment/findings of the Chieftaincy Secretariat."

The relief sought by the applicant is an order of prohibition restraining the respondent from occupying the palace of Akwatia, from calling himself the chief of Akwatia, and also from purporting to exercise the functions of the chief of Akwatia.

Before stating the case put up by the respondents, I must comment on the extremely careless manner in which these papers filed in these proceedings for the applicant have been prepared. All through these papers, reference is made to the judgment or findings of the Chieftaincy Secretariat. A reference to the Local Government Bulletin which has also been filed would have shown those responsible for preparing these papers that the findings were those of the chieftaincy committee and not the secretariat. Further the relief sought as stated in one affidavit is for an order of prohibition against the respondent herein to prevent him from exercising the functions of a chief of Akwatia including his judicial functions and in another affidavit it is "for an order of prohibition against the said respondent to stop him from occupying the palace of Akwatia, and also from purporting to exercise the functions of the chief of Akwatia." In the statement filed under Order 59, r. 2, however, no mention is made of an order of prohibition, neither is mention made of an order to prevent **[p.324]** the respondent from residing in the palace or performing any judicial functions.

The case of the respondent is well stated in paragraphs (5)-(12) of his affidavit in opposition. These state:

"(6) That the decision of the chieftaincy committee did not debar me from further election as a chief but gave the queenmother the chance in consultation with the kingmakers to nominate a suitable candidate for three consecutive times. This is contained in Local Government Bulletin No. 39, exhibit A.

(7) That this order was respected by the Akwatiaman and the candidate of the queenmother was rejected in three consecutive elections by the people according to custom and in terms stated by the decision; I was later accepted by the people and elected a second time.

(8) That I was elected according to custom and that I am entitled to live in the palace and exercise my rights as Akwatiahene.

(9) That immediately after my election the Okyeman Council approved my appointment and installed me as the chief of Akwatia whereupon I swore the oath of allegiance to the Okyeman Council and a report was accordingly made to the government.

(10) That the Ghana Government accepted my election and installation as a chief of Akwatia and revoked the prohibition order made against me; vide Executive Instruments E.I. 3 and E.I. 4 dated 22 January 1970, which copy is hereto attached and marked exhibit B.

(11) That on 23 January 1970, I was recognised by the Ghana Government as Akwatiahene. My appointment as a chief was published in the Local Government Bulletin No. 4 on Friday 23 January 1970.

(12) That by virtue of the facts, adduced herein, I am by custom and in law the chief of Akwatia."

The major issues appearing for determination are therefore:

(a) Whether the election of the respondent conformed with the decision or findings or directives of the chieftaincy committee as confirmed by the National Liberation Council.

(b) If it did not so conform with the directives, whether the swearing of the allegiance to the Okyeman Council or the paramount stool rectified the position.

(c) If it did not rectify the position whether the recognition of the respondent by the government and the publication of that recognition in the Local Government Bulletin is conclusive of the regularity of his election and installation.

As the determination of the third issue would involve the effect of recognition by the government of a chief under the Chieftaincy Act, 1961 (Act 81), and also the continued effectiveness of the Chieftaincy Act especially the provisions dealing with the power of the government to recognise chiefs, **[p.325]** I thought it desirable to have the Attorney-General's department served with the proceedings and invited submissions from that office.

Whenever a question arises in court whether or not any statute or any instrument made thereunder is void under article 1 (2) of the Constitution, 1969, or whether any statute or any instrument made thereunder which forms part of the existing law should be read with such modifications to bring it into conformity with the provisions of the Constitution under article 126 I shall direct the Attorney-General's department to be served with the necessary documents and shall invite arguments from that department. In India the Code of Civil Procedure, 1908 (Act V of 1908), makes provisions in Order XXVII-A for such a procedure.

The Attorney-General may then apply to join the case as a party; but he need not. He will have notice of the proceedings and may send a representative to present his views on the law to the court in a capacity similar to that of an amicus curiae. I am of the view that even if such a procedure is not specifically enacted in our rules, its observance will help greatly in making uniform the modifications etc., that will be introduced into the existing enactments by the courts.

Before I deal with the major issues, I shall consider a point of procedure which has been raised by the respondent. The respondent has submitted that the application for prohibition does not lie and that it is misconceived and that the application for injunction is irregular and also misconceived and that these applications should be dismissed in limine. The applicant originally filed an application for leave to apply for an order of prohibition. I was in some doubt

whether the position of a chief involved any judicial functions; I intimated to counsel that if it did not I was of the view that his proper remedy would be by way of an injunction.

I however granted leave to apply. Counsel in filing the pursuant notice filed an affidavit by the applicant in which he stated that the respondent, apart from his traditional functions, was also purporting to exercise judicial functions, but counsel did not claim an injunction on his pursuant notice apparently thinking that an injunction ought to be brought by ordinary motion and that it cannot be taken on an originating motion on notice as is required in applications for prerogative orders. On 29 December 1970 before I could rule on his original application for prohibition, he filed an ordinary motion for injunction. I decided therefore to hear arguments on his application for an injunction treating it as an amendment of the application for prohibition. In other words I have treated the applications as one dealing with prohibition or in the alternative an injunction. The application before me is therefore one of an originating motion on notice asking for an order of prohibition or an injunction.

I shall first deal with the respondent's objection to the application for an injunction. It is quite clear to me that if this is an application for the ordinary equitable remedy of injunction, then it will not normally lie in the absence of the pendency of a substantive writ before the court.

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However if the injunction is part of an application for a prerogative writ the position is different. By section 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, all informations in the nature of quo warranto were abolished in England. Subsection (2) of that section provided that the High Court may grant an injunction restraining any person from acting in an office in which he was not entitled to act and might if the case so required, declare the office vacant. Under subsection (3) of section 9 no proceedings could be taken by any person under that section who would not have been entitled to apply for an information in the nature of quo warranto immediately before the commencement of the Act. The principles on which the new injunction can be issued are the same as those which governed the grant of the old prerogative writ of quo warranto and not in accordance with the substantive equitable principles governing the grant of the equitable injunction. The statutory provisions show that the reform was procedural and not substantive. Order 53, r.9(1) of the White Book, 1970 provides:

"9 (1) The procedure in applications under section 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, shall be the same as in applications for an order of mandamus and rule 1,3,4 and 5 shall apply so far as applicable to such application."

In Ghana the same rule which deals with application for mandamus deals with prohibition. Order 59 provides for the procedure in prerogative writs and provides in rule 2 (1) that, "No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule." It is clear therefore that if section 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, applies to Ghana then the procedure must be under Order 59, r. 2. When leave is granted to apply for a prerogative writ, the applicant can with leave of the court amend his application. I think therefore that

this court has power to treat the motion for injunction as an amendment of the original application for a prerogative writ.

The question is whether or not section 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, applies to Ghana. Order 74 of the Rules of Court provides: [His lordship here read the provisions as set out in the headnote and continued:] I am satisfied that the procedure in England up to the time of our Constitution is in force in Ghana so far as no provision is made in our rules and so far as it can conveniently be applied. See Gray v. Gray [1971] 1 G.L.R. 422. Section 9 is clearly procedural and I hold that it is applicable here.

The objection to the application for an order of prohibition must now be considered. The applicant in one of his affidavits states"that apart from his traditional functions the respondent has also purported to exercise his judicial powers over the town and the subjects." The question that arises is whether prohibition lies to prevent a person from exercising judicial functions generally or only from exercising judicial functions in respect or specific causes. Blackstone in his Commentaries on the Laws of England, Vol. III, p.112 says:

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"A prohibition is a writ issuing properly only out of the court of king's bench being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some case out of the court of chancery, common pleas, or exchequer; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court."

Close examination of the cases shows that it has never been granted to prohibit a person from exercising judicial functions generally. I am not now prepared to say that it should never be granted, all that I say at the moment is that in this particular case prohibition is not an appropriate remedy.

When the learned state attorney representing the Attorney-General appeared he raised two points regarding the jurisdiction of this court. I decided to hear him even though he had been invited by the court for his views on the continued operation of the Chieftaincy Act, 1961 (Act 81). The first point he raised had also been raised by the respondent in his affidavit in opposition. It was submitted that the subject-matter of the application being a cause or matter affecting chieftaincy, the High Court had no jurisdiction. Reliance was placed on paragraph 66 of the Courts Decree, 1966 (N.L.C.D. 84), which provided that:

"Notwithstanding anything to the contrary contained in this or any other enactment, the High, Circuit and District Courts shall not have jurisdiction to entertain either as of first instance or on appeal any civil cause or matter instituted for—

(a) the trial of any question relating to the election, installation, deposition or abdication of any Chief whatsoever;

(b) the recovery or delivery of stool or skin property in connection with any such election, installation, deposition or abdication; or

(c) the trial of any question touching the political or constitutional relations subsisting according to customary law between such Chiefs."

The paragraph has since the arguments were presented in this case been repealed and substantially re-enacted in section 52 of the Courts Act, 1971 (Act 372), which provides that:

"Notwithstanding anything to the contrary in this Act or any other enactment the Court of Appeal, the High Court, a Circuit and a District Court shall not have jurisdiction to entertain either at first instance or on appeal any cause or matter affecting chieftaincy."

This prohibition is also enacted in sections 15 and 22 (1) of the Chieftaincy Act, 1971 (Act 370).

It is quite clear that Parliament having the power to establish inferior and traditional courts, section 52 operates effectively to divest the circuit **[p.328]** and district courts of jurisdiction in chieftaincy matters. The Position is not the same in the case of the Court of Appeal and the High Court. These are courts established by the Constitution, and by article 102 (2) it is specifically provided that:

"The Judiciary shall have jurisdiction in all matters civil and criminal including matters relating to this Constitution, and such other matters in respect of which Parliament may by or under an Act of Parliament confer jurisdiction on the Judiciary."

It is quite clear therefore that Parliament can only add to but not to take away the jurisdiction of the superior courts which has been conferred by the Constitution.

The jurisdiction of the High Court as established under the Constitution is spelt out in articles 113 and 114 of the Constitution and I set out the relevant provisions in extenso:

"113. (1) The High Court of Justice shall have jurisdiction in civil and criminal matters and such other original, appellate and other jurisdiction as may be conferred upon it by this Constitution or any other law.

(2) The High Court of Justice shall have jurisdiction to determine any matter relating to industrial and labour disputes and administrative complaints.

(3) Parliament shall, by or under an Act of Parliament, make provision for the exercise of the jurisdiction conferred on the High Court of Justice by the provisions of the immediately preceding clause."

Clauses (4), (5) and (6) are not presently relevant and are omitted.

"114. The High Court of Justice shall have supervisory jurisdiction over all inferior and traditional Courts in Ghana and any adjudicating authority and in the exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as it may consider appropriate for the purposes of enforcing or securing the enforcement of its supervisory powers."

The High Court has also certain special jurisdiction conferred on it by the Constitution, e.g. for the enforcement of the fundamental human rights under article 28. It is not necessary here to consider such special jurisdiction.

It is quite clear from the foregoing provisions that the High Court is vested with original jurisdiction in all matters and section 13 (1) of the Courts Act, 1971 (Act 372), makes this quite clear. It is argued however that the provisions of articles 154 and 155 of the Constitution operate to divest the High Court of that jurisdiction. Articles 154, 155 and 161 provide that:

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"154. (1) There shall be established a National House of Chiefs.

(2) The House of Chiefs of each Region shall elect as members of the National House of Chiefs five chiefs from the Region.

(3) The National House of Chiefs shall, subject to the provisions of clause (3) of article 105 of this Constitution

(a) have appellate jurisdiction in any matter relating to chieftaincy which has been determined by the House of Chiefs in a Region from which appellate jurisdiction there shall be an appeal, with the leave of the Supreme Court or of the National House of Chiefs to the Supreme Court; and

(b) advise any person or authority charged with any responsibility under this Constitution or any other law for any matter relating to or affecting Chieftaincy ....

155.(1) There shall be established in and for each Region a House of Chiefs which shall:

(a) have original jurisdiction in all matters relating to a paramount Stool or the occupant of a paramount Stool;

(b) hear and determine, subject to the provisions of clause (3)of article 105 of this Constitution, appeals from the highest Traditional Councils within the area of authority of the Traditional Authority within which they are established, in respect of the nomination, election, installation or deposition of any person as a chief;

(c) perform in and for the Region such other functions as may be conferred upon it by or under the authority of an Act of Parliament . . ."

"161. Subject to the provisions of this Constitution, Parliament may by or under an Act of Parliament provide for the performance of functions by the Councils established under this Chapter."

I do not find anything in these articles to support the view that the High Court was deprived of jurisdiction by the Constitution in chieftaincy matters, and that the exclusive jurisdiction in such matters was vested by the Constitution in the House of Chiefs or the Traditional Councils. Wherever the Constitution vested exclusive jurisdiction it stated it expressly, e.g. article 106 (1), which provides that the Supreme Court shall have "original jurisdiction, to the exclusion of all other Courts," in matters relating to the enforcement or interpretation of the Constitution.

It is clear to me therefore that the High Court as established under the Constitution has concurrent jurisdiction in chieftaincy matters.

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It is submitted further that the provisions of article 105 (3) shows that the Constitution establishes a regime in chieftaincy matters, i.e. that only the Supreme Court among the courts constituting the Superior Courts of Judicature is vested with jurisdiction in chieftaincy matters. Article 105 (3) provides that, "The Supreme Court shall have appellate jurisdiction to hear and determine any matter which has been determined by the National House of Chiefs."

It is clear that all that is established by the Constitution is that where a chieftaincy matter commences in a traditional council or a house of chiefs appeal proceedings lie therefrom ultimately to the Supreme Court through the National House of Chiefs. If, however, the proceedings are commenced in the High Court proceedings lie from there to the Court of Appeal and thereafter to the Supreme Court as in all other civil proceedings. I am satisfied that the High Court has concurrent jurisdiction in chieftaincy matters and that this court has jurisdiction to entertain this application.

The next point as to jurisdiction raised by the learned state attorney is that as a question relating to the enforcement or interpretation of the Constitution is involved in the determination of this application the jurisdiction of this court is ousted and that the question should be referred to the Supreme Court for determination under the provisions of article 106 (2). It is submitted that such question arises twice in this application. The first is in determining the jurisdiction of the court to hear the application and secondly in determining what effect the Constitution has had on powers of the government over the recognition of chiefs. There is a vast distinction between applying the Constitution and enforcing or interpreting the Constitution.

Article 126 (a) includes the "Constitution" among the laws of Ghana. Article 1 (2) of the Constitution provides that it shall be the supreme law and any other law found to be inconsistent with any of its provisions shall, to the extent of the inconsistency, be void and of no effect. The Constitution is itself in force already. There can be no action to enforce it as such. The Constitution confers rights, e.g. the fundamental human rights under Chapter Four, and also imposes duties such as the duty of ministers to declare their assets. An action taken to enforce these rights and duties can properly be said to be a matter relating to the enforcement of the Constitution. Further questions of interpretation arise only where there is a doubt as to the meaning to be attached to any of the provisions of the Constitution.

To say that every time the Constitution is applied it is being enforced would lead to absurd results. The Superior Courts are established by the Constitution, their jurisdiction is defined by the Constitution. In every case they must determine even if sub silentio the question whether or not they have jurisdiction, i.e. they must apply the provisions of the Constitution dealing with the jurisdiction to the issues raised in the proceedings.

[p.331]

To suggest that every such exercise involves the enforcement of the Constitution would mean that every case or application brought before the courts must be referred to the Supreme Court to determine the preliminary questions of jurisdiction. This clearly would be absurd. Furthermore the process of decision making is to apply a rule of law to the facts as found by the tribunal. In ascertaining what rule is applicable the court or judge would determine its validity albeit sub silentio by reference to article 1 (2) of the Constitution, i.e. the judge would determine whether the rule of law to be applied is in conformity with the provisions of the Constitution; for if it is contrary to the Constitution it ceases to be a rule of law; it is void and of no effect and cannot and ought not to be applied to any case. If it is suggested that every such exercise, which takes place in every case, sometimes several times in one case, is an interpretation or enforcement of the Constitution, then every time a court finds a rule of law it must refer it to the Supreme Court for determination as to its validity. Such a procedure was frowned upon by the Supreme Court itself in Republic v. Maikankan [1971] 2 G.L.R. 473, S.C.

Having disposed of the preliminary points in respect of jurisdiction and procedure, I shall now consider the major issues raised in this application. As I have stated earlier on in this judgment the first of these is whether the election of the respondent is in accordance with the Siriboe Committee's finding and recommendations as contained in No. 39 of the Local Government Bulletin 1968. The most relevant portion of the findings is where the committee recommended that the obaapanyin be given the chance of nominating a suitable candidate bearing in mind that at least she has three chances to do so. I am of the view that all that the committee meant was that the queenmother was to be allowed to nominate a suitable candidate for the stool according to custom. The respondent says in paragraph (6) of his affidavit that the decision of the chieftaincy committee gave the queenmother the chance in consultation with the kingmakers to nominate a suitable candidate three consecutive times. Both parties seem to believe that the committee's recommendation was a statement of the totality of the queenmother's rights and that apart from having three chances she had no further rights. The committee was obviously stating the minimum of her rights, otherwise the term "at least" would be meaningless. The rejection of the queenmother's candidates on three consecutive occasions does not exhaust the queenmother's rights; she is not thereby debarred from participating in the election of a candidate. The committee did not say that. The committee's recommendation means that in the election of a candidate for the stool the proper customary procedure should be followed. The customary procedure among the Akim Abuakwa is described by Danquah in his Akan Laws and Customs, pp. 110-112. The customary rules in this regard can be briefly stated:

(1) It is for the royal family, sometimes consisting of two or more houses, to have a candidate for the stool.

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(2) The acceptance of a person's candidature is by the people or the subjects of the stool.

(3) The candidate need not be the closest in blood with the deceased chief; any one belonging to the royal family can be chosen so long as he has no defects and is otherwise acceptable to the people.

(4) The formal act of choice is by the queenmother.

Danquah then describes the actual ceremony of election at pp. 111-112 and says:

"After the funeral obsequies of a Chief, or the final determination of the deposition of an unwanted Chief, all who must have a voice in the election of the new Chief assemble in the public place at the invitation of the Chief who is Regent ex-officio. Thereupon, the sub-Chiefs, Elders and Councillors of the town, together with the Captains of the Asafo Companies, call upon the female head, or in her absence, the male head of the Royal Family, to name a person fit for the stool. The members of the Royal Family would then retire into council with a view to consult on the question of the proper person to be elected for the stool. The Head of Family is, however, the moving spirit of the whole. On the return of the Head of the Royal Family with her people, she names a suitable candidate for election. If the nominee is acceptable to the sub-Chiefs, Elders and Councillors assembled, the name is submitted to the meeting, and the general approval of the Asafo or 'Werempi' Company (of young men) obtained. If he is not acceptable, the Asafo or 'Werempi' Company would signify their disapproval through their respective captains, and their opinion being in consonance with that of the sub-Chiefs, Elders, and Councillors the Head of the Royal Family would have to make other suggestions until the proper candidate desired by the people would be nominated and accepted."

Danquah states in a footnote at p. 112 that the foregoing is the "statement of the theory of 'the choice of a Stool heir by the Queenmother' [but that] in practice,.... the most important chiefs or councillors of a Stool would meet in a secret conclave of which meeting the queen-mother might be a member, and there agree on the person for election. The nominee being thus agreed upon, the election in a public assembly of all the chiefs and people would result in the appointment of the candidate unanimously chosen. The queenmother's voice is sought in the nomination because of her natural position as the mother or grandmother (mater familias) of all the Stool heirs."

Danquah states that the procedure for the election of a chief is democratic. It is democratic not in the sense that there is a counting of heads, but because of the extensive consultations of interested parties, and also of the **[p.333]** genuine efforts at arriving at a consensus especially between the royal family as personified in the queenmother and the people, i.e. the asafo, and the elders and councillors of the stool. A candidate for the stool must be acceptable to these two groups. Where the queenmother's candidate is not acceptable to the people, she must find another candidate and meanwhile the stool would remain vacant. The people themselves cannot nominate a person for election. It is quite clear from the respondent's own affidavit that he was not nominated by the queenmother or by the royal family. I hold therefore that his election and installation as a chief of Akwatia were irregular and contrary to custom. The next issue raised in these proceedings is whether the installation and the swearing of the oath of allegiance to the paramount stool cured the defect in the election of the respondent. Danquah at p. 112 says of a person who has been duly elected chief, "But the elected is as yet little more than an ordinary member of the Royal Family. There remains the ceremony of swearing-in, and then the grander and more solemn ceremony of installation." The learned author goes on at p. 113 that "The next custom is installation. This is a solemn ceremony done with great privacy, and almost always at night. It may properly

be called the ceremony of enstoolment, as being the occasion on which the new chief is ceremonially placed on his ancestral stool." He continues at p. 114 that:

"After this solemn ceremony the new chief is worthy enough to regard himself as the most elevated person amongst his peers, and he is now endowed with the right and correlative duty to rule and govern his dominions with the advice and counsel of the members of the Administration."

From these passages it is clear that the swearing of the oath of allegiance and the installation are essential formalities for the enstoolment of a chief. However there is nothing found in these passages that would suggest that the oath or an installation can operate to deprive the queenmother or the head of the stool family of their basic right to nominate the chief for election. Danquah puts the position beyond doubt in a passage appearing at p. 122 of his book. He states:

"As remarked elsewhere a stool comes into being as the private property of a more or less private family. This family in time rises to the position of rulers of a people-a group of clans or a whole tribe. These people are governed by the Stool, but they are governed with their own consent. The Stool, however, throughout its existence belongs to the Family for or by whom it was founded. Hence the Head of the Stool family is de jure custodian or owner of both the Stool and the Family. Consequently, if the people desire a new member of the Stool Family to rule them they have to approach the legal head of the family to nominate a fit person to sit on the Stool and rule them. The stool does not belong to the people, and when a thing does not belong to you you cannot do what you like with it, but if the one who actually occupies the property thereby acquires rights over you, then, naturally, a corresponding duty arises."

[p.334]

I am of the view therefore that the mere fact that there has been installation and the swearing of the oath of allegiance does not validate an election done by bodies other than the stool family as represented by the queenmother and the head of family. I hold therefore that the installation of or the swearing of the oath to the Okyeman Council by the respondent did not rectify the invalidity in his nomination as a chief.

The last major issue is whether the recognition of the respondent made him a chief notwithstanding that his enstoolment under customary law is invalid. The publication in the Local Government Bulletin, No. 4 was dated 23 January 1970, i.e. before the Chieftaincy Act, 1971 (Act 370). I shall therefore first consider the position under the Chieftaincy Act, 1961 (Act 81), as far as the status of the respondent is concerned. Section 1 of that Act (Act 81) provides that:

"(1). A Chief is an individual who -

(a) has been nominated, elected and installed as a Chief in accordance with customary law, and

(b) is recognised as a Chief by the Minister responsible for Local Government (in this Act referred to as 'the Minister')."

It is clear from this section that before the Constitution came into force, a person had to be recognised by the government before he became a chief. The position immediately before the change of government in 1966 has been described by the Constitutional Commission set up by the National Liberation Council at p. 176 in para. 645 of their report and recommendations. They say:

"We have given careful thought to the present practice whereby Government gives official recognition to the installation, enstoolment and destoolment of chiefs. In our view the perpetuation of this practice, as borne out by recent developments under the Convention People's Party Government, would only tend to make the chiefs mere puppets and play-things in the hands of politicians. Chiefs are made or unmade by their people and not by the government."

Act 81 is part of the existing law, and its provisions are to be read with such modifications, exceptions etc., as would bring it in conformity with the Constitution. I postponed this judgment for such a long time to enable me to consider the new Chieftaincy Act, 1971 (Act 370), which was in the process of being passed by Parliament. Section 48 of the 1971 Act provides that:

"(1) A Chief is an individual who has, in accordance with customary law, been nominated, elected and installed as a Chief or as the case may be appointed and installed as such and whose name for the time being appears as a Chief on the National Register of Chiefs: Provided that no person shall be deemed to be a Chief for the purposes of the exercise by him of any function under this Act or under any other enactment, unless he had been recognised as such by the Minister by notice published in the local Government Bulletin."

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Section 52 (1) provides that:

"If it appears to him to be necessary so to do in the interests of public order the Minister may by executive instrument-

(a) prohibit any person who is not a Chief (whether or not he was formerly, a Chief) from purporting to exercise any functions of a Chief,

(b) require that no person shall treat as a Chief a person subject to such prohibition."

The foregoing shows that a person can be regularly enstooled as a chief in accordance with custom and registered on the National Register of Chiefs, without being a chief for the purposes of performing functions under the Act such as being a member of the House of Chiefs, because the government does not recognise him. He cannot be a member of the divisional councils set up under the Act; he cannot be a member of the regional, district, or local councils under the Local Administration Act, 1971 (Act 359), or a member of the traditional council unless he is recognised by the government. He cannot sell or dispose of stool land because such disposition is voidable unless made with the consent of the traditional

council. A person might have been declared a chief by the highest court in the land, i.e. the Supreme Court whether on appeal from the decision of the High Court through the Court of Appeal or from the decision of the National House of Chiefs; he would yet not be able to exercise the duties of a chief under any enactment unless he is recognised by the minister. Such a person may even be banished from his area by the minister under section 52.

Fortunately I am not presently called upon to pronounce on the validity of these and other provisions of the Chieftaincy Act, 1971. I however confess that I find no guidance whatsoever in its provisions in dealing with the provisions of the Chieftaincy Act, 1961 (Act 81), vis-a-vis the Constitution. Article 153 of the Constitution provides in clear and unambiguous language that, "The institution of chieftaincy together with its Traditional Councils as established by customary law and usage is hereby guaranteed." It is obvious therefore that a person becomes a chief when he is elected, installed etc., according to that "customary law and usage" referred to in the said article 153 of the Constitution. Article 126 (3) of the Constitution dealing with the laws of Ghana defines customary law as "the rules of law which by custom are applicable to particular communities in Ghana." The minister may choose to recognise the person enstooled, but the minister's recognition would be declaratory only and not constitutive. The recognition by the minister may be evidence, even prima facie evidence, of such enstoolment but certainly not conclusive evidence of the regularity of the enstoolment. This prima facie evidence like a presumption can be rebutted by cogent evidence showing that no regular enstoolment has taken place. A judgment of a court of competent jurisdiction declaring a person as regularly enstooled shall, if there has not been any destoolment subsequently, be conclusive proof **[p.336]** that the person is a chief, notwithstanding the fact that the minister has recognised another person. I shall therefore read Act 81 with an exception, namely, that with the coming into force of the Constitution, 1969, recognition by the minister is no longer essential to the validity of enstoolment of chiefs. A chief therefore under Act 81 after the Constitution is one who has been nominated, elected and installed as a chief according to customary law. I therefore hold that the recognition given by the minister of the enstoolment of the respondent did not operate to cure the defect in his enstoolment.

I have already decided that the remedy by prohibition usually does not lie to prohibit a person from generally exercising judicial functions. It is more appropriate in particular cases. I shall now consider whether an injunction under section 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, will lie. To justify a grant of injunction under this section, the office must be one of a public nature; the holder must have already exercised the office.

The starting point of any consideration of this part must start with the words of Tindal C.J. in Darley v. R. (1846) 12 C1. & F. 520. He said at pp. 541-542:

"After the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others."

Lord Reading C.J. in R. v. Speyer [1916] 1 K.B. 606 adopted the words of Tindal C.J. and said at p. 609:

"The test to be applied is whether there has been usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title. This decision [that is Darley v. R.] is an authority against the proposition argued by the Attorney-General. It establishes that, whereas formerly a quo warranto was held to lie only where there was an usurpation of a prerogative of the Crown or of a right of franchise, a proceeding by information in the nature of quo warranto has long since been extended beyond that limit and is a remedy available to private persons within the limits stated by Tindal C.J. and subject always to the discretion of the court to refuse or grant it."

It is clear that chieftaincy is a public institution having been guaranteed under the Constitution. I hold therefore that an injunction under section 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, would lie. de Smith in his Judicial Control of Administrative Action, 1968 (2nd ed.), p. 480 remarks that there is not a single reported case of an injunction under this section in England. He gives the reasons for this state of affairs as public apathy or alternatively a commendable **[p.337]** absence of the litigious spirit and also the presence of other remedies. In Ghana no use has been made of this remedy. The reason is that there are remedies for challenging all offices and it has not been thought necessary to have recourse to this procedure. Now that I have held that the High Court has concurrent jurisdiction in chieftaincy matters, the position may well change and more applications under this rule may be made challenging the usurpation of positions on stools. I grant the injunction prayed for. The applicant will have his costs which I assess at N¢200.00.

DECISION

Application for injunction granted.

K. T.

REPUBLIC v. KWADWO II [1991] GLR 1-12
COURT OF APPEAL, ACCRA

17 JANUARY 1991

AMPIAH, OFORI-BOATENG AND ADJABENG JJ.A.

This is an appeal by the Republic (hereinafter called the appellant) against the decision of the High Court, Kumasi, in favour of Nana Osei Kwadwo II (hereinafter called the respondent)[**p.4]**. The facts of the case are as follows: The respondent, Nana Osei Kwadwo II, is the Omanhene of Bekwai. Under him is a village called Fahiakobo. Fahiakobo is a stool land and is controlled by an odikro or an agent of the respondent, for ruling or controlling Fahiakobo.

It is the practice in the area that the stranger farmers on the land, pay some money to the respondent and the other "odikro." But with special regard to Fahiakobo the practice as alleged by the appellant is that, whenever any stranger farmer wants land for cultivation he has to

consult the Bekwaihene, i.e. the respondent. The respondent will then refer him to the odikro of Fahiakobo, who will demarcate the land to the interested person. Any money paid in consideration of the transfer of the land is called "asikano," and it goes to the benefit of the Bekwaihene in his capacity as the Omanhene. After the "asikano" has been paid the stranger farmer does not have any obligation to pay any other moneys to the Bekwaihene.

The respondent's contention is that with regard to the lands of Fahiakobo, the "asikano" does not mean only the money a stranger farmer pays when he first acquires a part of the Fahiakobo stool lands. It includes all the revenues which accrue from the lands, such as tributes from cocoa farms, rice farms, etc. because of the peculiar history of the Fahiakobo lands. The history is that many years ago a boundary dispute arose between the Dwebisohene and the Twafohene, both being sub-chiefs under the Bekwaihene, the respondent. To avoid a civil war the respondent asked the Ehurenhene to settle the dispute. Each disputant showed his boundary, and when the boundaries were well demarcated, it was noticed that there remained a piece of land not claimed by any of the parties. This piece of land, now known as Fahiakobo was given to the respondent to rule directly. Fahiakobo alone has all the revenues on its lands collected and sent directly to the respondent as the Omanhene. This story appears to be accepted by the appellant.

The contention of the appellant is that the respondent is entitled only to the money which a fresh stranger farmer may pay on acquiring his land. Every other money payable by way of revenue should be paid to the Lands Commission. The State had information that the respondent was collecting nearly every revenue from Fahiakobo and keeping it for himself. He was warned against the practice. He insisted that every Omanhene of Bekwai had done this so-called illegal collection without getting into trouble. That even Fahiakobo was not on the list of the stool lands from which the government collected stool lands revenue, and he had a claim of right to continue to collect the revenue. He was accordingly charged with stealing **[p.5]** various sums of money from stranger farmers by way of tribute. He was convicted by the Circuit Court, Kumasi. He was acquitted on appeal by the High Court; and hence this appeal.

The grounds of appeal by the State are essentially on points of law, as the facts of the case are not in dispute. The Chief State Attorney indicated the authority to whom is given the power of collecting and administering all stool lands. He referred the court to section 17(1) of the Administration of Lands Act, 1962 (Act 123) which provides:

"17. (1) All revenue from lands subject to this Act shall be collected by the Minister and for that purpose all rights to receive and all remedies to recover that revenue shall vest in him and, subject to the exercise of any power of delegation conferred by this Act, no other person shall have power to give a good discharge for any liability in respect of the revenue or to exercise any such right or remedy."

It was argued further that the collection of the various revenues by the respondent other than the "asikano" was tantamount to usurpation of the work of the minister by a person who was not the agent of the minister, and failure to pay the money collected to the minister was tantamount to wrongful collection and stealing of the money thus collected. The Chief State Attorney submitted that the learned High Court judge misdirected himself as to the meaning

of section 17(1) of Act 123 and the meaning of dishonest appropriation under section 120 of the Criminal Code, 1960 (Act 29) and so came to the wrong conclusions.

It was further pointed out that although section 27 of Act 123 prescribes an offence for the violation of the provision, there was nothing wrong with charging the offender under any other Act which the offender might also have violated. Furthermore, the offences preferred against the respondent were in strict compliance with section 112 of the Criminal Procedure Code, 1960 (Act 30).

The learned High Court judge found that the trial judge convicted the accused without particularising the counts on which he was convicted, and passed one sentence for all the several counts. According to him this procedure was incurably bad. The learned Chief State Attorney submits that such errors are mere irregularities that can be corrected by the appellate court and could have been corrected by the High Court judge himself.

Also, the defence of the respondent that he acted on a bona fide claim of right was attacked by the Chief State Attorney. According to him the claim of right was not bona fide, because the respondent **[p.6]** had been warned that he was usurping the power of the Stool Lands Secretariat.

The reply of counsel for the respondent to the appeal is essentially the same as his defence throughout the whole case. That is, because of the special history of Fahiakobo, the paramount chief of Bekwai as of right, is entitled to all dues collected from the stool lands of Fahiakobo. In other words, he is exempt from the revenue laws on stool lands. And if he is mistaken, then he claims a bona fide claim of right.

This appeal may be dealt with under the following broad issues. The first issue to be considered is the extent to which the administration of stool lands revenue affects Fahiakobo stool lands. Section 1 of Act 123 states that "the management of Stool lands shall be exercised by the Minister"; and section 17 (1) of Act 123 referred to above together with section 1 have been modified by section 48 of the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982 (P.N.D.C.L. 42). The part of section 48 which is relevant to this appeal is section 48 (1) which provides:

"48. (1) There shall be in the Secretariat of the Lands Commission an Administrator of Stool Lands who shall be responsible for—

(a) the management and disbursement of all existing funds held on account of stools by the Government;

(b) the establishment of a stool land account for each stool into which shall be paid all rents, dues, royalties, revenues or other payments whether in the nature of income or capital from stool lands;

(c) the collection of all such rents, dues, royalties, revenues or other payments whether in the nature of income or capital and to account for them to the beneficiaries specified under subsection (2) of this section."

To my mind, it is indisputable that the management of stool lands and the collection of moneys itemised under section 48 (1) (c) of P.N.D.C.L. 42 is the monopoly of the Secretariat of the Lands Commission through the Administrator of Stool Lands.

It is not in dispute that Fahiakobo lands are stool lands; **[p.7]** therefore despite the history behind how Fahiakobo became part of the stool lands of the respondent, those lands are under the management of the Stool Lands Commission Secretariat, and it is only the Administrator of Stool Lands or his duly appointed agent who can lawfully collect revenue from stranger farmers on those stool lands, in accordance with section 48 (1) (c) of P.N.D.C.L. 42.

The provisions of section 48 (1) and (2) of P.N.D.C.L. 42 are so comprehensive that I am unable to see how it can be said to exempt any stool land from their control. I am also unable to see how any of the various accounts identified under section 48 (1) (b) and (c) can be exempted from the operation of the section. The burden of proving an exemption is on the respondent. The basic evidential principle is that whoever claims that he has a licence or exemption from complying with the law, has the burden on him to prove that licence or exemption. The standard of proof is just to create a reasonable doubt: see R. v. Spurge [1961] 2 Q.B. 205 at 212-213, C.C.A.

I have examined the evidence as a whole and that of the respondent in particular very carefully, and I am satisfied that there is no evidence which creates any exemption which takes Fahiakobo stool lands from the jurisdiction of the Administrator of Stool Lands as provided under section 48 (1) (b) and (c) of P.N.D.C.L. 42.

If Fahiakobo lands fall under the control of the Lands Commission Secretariat and under the direct control of the Administrator of Stool Lands, then the collection of the revenue by the respondent or his agents, which the respondent does not deny, is an unlawful collection.

The next point to be considered is whether the unlawful collection of the stool lands revenues by the respondent amounts to stealing under Act 29. On this issue, the respondent, supported by the learned appellate High Court judge, stated that the Lands Commission Secretariat did not have Fahiakobo stool lands on its list of stool lands for revenue collection. Therefore there was no evidence that the farmers or the persons from whom the revenues were due would have refused to pay if the secretariat had demanded the payment from them, even though the respondent would have already made his "unlawful" collection. Also as such collection, even if improper, would have been made under a bona fide claim of right it would not be a basis for a criminal action.

There is evidence that officers or agents of the Lands Commission Secretariat informed the respondent that he should desist from collecting revenues from Fahiakobo stool lands because revenues from those lands were under the control of the secretariat. Thus when the respondent ordered the collection of the revenues he **[p.8]** appropriated the revenues, "with a knowledge or belief that the appropriation (was) without the consent of some person . . . who is owner of the thing." (See section 120 (1) of Act 29 for the explanation of misappropriation). In the face of this evidence, it would really not be any defence to the respondent if the farmers either through fear or ignorance paid again after the unlawful

collection. Each collection by the respondent would be unlawful, whenever made with the knowledge that he was collecting somebody's revenues against that person's wishes.

Claim of right in good faith appears to be a sound defence if the act was done mistakenly but the mistake was an honest one. I think that defence is deceptive and should be used extremely carefully. This defence is in section 29 of Act 29:

"29. (1) A person shall not be punished for any act which, by reason of ignorance or mistake of fact in good faith, he believes to be lawful.

(2) A person shall not, except as in this Code otherwise expressly provided, be exempt from liability to punishment for any act on the ground of ignorance that the act is prohibited by law."

Section 29 of Act 29, as I have always understood it, draws a rigid line between a conviction and punishment. It is not a shield against a conviction. It only provides an occasion when a person who has been found guilty will nevertheless be exempted from punishment, by being given absolute discharge, such as "cautioned and discharged" or "bound over to be of good behaviour," as none of these pronouncements count as punishment under section 294 of Act 30, the provision that defines what constitutes punishment under our laws. If section 29 is to become a defence it means the respondent has to agree to be guilty of stealing but is pleading to be exempted from punishment because in good faith he thought, as all his predecessors had violated the stool lands revenue laws without any complaints from the State, as of right, he also could collect the revenues from Fahiakobo for himself and refuse to pay them to the Administrator of Stool Lands.

But can this mistaken belief fall under section 29 (1), i.e. is the error an error arising out of ignorance or mistake of fact? To my mind whether a person is entitled to keep for himself revenue accruing from stool lands to the exclusion of the Administrator of Stool Lands, contrary to P.N.D.C.L. 42, is not a question of fact. It is certainly a question of law.

If it is a question of law, then the respondent falls under **[p.9]** section 29 (2), and has to establish that somewhere under Act 29, he is exempted from punishment for stealing through ignorance. There is no evidence of that defence available on record in favour of the respondent. I accordingly hold that this partial defence under section 29 of Act 29 does not avail the respondent.

The next issue to be examined is the question of submission of no case at the end of the prosecution's case. The learned High Court judge rightly pointed out that there was no evidential support for counts 12 and 13 against the accused. The Chief State Attorney also concedes that point. On examining the evidence on record I have also come to the same conclusion. The appeal against conviction on counts 12 and 13 must therefore be dismissed, and I would dismiss them.

The learned High Court judge raised the question of whether or not there was proper evidence to convict on count 10. In his opinion as the receipt which was apparently used as part of the evidence to convict the accused was only an identification and was never tendered as evidence, it could not count as evidence. The law here is settled that in trials, particularly

where the accused is defended by counsel, facts wrongly admitted as evidence should be protested against at the earliest possible opportunity; and in a case such as this, the point should be specifically raised as one of the grounds of appeal. This point cannot therefore be raised belatedly and obliquely here by the appellate High Court judge.

The final legal point that needs considering is the failure of the trial circuit judge to convict the respondent on the number of offences on which he was found guilty, as well as his one general sentence covering all the counts without specifying which count was awarded what sentence. The learned appellate High Court judge made a close analysis of the law governing such situations, citing some relevant Court of Appeal decisions which are quite opposite to the present position. He said:

"I finally come to the more serious part of the conviction of the appellant. I have already in this judgment quoted what the learned circuit judge pronounced on the conviction in these terms

'I find the accused person guilty of the charges and accordingly proceed to convict him. In this case however, even though as many as thirteen counts were preferred, general evidence of stealing was led and only a few particulars were proved . . .'

Assuming that a few particular counts were proved; he should have mentioned those counts and convicted the accused on **[p.10]** them. Again, in imposing sentence, he should have stated to which the fine related, and whether concurrent . . ."

The learned appellate High Court judge cited the case of Biney v. The Republic, Court of Appeal, 14 April 1969; digested in (1969) C.C. 70, a case whose situation is very much like the present one. In that case the accused was tried on two counts of pretending to be a public officer. The magistrate did not formally convict him on any of the counts, but proceeded to sentence him by giving him one sentence of two years' imprisonment with hard labour without stating the sentence for each count. The learned judge then set out in extenso the judgment of the Court of Appeal in that case, per Azu Crabbe J.A. (as he then was):

"A failure to convict, therefore, unless there is a sufficient reason to the contrary, is a breach of the mandatory provisions of section 171(2) of Act 30. And as the court said in Agbettoh v. Commissioner of Police [1963] 2 G.L.R. 413 at 416, S.C.:

'. . . where the irregularity complained of relates to a breach of a mandatory statutory provision, such as in this case, it is no excuse to say that the irregularity had occasioned no substantial miscarriage of justice.'

In this case the appellant was charged upon two counts, but the learned district magistrate passed only one sentence which was quite ambiguous. There should have been a sentence on each count . . .

In our view, the failure to convict the appellant on each count before sentence, and the other irregularities, constitute such a grave departure from the administration of criminal justice as to render the proceedings null and void. Consequently, we do not think that this case can be brought within the ambit of section 406 of Act 30.

For the above reason, we allowed the appeal and annulled the sentence of two years unlawfully passed by the learned district magistrate."

On the basis of this Court of Appeal decision, the learned High Court judge allowed the appeal in this case.

Section 406 of Act 30 which is regarded inapplicable in the face of such errors states:

"406. (1) Subject to the provisions hereinafter contained, no finding, sentence, or order passed by a Court of **[p.11]** competent jurisdiction shall be reversed or altered on appeal or review on account —

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment, or other proceedings before or during the trial or in any enquiry or other proceedings under this Code; or . . .

unless such error, omission, irregularity, or misdirection has in fact occasioned a substantial miscarriage of justice."

It may be reiterated that in the decision of Biney v. The Republic (supra) the Court of Appeal stated that where an irregularity violates mandatory statutory provisions such as relating to convicting on each count and sentencing on each convicted count, such violations will nullify the verdict on appeal even though the violations might have caused no substantial miscarriage of justice. If Biney v. The Republic (supra) which was decided in 1969 is the authoritative statement of the law at that period then the position of the law has drastically changed with the coming into force of the Courts Act, 1971 (Act 372).

Under Act 372, the only basis for allowing a criminal appeal, no matter what, is the causing of a substantial miscarriage of justice. Section 26 (12) of Act 372 provides:

"(12) The appellate Court on hearing any appeal before it in a criminal case shall allow the appeal if it considers that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment in question ought to be set aside on the ground of a wrong decision of any question of law or fact or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:

Provided that the said Court shall notwithstanding anything to the contrary in this subsection dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or that the point raised in the appeal consists of a technicality or procedural error or a defect in the charge or indictment but that there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the accused could have been convicted upon that charge or indictment."

[p.12]

(The emphasis is mine.) The first part of section 26 (12) of Act 372 is mandatory if the court thinks that the decision was unreasonable or wrong in law or fact. The proviso also says the proviso must mandatorily apply and in spite of whatever is said in section 26 (12) of Act 372

no appeal should be allowed unless a substantial miscarriage of justice has been caused by the conviction.

Also an appeal should not be allowed where all that has happened is a technical error or procedural error. Also if there is a defect in the charge or indictment but there is evidence on record upon which the defective charge can be supported or another charge can be supported, the accused cannot be discharged or acquitted simply because these technicalities or procedural defects exist in the charge, without causing actual substantial miscarriage of justice.

On the authority of the proviso of Act 372, therefore, if a trial court sentences an accused person without first convicting him, or finds him guilty on a number of counts without indicating which counts, and pronounces only one sentence to cover the undisclosed counts, that court would have erred; but so long as there is evidence on record to indicate on which count the accused could be convicted, the appellate court in so far as its action does not cause a substantial miscarriage of justice, is compelled to dismiss the appeal and substitute the appropriate convictions and of course the sentences.

To my mind, to acquit on appeal, a person against whom there is undoubted evidence beyond reasonable doubt, because before sentencing him the trial court forgot to announce the incantation of "you are hereby convicted on counts 1, 2, 3, etc. and sentenced to a fine or imprisonment on each count concurrently" is being unduly technical without paying sufficient attention to the real question of doing justice. The holding of the balance of justice between the accused and the public by the appellate courts and the veering of criminal justice from technicalities to the real essence of justice is, to my mind, the policy behind the Courts Decree, 1966 (N.L.C.D. 84), s. 13, which eventually became Act 372, s. 26 (12). Applying the law as it is now to the present case I would allow the appeal of the Republic.

JUDGMENT OF AMPIAH J.A.

I agree.

JUDGMENT OF ADJABENG J.A.

I also agree.

DECISION

Appeal allowed.

M. C. N. – N.

CHAPTER SIX
MANAGEMENT OF FAMILY PROPERTY

1. The Family as a Holder of Interests in land

The meaning of the word family necessarily depends on the field of law in which the word is used; the purpose intended to be accomplished by its use, and the facts and circumstances of each case.

The family is the central; institution under customary law. His is because it permeates every aspect of customary law. A family can be defined as a group of people with a common lineage. According to Kludge (1973:131):

"The word 'family' is one which is difficult, if not impossible to define precisely. In one sense it means all blood relations who are descended from a common ancestor; in another, it means all members of a household, including husband and wife, children, servants and even lodgers. But for the present purpose both these definitions are far too wide….."

Insert 2.3.2 of ACLP

First, family could be used to refer to husband, wife and children.
Second, family could also refer to a collective body of persons who live in one house under one head or management.

Third, family could refer to a group of blood-relatives or all the relations who descend from a common ancestor or ancestress as the case may be, or who spring from a common root.
Fifth, family may be used interchangeably with household.

In the context of customary land law, a family generally refers to groups of persons or individuals whose precise kinship relationship to each other are known, in the sense that they can identify the persons through whom they trace their relationships. In this context members of a family do not necessarily have to be related by blood.

Note however, that in certain cases the word family is used to describe wider groups which are known to be related but whose precise relationships have been forgotten.
Mention types of families as Matrilineal and Patrilineal. Defer discussion on distinction between family, clan, lineage and ethnic group, etc. See:

In Re Adum Stool: Agyei & Anor. v. Fori & Ors. [1998-99] SCGLR 191.

2. Family Land

What is family land? How is that different from stool land? We discussed that controversy previously. We need not belabour the issues. You may recall that the definition of stool land in Article 295(1) of the 1992 Constitution does not include family land. There are arguments on both sides of the divide about whether stool land should cover lands held by families. Refer to implications of Article 267(5) on prohibiting the grant of freeholds in stool land.

The logical implication of Articles 267(5) and 295(1) could be that you could make grants of freehold in family lands. Reason being that family lands are subject to a different regime from stool lands.

3. Incidents of Membership of the Family

Here we are referring to the bundle of rights and responsibilities that accompany an individual's membership of a family. In other words what rights does a member have in relation to land held by the family?

Distinguish between situations where the family holds the Allodial title and where it holds a customary freehold.

Generally speaking where the family holds the allodial title, the members' rights are similar to the interest of a subject in stool lands. Refer back to the case of Oblee v. Armah, supra cited. Member acquires the customary freehold upon his occupation and use. In the case of ***Heyman v. Attipoe (1957) 2 WALR 87*** subject in dispute was whether a particular land that belonged to one Adansingo was disposed of during her lifetime to her one of her children (Nyanya) alone or whether because the late woman had died intestate the land became family property to be enjoyed in common by all the direct descendants of the deceased. The court held that by native custom the head of the family is the proper person to have charge of and control of the family land for and on behalf of the family.

Heyman v. Attipoe (1957) 2 WALR 87.

HEYMAN *v.* ATTIPOE [1957] 2WALR 86
High Court, Eastern Judicial Division, Land Court
Ollennu J.

OLLENNU J.
The plaintiff and the defendant are both direct descendants of a common ancestress, one Adanshigbo. The defendant is the grandson of Nyanya, one of Adanshigbo's five children by her first husband, Chief Sokpui I; the plaintiff is a grandson of Hudzengor, one of Adanshigbo's two children by her second husband Kumorshie. It is common ground between the parties that the land in dispute belonged originally to Chief Sokpui I, and that he made a gift of it to his wife Adanshigbo. But while the plaintiff claims that Adanshigbo died intestate possessed of the said land, and that it has, by native custom, now become family property to be enjoyed in common by all the direct descendants of Adanshigbo, the defendant contends that Adanshigbo disposed of the land during her lifetime to her daughter Nyanya alone, that Nyanya died intestate and possessed of it and that it has therefore become the sole property of the direct descendants of Nyanya, his grandmother, to the exclusion of all other direct descendants of Adanshigbo.

The only issue thus joined between the parties which the Native Court was called upon to determine is simply this: did Adanshigbo die possessed of the property or did she dispose of it during her lifetime to her daughter Nyanya? In their judgment the Native Court held that the land was given to Adanshigbo for farming purposes and that upon her death it descended by Anlo custom only to her direct descendants by Chief Sokpui.

The first finding of the Native Court contradicts the case put up by either party, which is that Chief Sokpui I made an absolute gift of the land to Adanshigbo, such that Adanshigbo could deal with it in any way she liked. That decision, therefore, is not supported by the evidence and so cannot stand.

The second finding amounts to a decision that Adanshigbo died possessed of the land. As already pointed out, that in fact is the only issue the Native Court was called upon to determine. This finding is in favour of the plaintiff. Therefore the proper and indeed the only judgment which the Native Court should have given is one for a declaration in favour of the plaintiff that the property is family property for all direct descendants of Adanshigbo, including the plaintiff and defendant. But instead of giving judgment for the plaintiff the Native Court built up a case for the defendant which was quite different from the one he set up and tried to prove by the evidence he led. That new case is that Adanshigbo's only interest in the land was that of farming rights, which by native custom died with her, and thereupon the property descended by Anlo custom to her children by Chief Sokpui the donor exclusively.

Mr. Apaloo, learned counsel for the defendant, has properly conceded that that decision cannot be defended. A court is not entitled to make a case for any party. Its simple duty is to adjudicate upon the issues which are raised before it, and any others that are incidental to those issues. The Native Court therefore erred in taking it upon themselves to make a new case for the defendant, and in entering judgment in his favour on that case.

Now in addition to his claim for a declaration that the land is the property of all the direct descendants of Adanshigbo, the plaintiff also claimed recovery of possession and accounts. Mr. Akufo-Addo, learned counsel for the plaintiff, conceded that the claim for an account against the defendannt, the head of the family, is not maintainable according to native custom. As to the claim for recovery of possession, he says that he would not press for an order in that behalf: that was as far as he could go.

By native custom a member of a family eannot sue the head of the family for accounts. The authorities are many on that point; one of them is *Abude and Others* v. *Onano and Others*. The plaintiff's claim for account must therefore fail.

Again, by native custom the head of the family is the proper person to have charge of and control of the family land for and on behalf of the family. A member of the family cannot maintain an action against him for recovery of general family land in the possession of the head. The only instance in which he can maintain an action for recovery of possession against the head is when the head wrongfully takes possession of a portion of the family land which the individual member or a branch of the family has reduced, by one of the customary methods, into his possession, *i.e.,* land over which the individual member or branch of the family has established a usufructuary title. There is no evidence on the record that the area in dispute has ever been in the exclusive possession of the plaintiff, or of his small branch of the family, as their separate estate. In the circumstances the claim for recovery of possession must also fail.

Thus, of the three claims the plaintiff made, only the principal one, namely, the one for a declaration that the land in dispute is property of the family of all direct descendants of Adanshigbo, can succeed. For the reasons stated above I allow the appeal, set aside the judgment of the Anlo Native Court "A" including the order as, to costs, and substitute therefor the following:
"There will be judgment for the plaintiff against the defendant for a declaration that the land in dispute is the property of the Adanshigbo family, consisting of all direct descendants of the said Adanshigbo, including the plaintiff and all those he represents, and the defendant and all descendants of Nyanya."
The plaintiff's claim for recovery of possession and for account are dismissed.
Appeal allowed in part.

A member of the family mayalso exercise the rights of possession against the head of family. Heyman v. Attipoe (1957) 2 WALR 87.

Nunekpeku v. Ametepe (1961) 1 GLR 30 is the authority for the proposition that such rights are exercisable even against other members of family. A junior member of the ... family wrongfully granted a portion of the family land to the defendant, who was later found to be part of the family; without the consent of the principal members of the family. The court on appeal held that since it had ben established that the defendant was a member of the family, he is entitled to occupy any available part of the Agbeve family land, and that once he has occupied that portion, he has a limited right to it, and cannot be ejected therefrom at the will of the individual member of the family.

Nunekpeku v. Ametepe (1961) 1 GLR 301.

NUNEKPEKU AND OTHERS v. AMETEPE [1961] GLR 301-305
IN THE HIGH COURT, HO
6TH JUNE, 1961

PREMPEH, J.

This is an appeal from the judgment of the South Anlo Local Court "A" given in favour of the plaintiffs-respondents herein.

"The land commonly known and called Bawe land situate and being between Woe and Tegbi towns is admittedly the property of Agbeve family of Anloga and Woe – which is under the control and supervision of the plaintiffs as head and principal members of the said Agbeve family.

"The defendant who is not a member of the said Agbeve family has been wrongly and unlawfully granted a portion of the said Bawe land (previously cultivated by the late Abusah) by Kwashie Bohlibo Akpalu a junior member of the Agbeve family without the knowledge, consent and authority of the plaintiff and/or the family as a whole wherefore the plaintiffs' claim against the defendant is for an order of ejection of the defendant from the land wrongly occupied by him at Bawe and bounded on the East by Bawe Tribal land, West by the land of farm cultivated by Tsigui Akpalu: North by the farm wrongly entered upon by Tetor Abotsi Aho and on the South by the farm wrongly entered upon by Denu Kese.

A further order upon the defendant, his agents, servants and labourers to vacate any other portion of Agbeve family land known and called Bawe land, Aborme land and Aveglo land wrongly and unlawfully occupied and/or cultivated by him.

In the second paragraph of the particulars of claim, the respondents claimed that the appellant was not a member of the Agbeve family, but in giving evidence for and on behalf of the other respondents, the second plaintiff-respondent admitted that the defendant was a member of the Agbeve family on the maternal side, and it is not insignificant to observe that the second plaintiff himself admitted that he was a member of the said Agbeve family on the maternal side.

It having been established that the appellant is a member of the Agbeve family, whether it be of the wider or immediate family, it is my view that he is entitled to occupy any available part of the Agbeve family land, and that once he has occupied that portion, he has a limited right to it, and cannot be ejected therefrom at the will of the individual member of the family.

It has been contended on behalf of the respondents that the appellant was a licensee of the respondents, but I am unable to accede to that argument since as a member of the family he has limited rights to the family land.

It is my view that even if the appellant had joined some other members of the family in alienating a portion of the family land rightly or wrongly, the remedy open to the respondents, if they had a right to sue at all, was to bring an action for the recovery of the land from the vendee.
In my opinion, the alternative remedy open to the respondents was to have called a meeting of the whole family, and if the entire family or the principal members thereof had resolved that he should be ejected from or dispossessed of the portion of family land he himself occupied, and if he still remained on the land, then and in that case he could be termed a trespasser, and the family per the respondents could then properly bring an action in a native court to enforce the decision of the family and obtain an order of ejectment or for possession. See Abontendomhene Kweku Akenten v. Kwame Dapaah.

In that case, the respondent had been made the customary successor of one Kweku Pong deceased, a member of the family to which both the appellant and the respondent belonged, and the cocoa farm left by the deceased had been entrusted to the respondent as caretaker thereof for the family, and to utilise the proceeds of the said cocoa farm for the benefit of the family. The respondent failed to utilise the proceeds of the farm to repair the family house, as he had to do, and had also refused to render accounts, and the appellant brought an action in the native court for the recovery of possession from him of the said cocoa farm.
It was held by the Land Court, supporting the judgment of the Asantehene's Appeal Court "A", that the family could only bring the action for recovery of possession of the farm after the family had properly met and customarily removed the respondent from his position as successor and caretaker, the point being that after having been removed, the respondent would be a trespasser if he remained in occupation of the farm.

In my opinion the principle applies with much more force in this case. In this case, the respondents just sued in the native court to dispossess the appellant of the portion of Agbeve family land occupied by his ancestors and now occupied by him, on the ground that he had joined some other members of family to alienate another portion of family land, and since the procedure which I have indicated in the case above referred to was not followed, I do hold that the respondents' action against the appellant was not maintainable.
Further, and in any case, it is my view that if there was a peculiar custom applicable to the respondents' family or to the area in which the property is situated, whereby the action could be maintainable without such customary observance, such peculiar custom should have been proved by evidence. See Tetteh v. Doku. This the respondents failed to do and the trial court also failed to direct itself that such custom should have been proved.
One other reason for the institution of the action against the appellant, as is evidenced in paragraph 2 of the particulars of claim, was that he had been in occupation of a portion of family land previously occupied and cultivated by Abusah. In my view that was a right of action open to Abusah himself, if in fact he had a family right which had been disturbed by the appellant, and I hold therefore that the respondents were not in those circumstances competent to bring this action against the appellant on that ground.
For these reasons I will allow this appeal, and I do set aside the judgment of the native court. Accordingly I do order that the plaintiffs-respondents' claim against the defendant-appellant be dismissed, and I enter judgment for the defendant-appellant with costs which I assess at 70 guineas, inclusive of counsel's brief fee. The appellant will have his taxed costs in the court below. Appeal dismissed.

However in Botwe v. Oduro (1946) DC (Land) '38-47, 184 it was stated that such rights could also be exercised against non members of the family or strangers.
What other rights could members enjoy? (**Ask class**)

Right to residence in family houses, but without power to determine which room you would occupy;
Funeral and other expenses to be payable by other members upon your death;
Support for school or to start a business or trade;
Are any of these "rights" capable of judicial enforcement?
Obligations of members:
Contribute towards the payment of family debts;
Contribute towards the payment of debts of individual members;
Payment of funeral and burial expenses of deceased members; and
Assistance to needy members.

4. Acquisition of Family Property

Two issues arise here. First, which acquisitions inure to the benefit of the family member performing the acts of acquisition and which inure to the benefit of their family.
Second, where property inures to the benefit of the family how do you determine the scope of the entitled class in the family? See for example In re Atta (Deceased): Kwako v. Tawiah (2001-2002) SCGLR 461.

The mode of acquisition determines the status of the property.
The general rule is that property acquired with family resources, e.g. income from existing family property (or where family property is sold and proceeds used to acquire other property) such property is family property.

Where property is acquired by the joint efforts of members of the family, there arises a rebuttable presumption in favour of family property. Generally speaking upon the death of one of the acquiring members, the surviving contributors only retain a life interest and the property becomes a full-fledged family property upon the death of the other contributor(s) as seen in the case of Tsetsewa v. Acquah (1947) 7 WACA 216.

But where a member acquires property with a small contribution from the family the property does not assume the character of family property.Cudjoe v. Kwatchey (1935) 2 WACA 371.
The fact that a family member benefited from financial support of the family towards their education does not make property subsequently acquired by them in the future family property.

In ***Larbi v. Cato (1960) GLR 146*** the plaintiff who was the brother of A.O.Larbi (desceased) claimed that the property left by the desceased was family property because he had built the premises with financial assistance of various members of the family. The action was dismissed at the court of first instance. On appeal the appellant further went on to claim that the deceased had, together with other members of the family, been given the advantage, with the support of family funds, of an education which had enabled deceased to practise with distinction and consequent self-enrichment at the Bar and as a solicitor, therefore everything he enjoyed as the result of his early education, and everything that was purchased by him out of his own efforts and earnings, took upon itself the character of profits earned by the use of family funds, and that therefore the House desceased house in Adabraka, and (presumably) the substantial bank balance from time to time available to the deceased, belonged, not to the deceased but to the Obuadabang Larbi family of Larteh. The court held that "*Support so extended is by way of gift for the advancement of the younger generation, and, while it*

places upon them certain recognised moral obligations towards the family, it does not stamp with the mark of the family everything that they afterwards acquire by their own efforts, whether as lawyers, doctors, or merchants, or by activity in other fields"

Larbi v. Cato (1960) GLR 146.

LARBI v. CATO AND ANOTHER [1960] GLR 146-155
IN THE COURT OF APPEAL
6TH JUNE, 1960

KORSAH, C.J., VAN LARE, J.A. AND GRANVILLE SHARP, J.A.

GRANVILLE SHARP J.A.

A. O. Larbi died in, 1956. In 1937 he had built House No. C276/1, Nsawam Road, Accra, Adabraka on self-acquired land. He added to the buildings in 1950. By deed of gift dated 24th March, 1952, he conveyed the property to his son A. O. Cato-Larbi and confirmed the deed in his will dated 19th September, 1952. At his death, the ownership of the property was therefore vested in A. O. Cato-Larbi.

In 1957 the brother of the deceased brought an action in which he claimed inter alia a declaration that the said property was family property (and therefore property of which the deceased was not entitled to dispose). The defendants were the brother-in-law and the widow of the deceased. The basis of the plaintiff's claim was that the deceased had built the premises with the financial assistance of various members of the family. The action was dismissed by Ollennu, J. and the plaintiff appealed. At the hearing of the appeal it was further argued on behalf of the plaintiff that as the deceased had been educated with the assistance of family funds, his subsequent earnings and property acquired were stamped with the mark of family property.

On this evidence the learned judge, in our opinion, was fully entitled to find, and was right in finding, that the plaintiff had not proved his case. On our own reading of it, the evidence for the plaintiff stands out as quite unreliable, and such inferences as are to be drawn from it cannot support the claim put forward by the plaintiff. The learned judge had the additional advantage that he heard and saw the witnesses, whose demeanour no doubt assisted him in his assessment of their reliability.

It was in these circumstances that Dr. Danquah felt himself to be justified in presenting (not once, but with constant and quite unnecessary repetition) an argument that because the deceased had, together with other members of the family, been given the advantage, with the support of family funds, of an education which had enabled deceased to practise with distinction and consequent self-enrichment at the Bar and as a solicitor, therefore everything he enjoyed as the result of his early education, and everything that was purchased by him out of his own efforts and earnings, took upon itself the character of profits earned by the use of family funds, and that therefore the House No. C276/1 in Adabraka, and (presumably) the substantial bank balance from time to time available to the deceased, belonged, not to the deceased but to the Obuadabang Larbi family of Larteh.

It is material to point out that the plaintiff himself said that sons of the family, assisted by the family in the way in which the deceased was, were under no obligation to repay the sums expended upon them. This statement is in full accord with our understanding of custom in Ghana. Support so extended is by way of gift for the advancement of the younger generation, and, while it places upon them certain recognised moral obligations towards the family, it does not stamp with the mark of the family everything that they afterwards acquire by their own efforts, whether as lawyers, doctors, or merchants, or by activity in other fields. If the contrary were the correct view there is hardly a person of distinction in the country who could

claim to possess anything that he could call his own, and much of the body of customary law on the disposal and inheritance of self-acquired property would be cast away, which is the reductio ad absurdum of the whole argument.

According to Dr. Danquah, if a person were building a mud house for himself in a village, and a member of his family came near at a moment when the builder (overtaken with thirst and fatigue) begged and received from the visitor refreshment to the value of a shilling, this would suffice to stamp the building with the mark of the family. We do not doubt for one moment that those family members who make contribution to the building of a house are entitled to share the enjoyment of the building, but this is (and must be) on the basis that, by accepting support and contribution from the family, the builder recognises that he is building a house for the family. It is quite otherwise when, as the learned judge upon ample evidence here found, a person is building his own house and seeks assistance by way of loan, or as his personal share of a family fund, in order to complete his building. If the family as a whole is in fact assisting in the building of the house it would not affect the situation if the contribution of one member was greater than another's. In such circumstances the slightest assistance (which is to say contribution) would give to the provider an interest in the enjoyment of the house, but in our view, as in that of the trial judge, one single member of the family cannot by carrying one brick, or one board of wood, stamp the building with the mark of the family. Where, as in the present case, by special arrangement a loan or payment of money due out of a family fund is made to a person building his own house, and the sum involved is £30 (a small part of the cost of the building) it would, in our opinion, require evidence much stronger than was tendered before the learned trial judge to justify a finding that the house is a family property.

Towards the conclusion of his judgment the trial judge said:
"the building erected by deceased on his land was worth no less than £2,500. The amount of £30 was, therefore, negligible compared with the value of the building. Applying the principle which I have already stated, even if it was meant to be a contribution in the technical sense, it could not (in these modern days) change the character of the building from individual to family property."

We do not think that the learned judge intended by these observations to change the customary law, as Dr. Danquah would have it. It is not, in our opinion, necessary to decide this one way or another, as the observations in question were in any event obiter to his decision on the facts.
Dr. Danquah cited to us a small volume of authority upon his contentions, to which it is therefore necessary, in conclusion, to refer.

In doing this we are according to Dr. Danquah a degree of consideration which he himself failed to extend to the court. First, however, we would refer to a case to which Dr. Danquah did not himself make reference, African & Colonial Co. Ltd. v. Blemir Syndicate, G. C. Hutchful and Others (Full Ct. 1923-25 p.40). In the present case there is ample evidence that Cato-Larbi's predecessor (through whose gift and devise he holds the property), and Cato-Larbi himself, have throughout held themselves out as owner in each case of the house. They have lived in it and controlled its use, and the family have not noticeably interfered, save for the issue of one warning which was ignored with impunity and without further incident. In these circumstances, according to the case cited above (in which the judgment of the Full Court was confirmed by the Privy Council), "very satisfactory evidence is required to prove that the land or house is not his sole property," (at p.44) a proposition earlier laid down in the case of Russell v. Martin (1 Ren. Rep. 193). Next, it is not immaterial to refer to Dr. Danquah's own

learned work on Akan Laws and Customs which, though for a certain lively reason not authoritative, has not inconsiderable persuasive force. At pp.205-206 the learned author says: "No person can have absolute control over property except he owns it sui juris . . . [Property] may be held by a son as a gift from his father. It may be held by one member against all others as a gift received from another member of the family or from a member of a strange family. Lastly, it may be acquired by outright purchase, or by other business means out of income earned through one's own individual efforts."

It may be asked how Dr. Danquah would seek to reconcile these observations in his book with his general argument before us, and in particular with his contention that if a lawyer, whose profession had been made possible for him by reason of support from the family, were given some property by a stranger as a token of admiration for his skill in advocacy and devotion to duty in the course of some litigation, that gift would belong, not to him but to the family to whose early support he owed his professional qualification.

In the cited passage Dr. Danquah followed the view expressed by Sarbah at p.77 of his Fanti Customary Laws, (1st. ed.) that;
"Property is designated self-acquired or private, where it is acquired by a person by means of his own personal exertions without any unremunerated help or assistance from any member of his family."
It should be made clear that it is the "exertions" that have to be assisted, and it matters not that these exertions were made in a sphere or calling, access to which had been made possible to the person by the earlier assistance of the family or some member of it.

Similarly Redwar at p.79 of his Comments on Gold Coast Ordinances:
"According to Native Law there is a presumption in favour of all land being jointly held by a Family or other Community, which presumption may, however, be rebutted by evidence that it has been acquired by an individual through his own personal exertions in [p.154] trade or otherwise, without any assistance from the Community of whom he is a member, or by gift to the individual apart from the rest of the Community ... It is also clear that he has an unfettered right to dispose of his Individual Property either during his life time or by Will.

While it is true that customary law requires that the presumption in favour of family property should be rebutted by evidence, and that the onus is upon the one who asserts sole ownership, that onus shifts once it is shown that that person has been dealing with the property as his own, or that it came to him by gift or by testamentary disposition from one who dealt with it as his own: see Russell v. Martin (1 Ren. Rep. 193).

The case of Codjoe & Others v. Kwatchey & Others (2 W.A.C.A. at p.375), which was cited both in the court below and to us, contains passages that do not support the arguments presented in support of this appeal. Evidence that a member of the family had been allowed to put up a small shed or shelter for trading during a short period on the land was claimed by the plaintiffs to establish that the land was family property. The trial judge rejected this argument, and Webber, C.J. agreed with him, citing with approval the following passage from his judgment,
"Her adoptive brother would naturally let her do a little petty trading there if she wanted and erect a stall as I have indicated. The family system would account for that. It is not by `scintillae' such as this that the ownership of land can be determined." Webber, C.J., also cited with approval this passage from Okai v. Asare (unreported.) "Self-acquired land is not turned into family land by the owner of the land being kind enough to allow some of his family to live on the land and enjoy the use of it" (ibid.)

The fact, therefore, that a nephew in the present case was allowed to reside in the house is colourless, and in our opinion ineffectual to stamp the house with the character of a family property. Also, although we agree that according to the best authority a real contribution towards the building of a family house need not be substantial in the accepted sense of that word in our view (as in that of the learned trial judge) it must be a "real contribution", and we cannot accede to the view that customary law is a stranger to the doctrine de minimis non curat lex. We have considered the other cases cited by Dr. Danquah, but we find them irrelevant to the issues decided by the learned judge, and to the facts upon which such issues were decided.
We have considered this appeal in a full awareness of the warning of Lord Haldane, in the case of Tijani v. Secretary, Southern Nigeria ([1921] 2 A.C. at p. 402) when he said:
"in interpreting the native title to land, not only in Southern Nigeria, 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 up under English law. But this tendency has to be held in check closely ... there is no such full division between property and possession as English lawyers are familiar with."
Perhaps we may permit ourselves to say that this court is not, nor has it been since its inception, unfamiliar with this cautionary passage which was cited to us. Having given the most careful consideration to the matter we cannot (save, as we have already said, in that part of it which was obiter) find anything in the judgment of the learned trial judge which is open to any criticism, and we therefore dismiss this appeal.

DECISION
Appeal dismissed.

(Particularly the last paragraph starting from the bottom of page 151)
Read the middle paragraph of page 152 in Larbi v. Cato above for situations in which a member is building his own house and seeks assistance from the family.
Ollennu PCLLG in ***Boafo v. Staudt*** explained that where also,Where one member of the family acquires land with his own resources and other members provides the funds to build on the land the house becomes family property..
Where a member builds a house on family land the land remains family land and the house becomes family property with the member only retaining a life interest. Indeed upon his death the widows and children of the man have only a right of occupation subject, of course to good behaviour.In ***Amissah-Abadoo v. Abadoo (1974) 1 GLR 110*** there was a controversy between the younger brother of the desceased (Lawyer Abadoo) and the desceased wife that some properties of the desceased are the property of the plaintiff's family and not the private property of the desceased. The trial court found that the house in dispute was built by the late lawyer Abadoo out of his private resources did not become family property within the meaning of "substantial contribution" as enunciated in the Larbi case (supra) merely because of the casual supervision by his mother in his absence nor did the cooking services rendered by his sister satisfy the "substantial" requirement

Amissah-Abadoo v. Abadoo (1974) 1 GLR 110.

AMISSAH-ABADOO v. ABADOO [1974] GLR 110-132
HIGH COURT, CAPE COAST
12 NOVEMBER 1973
EDWARD WIREDU J.

The plaintiff in this action is the younger brother, customary successor and the head of the immediate family of the late lawyer Abadoo of Cape Coast and the defendant is his lawful

widow. The controversy between them is about the ownership of house No. G8/2, Tantri Lane, Cape Coast, and a plot of land situate at Kotokuraba also in Cape Coast.
The declaration sought by the plaintiff in his capacity as the head of the late Abadoo's family reads as follows:

> "A declaration that house No. G8/2, Tantri Lane, Cape Coast, as well as a plot of land at Kotokuraba Road, Cape Coast, are the property of the plaintiff's family and not the private property of the late barrister D. Myles Abadoo."

The defendant for her part by her counterclaim claims a declaration:
"(a) That house No. G8/2, Tantri Lane, Cape Coast, as well as the plot at Kotokuraba Road, Cape Coast, were acquired by the individual effort and individual means of the late barrister Abadoo and as such [are] the self-acquired property of the late barrister Abadoo, his heirs and successors and not the property of the plaintiff's family.
(b) That the defendant and her children of the marriage between her and the late barrister Abadoo are entitled to remain in the said house No. G8/2, Tantri Lane, Cape Coast."
It is not in dispute that during the lifetime of the late lawyer Abadoo he lived in the disputed house exclusively with the defendant and their children. The events which seemed to have provoked the institution of the plaintiff's action are that by an instrument dated 19 December 1964 and described as the last will and testament of lawyer Abadoo, which instrument was by consent admitted in this proceeding as exhibit 1 the two disputed properties were devised as follows:

> "(a) I devise my house No. G8/2 situate at Tantri Lane, Cape Coast, which was built solely by me during the lifetime of the parents in 1929-1930, without any assistance financially or otherwise from any member of the family upon the earnest request of the parents in order to prevent the erosion of the land on the western side of Ebenezer Hill house No. G9/2 due to rainfall to my dear wife Chrissie Millie Abadoo and my three sons, namely, Josiah Myles Abadoo, Daniel Myles Abadoo, Junior, and John David Ekum Abadoo all of Cape Coast together with all the furniture, pictures, bedsteads and things therein, to hold, possess and enjoy the same absolutely as tenants in common. Also to my said wife and her children, I devise my house No. E30/2 situate at Elmina Road, Cape Coast, for their absolute use and to hold, possess and enjoy the same as tenants in common . . .
> (i) I devise my land situate at Kotokuraba Road, Cape Coast, measuring 50 feet by 100 feet long sold by nephews, the Holdbrooks, to establish a cornmill business at Amanful and re-bought by me through the late Sam Bentil, a licensed auctioneer, Cape Coast, to my second son Daniel Myles Abadoo, Junior, to erect with his own money a modern building or house thereon for his own use as soon as would be possible for him to do so."

The plaintiff's statement of claim shows that on the death of lawyer Abadoo his private apartments in the disputed house were closed by the family apparently in accordance with customary law practice. This action by the family appeared to have caused some concern to the defendant and her son Daniel who apparently are devisees of these properties under exhibit 1.
Paragraphs (10)-(13) of the plaintiff's statement of claim which set out in detail what seemed to have sparked off the present action read as follows:
"(10) On or about 31 December 1972, the defendant and her son Daniel Abadoo informed the plaintiff and other members of his family that if by 10 a.m. that morning they had not surrendered the keys of lawyer Abadoo's private apartments (which apartments according to custom were to remain closed for a year after the death of lawyer Abadoo) the plaintiff and his family would be taken to the Regional Commissioner, there to face the consequences."
(11) When this threat was ignored the defendant's son forcibly broke open the closed apartments and ransacked the rooms: Daniel Abadoo explained his conduct by saying that the house had been bequeathed to his mother and her children and that he was the sole executor of his father's will.

(12) The plaintiff's mother Sarah Abadoo bought a plot of land at Kotokuraba Road, Cape Coast, adjoining late Winful's house,for plaintiff's brother-in-law one Holdbrook then in Nigeria. After his death the land was given to plaintiff's sister Mrs. Holdbrook. After her death her children mortgaged the land to raise funds for erecting a cornmill. Later lawyer Abadoo redeemed the land on the understanding that the children would repay him. In the event lawyer Abadoo died without the children being able to refund the sum of ¢180.00 involved.
(13) This land the aforesaid Daniel Abadoo, defendant's son now claims has been bequeathed to him under the so-called will of his father: Wherefore the plaintiff claims as per his writ of summons."

These averments are however denied in the statement of defence. When the plaintiff's writ was served on the defendant, she entered an appearance under protest and later filed an application to have the plaintiff's writ set aside and his action dismissed as disclosing no reasonable cause of action against her. This application was filed the very day that the plaintiff's statement of claim was filed. The application was opposed and was later dismissed (in my earlier ruling reported in [1973] 1 G.L.R 490), principally on the ground that it was brought prematurely. The defendant however did not leave that point to rest there and by paragraphs (16) and (17) of her statement of defence summarised the same point as follows:
"(16) The defendant says that the action against her is misconceived and in law not maintainable against her but rather against the executor or the appropriate person. Hence the action ought to be dismissed."
"(17) The defendant says that the plaintiff is not entitled to any declaration either in respect of house No. G8/2, Tantri Lane or the plot on which the said house stands."

This brings me now to the most controversial aspect of the case, namely, the disputed house No. G8/2, Tantri Lane, Cape Coast. Even though the pleadings on this aspect of the dispute are very elaborate, not enough evidence was produced to enable me to settle most of the matters upon which issues were joined between the parties. The little evidence which was produced at the trial makes me wonder where solicitors who drafted the pleadings in this case obtained their materials from. The parties to this suit who were the only witnesses to testify at the trial appear not to have much personal knowledge about the history of the disputed house. The defendant did in her evidence state that she had nothing more to say about the building than what her husband had stated in exhibit 1. Of course one can understand her stand as she had not then officially been admitted into the Abadoo family when the building was under construction. The plaintiff also did not have much to say about this and although he testified that the idea of constructing a building on the land was mooted at a family meeting, his answers to questions in cross-examination revealed that he was not personally present at that meeting and therefore did not know actually what took place. Apart from what is contained in exhibit 1 about the disputed house there is no other preferable evidence on record about how the disputed house came to be constructed. I have therefore resolved to go by the contents of exhibit 1 as the nearest approach to the true facts about the history of the disputed house. There are however two main matters about which the facts appear not to be in hot dispute between the parties. The first is about the funds and materials provided for the construction of the building. The overwhelming facts show that the funds and all materials provided for the construction of the disputed house were solely from lawyer [p.119] Abadoo. In other words the disputed house was built by lawyer Abadoo out of his own private means. Even though the plaintiff pleaded in paragraph (8) of his statement of claim that:

> "House No. G8/2, Tantri Lane, Cape Coast, was as a result built on the family land principally from funds provided by lawyer Abadoo but with contributions from other members of the family in particular from lawyer Abadoo's mother who in addition actually supervised the building in the absence of lawyer Abadoo,"

the evidence produced by him satisfies me that the nature of the contributions allegedly offered by lawyer Abadoo's mother and his sister (i.e. supervising the construction in his absence and rendering him other services such as cooking for him) were not the nature of

contributions within the meaning of the phrase "substantial contribution" as enunciated in Larbi v. Cato [1959] G.L.R. 35 as to even taint the disputed house with family character. The evidence shows that lawyer Abadoo was a bachelor at the time of construction of the disputed house and that he and his other brothers and sisters were staying with their parents in house No. C9/2 just opposite the disputed house so that the nature of services rendered him by his mother and sister as stated above do not go beyond what he would ordinarily have enjoyed from them under those circumstances. I hold in my judgment therefore that house No. G8/2, Tantri Lane built by the late lawyer Abadoo out of his private resources did not become family property within the meaning of "substantial contribution" as enunciated in the Larbi case (supra) merely because of the casual supervision by his mother in his absence nor did the cooking services rendered by his sister satisfy the "substantial" requirement.

The other matter about which there did not seem to have been much controversy is the land on which the disputed house stands. The evidences shows that this land was a portion of land with a building thereon conveyed as a gift by lawyer Abadoo's father to his wife (the mother of lawyer Abadoo) and the children of their marriage. The gift was by a deed dated 28 August 1891 and was admitted by consent as exhibit A. By the said deed the donor conveyed his interest therein to his wife, children, their "heirs and assigns."

The main contention of the plaintiff as submitted by his counsel was that by the said deed the donees took the land and held it jointly as indivisible family property. The family in this sense according to learned counsel for the plaintiff was constituted by the wife (i.e. the mother of the plaintiff) and the children of her marriage with the donor and their "heirs and assigns." Counsel further submitted that the limitation as to use and the right of inheritance as enjoined on the donees by the directions of the donor as contained in exhibit A showed beyond doubt that the gift was to find its way ultimately into the matrilineal family of the Abadoos. Founding himself on the cases of Owoo v. Owoo (1945) 11 W.A.C.A. 81, Beyeden v. Bekoe (1952) D.C. (Land) '52-'55, 38 and Ansah v. Sackey (1958) 3 W.A.L.R. 325 learned counsel contended that lawyer Abadoo had only a life interest in the house he built on the joint family property. He argued that his dealings in respect of the disputed house could not go beyond his life interest and therefore he could not alienate beyond that interest. Counsel further argued that the family on the evidence was in effective occupation of the area on which the house was built. Present at the site according to counsel was a well in use and a play ground for the family. Counsel submitted that the site was in active use by the family. He contended that the request to Abadoo to put up a building on the land was to check erosion and thereby to protect the family land. Learned counsel also referred to the case of Mensah v. Lartey [1963] 2 G.L.R.92, S.C. and submitted that since Abadoo's father had gifted the said piece of land without any limitation as to what estate each of the donees was to have in the property, such property was to be considered as their joint family property.

For the defendant it was submitted that on the proper interpretation of exhibit A the land on which the disputed house stands was conveyed to the plaintiff's mother and her children by way of gift so that the property became their absolute property which they could assign or alienate. Founding himself on the Lartey case (supra) counsel submitted that the family contemplated under exhibit A were the donees, their children and their children's descendants and not family in the accepted customary law sense as argued by counsel for the plaintiff. Counsel argued that where on the face of a document property is given to be enjoyed in perpetuity then any condition which limits that enjoyment was a mere surplusage. It was therefore contended on behalf of the defendant that the words used in exhibit A by the donor were contrary to the customary law view taken by the plaintiff's counsel. It was next submitted on behalf of the defendant that granted that the land on which the disputed house stood was held to be family land, the family's interest was limited to the land itself as distinct from the

house which stood on it. For authority learned counsel cited the case of Adu v. Sarkodee Addo, Court of Appeal, 31 March 1969, unreported; digested in (1969) C.C. 59. Counsel further contended that on the authority of Amoabimaa v. Okyir [1965] G.L.R. 59, S.C. in the absence of any proved fact that the family was in occupation of the site where the late lawyer Abadoo had built, the disputed house became his self-acquired property which he could dispose of or alienate by will. Learned counsel finally argued that should the court find on the evidence that the disputed house was put up on a site which was in use by the family then notwithstanding the fact that the property became family property in which the late Abadoo had an interest limited to his life, the defendant as his widow and her children have a right of occupation under customary law.

It is clear from the submissions of learned counsel that there is no divided view on what interest the donees took under exhibit A. Both counsel agree that on the true construction of exhibit A, the donees held the gift as indivisible family property in which until disposed of by consent of the members they all have a joint interest with none of them having an alienable interest. The only area of disagreement amongst them is their respective views about who constitute the family in the sense used in exhibit A. Whilst learned counsel for the plaintiff favours a construction in favour of the matrilineal line, counsel for the defendant favours a construction in favour of the children and descendants of the donor. The construction of exhibit A (the deed of gift) has not been an easy task. The document itself has been drafted in English form and follows the strict pattern of pre-1881 conveyancing law practice. The difficulty about its construction has been brought by the introduction of native customary practice and usages into its main body and the employment of some words unknown to customary law. The donor however directed that the property was to be held as family property in the operative part of exhibit A. The relevant portion of exhibit A reads as follows:
"THIS INDENTURE made the 28th day of August one thousand eight hundred and ninety one between Daniel Myles Abadoo of Cape Coast in the Gold Coast Colony on the West Coast of Africa trader hereinafter called the donor of the one part Sarah his wife and Josina Daniel Myles Kezia Yarkoon and Joseph Amissah the children of the aforesaid donor by his said wife Sarah who with her said children are hereinafter called the donees of the other part witnesseth that the said donor as well for and in consideration of the natural love and affection which he hath and beareth unto each of the said donees as also for the better maintenance support livelihood and preferment of each of them the said donor hath given granted aliened delivered and confirmed and by these presents doth give grant alien deliver and confirm unto the said Sarah his wife and his children by the said wife to wit Josina Daniel Myles Keziah Yarkoon and Joseph Amissah and such other children which he the said donor may have by his said wife Sarah their heirs and assigns all that piece or parcel of land situated close to Commercial Road in Cape Coast aforesaid as the same is more particularly delineated and described in the plan drawn hereon together with the messuage or dwelling house thereon erected and with the rights easements and appurtenances to the said premises or any part thereof by reputation thereto belonging or therewith or heretofore held or enjoyed and all estate and interest of the said donor therein to have and hold the said piece or parcel of land hereditaments and all other the premises herein before expressed to be hereby granted and confirmed or mentioned and intended so to be with their and every of their appurtenances unto and to the use of the said donees their heirs and assigns forever in strict accordance with the native law and custom relating to the enjoyment of and the succession to family property which native law and custom shall regulate the rights of each of the donees in the hereditaments and premises hereby granted or expressed so to be."
The phrase "heirs and assigns" are words of limitation and I have no doubt that they were used in that sense in exhibit A. They are really matters of real property law with no conveyancing virtue. The addition of the word "assign" to the "heirs" was also used merely as a declaratory power of alienation in the donees which they would have had anyway without

it. The significance of the words of limitation is that in pre-1881 deeds, in order to convey the fee simple (inheritable freehold estate) the use of such words were necessary: see Williams on Real Property, p. 121. What I have been able to make out of the addition of these words of limitation in exhibit A is that the deed operates to convey by way of absolute gift to the donees and their heirs as purchasers the whole interest of the donor in the property the subject of the gift. In the case of Mensah v. Lartey [1963] 2 G.L.R. 92, S.C. (referred to by learned counsel for the plaintiff) where a father by a deed of gift conveyed as family property a piece of land with building thereon by way of absolute gift to three of his eldest sons all of different mothers to be held by them in trust for themselves and their brothers and sisters, it was held (as stated in the headnote at p. 92):

"that in both patrilineal and matrilineal societies in Ghana where a man makes a gift of property to his children without any limitation as to the estate which the children are to have in the property, such property is considered as family property. The children constitute the family for the purpose of holding and enjoying the said property in perpetuity. The concept of family property imports the principles of non-divisibility of the said property except by the consent of the family, of the members of the family having joint interest in the property and of the appointment of the head of family as the `caretaker' of the property. Of family property there is, strictly speaking, no devolution on intestacy for the property remains in the family at all times. A therefore did not have any alienable interest in the property which could be inherited by the plaintiff"

Akufo-Addo J.S.C. (as he then was) in his judgment said, pp. 95-96 that:

"The family of children constituted by a gift from their father is made up of the children, their children's children and descendants irrespective of sex, for the general notion underlying the customary law in this regard is that a father by a gift to his children evinces a desire that his memory be perpetuated by his descendants. The law does not presume an intention on the part of a father making a gift to his children that the gift should ultimately find its way into the matrilineal family of the children (that is where the children belong to a matrilineal community), for if such were the intention of man he would make a gift to his wife (the mother of the children) and not to the children."

In his book on The Law of Testate and Intestate Succession in Ghana, Ollennu at p. 179 notes:

"Another instance of mixed paternal and maternal succession occurs, where a man of a maternal system who has his own farms or houses, to the knowledge of his family makes a gift of a house or farm to his wife and children for their use without making a formal gift of it to the wife exclusively . . . Such property cannot be claimed by the wife's family because it did not belong to her either by gift or by any other means of original individual acquisition."

In the present case the donee family is constituted by the mother and her children by her marriage with the donor and their heirs. They are to hold the property "forever in strict accordance with native law and custom relating to the enjoyment and of succession to family property which native law and custom shall regulate the rights of each of the donees." The question here is, is this limitation as to use as directed by the donor in accordance with the general notion underlying the customary law as stated above? I have no doubt in my mind that the limitation as to use and enjoyment of the gift as directed by the donor in exhibit A is in accord with the general notion underlying the customary law as enunciated in the Lartey case (supra). The inclusion of the mother in this case makes no difference because in matters of succession to property children are the proper inheritors of their mother: see Sarbah, Fanti Customary Laws (1897, 1st ed.) at p. 256 and the dissenting judgment of Akufo-Addo J.S.C. in Krabah v. Krakue [1963] 2 G.L.R. 122 at p. 138, S.C. And according to Ollennu in his book (supra) the property cannot be claimed by the wife's family because it did not belong to her exclusively. So that in the final analysis the property will find its way into the hands of the children. In my judgment therefore the land on which the disputed house stands is the property of the plaintiff's family constituted by his mother and the children of her marriage

with the donor, their children's children and their descendants of which family the plaintiff is the head.
Even if the above construction which I accept to represent the donor's intention as expressed in exhibit A is wrong and the donor under exhibit A intended the property to be enjoyed in such a way that it found its way ultimately into the matrilineal family of the Abadoos as was contended by learned counsel for the plaintiff, a construction which I very much doubt, the one significant thing about the property is that in either way it will be held as joint indivisible family property in the enjoyment and use of which the late lawyer Abadoo was one of the beneficiaries and in the use and enjoyment of which none of the beneficiaries has an alienable interest.

This brings me to the question as to the interest which lawyer Abadoo had in the house he built on this land. In the case of Amoabimaa v. Okyir [1965] G.L.R. 59, S.C. Ollennu J.S.C. in his judgment at pp.63-64 had this to say about the interest a family member acquires in respect of family property he reduces into his occupation:
"The law as to title of a subject of a stool or member of a family to stool or family land in his occupation is that by his occupation, he acquires a determinable or usufructuary title to the portion he so occupies; that title is a burden on the absolute title of the stool or family; it vests in the subject or the member of family an exclusive right to possession; it is the most perfect estate that an individual can have in land, a freehold interest of inheritance. That title prevails against the whole world even against the stool, community or family in which the absolute title may be vested. In some respects that possessory title vis à vis the absolute estate is comparable to the possessory title of a tenant for a term of years under the common law vis à vis the reversion of the landlord which possession, while it subsists, is good against the whole world including the landlord: see North Western Railway Company v. Buckmaster ((1874) 10 Q.B. 70 at p. 76); but it is superior to the possessory title of the tenant, in that while the title of the tenant is limited to a definite term of years or a term that is definable: see Sevenoaks, Maidstone and Tunbridge Ry. Co. v. London Chatham and Dover Ry. Co., ((1879) 11 Ch.D. 625 pp. 635-636), that of the subject or member of family is in the nature of an inheritable freehold estate which continues indefinitely so long as the subject acknowledges his loyalty to the stool or family. Therefore a hostile or an unfriendly entry by a stool upon a portion of stool land in the possession or occupation of a subject or by a family upon land in the possession or occupation of a member of the family is against all principles of customary law. Such an entry is an undue and arbitrary interference by the stool or family with the title and possession of the subject or member, it is discountenanced by customary law; in, short, it is unlawful." Later in the course of the judgment his lordship had this to say at p. 65, "a person's self-acquired property includes a portion of family land which he has reduced into his exclusive possession."

In an earlier case of Ansah v. Sackey (1958) 3 W.A.L.R. 325 it was decided by Ollennu J. (as he then was) as stated in the headnote at p. 326 that:
"the interest retained by a family member in buildings erected by him, using his own private resources, on family land otherwise unbuilt upon is an interest limited to his own life. Although the life interest itself is fully alienable (e.g., it can be given as security for a loan) it is not open to the life tenant, unless he acts with the consent and concurrence of the head and principal members of the family, to alienate any greater interest or estate. On the death of the life tenant the interest in the property vests in the family and any disposition by the life tenant purporting to have any other effect is ineffective."
The customary law position of the interest retained by a family member in buildings erected by him using his own private resources on family land appears to have been widely generalised in the Sackey case (supra) and so is the position with regard to a person's self-acquired property enunciated in the Amoabimaa case (supra). Ollennu himself acknowledges this when

in his invaluable book Customary Land Law in Ghana after reviewing the various decided cases on the point (among which were the Sackey case (supra) the Owoo case (supra) and Santeng v. Darkwa (1940) 6 W.A.C.A. 52 he had this to say at p. 42:
"It is submitted, however, that the correct statement of custom is that if a member of the family is granted a portion of the general family land, i.e., a site which has not previously been granted to another individual member of the family, or a site which another individual member has not previously effectively occupied,the house which he builds on such a site, by his independent effort and his own individual means, becomes his self-acquired property,which he may alienate inter vivos or by testamentary disposition. But a building which the individual member of a family is permitted to erect on family land in use by the family, e.g., a site on which family structure of any sort exists, is property in which the individual member who builds has a life interest only; it is to be used and treated in every respect as his individual property, except that he cannot create an interest in it which may subsist after his life."
One matter of some significance about the above proposition of the law as stated by Ollennu which should not be allowed to pass without comment is the qualifying phrase "a site on which family structure of any sort exists." The above quotation, it is submitted with respect, needs some qualification in the light of what the learned author himself observed on the Santeng case (supra) as to the state of condition of the "structure." It is submitted therefore that for the structure to be taken into consideration in determining the character of the property there must be some evidence as to the nature of its state of condition, for where the structure is already ruined or has been allowed to waste it will be inequitable to conclude that its mere existence is enough to satisfy the requirement as to the "family's occupation."

The facts before me in this case however show that the family was in effective occupation of the site on which the late lawyer Abadoo built. The plaintiff's evidence which I accept shows there was in existence a well, and ground prepared for outdoor games which was in use by members of the family and that one of the primary reasons why lawyer Abadoo was requested by his parents to put up the disputed house was to protect the land by checking the threat of erosion. Under those circumstances where the structures had to give way for the construction of the disputed house, lawyer Abadoo who put up the house on that site could not dispose of the house beyond his life. He had only a life interest in the building he put up. He did not therefore in the absence of established evidence that a gift of that site was made to him, [p.126] have any alienable interest in the building which he could dispose of by will. This finding concludes the case against the defendant in so far as the first leg of her counterclaim is concerned.
The next interesting submission by learned counsel for the defendant which deserves consideration is the submission based on the maxim quicquid plantatur solo, solo cedit which according to learned counsel should be held not to apply to the facts of this case since by exhibit 1 the donor directed the donee's interest in the property to be regulated by native law and custom. The argument of learned counsel as I understood him was that since lawyer Abadoo was not the owner of the land on which he built, but put up the building with leave and licence of the members of the donee family then on the authorities as they stand now, the non-application of the maxim in respect of lands held under customary law should avail the claim by the defendant. There is no doubt that this submission is ingenious and in fact it was one of those principles of the customary law which had engaged my mind since arguments in this case commenced but I doubt whether on the already firmly established customary law relating to the rights retained by members of family in respect of family land which they reduce into occupation, it will be safe to extend the non-application of the maxim to cover such situations without creating an unwarranted innovation into this well-established principle. The present state of the law in this regard is what is stated in the case of Adu v. Sarkodee Addo, Court of Appeal, 31 March 1969, unreported; digested in (1969) C.C. 59. This case confirmed with some variation the principle enunciated in Asseh v. Anto [1961] G.L.R. 103, S.C. the

leading case on the non-applicability of the above maxim to lands held under customary law. The state of the present law on the matter is that, where the consent of the owner of the land has not been sought and given and where no plea of acquiescence avails against the owner of the land the maxim is clearly applicable: see Sarkodee Adoo's case (supra). In other words a trespasser who is warned off but persists in constructing a building on land he does not own, will have to lose the building he erects. It is significant to note that the main distinguishing features about all the cases referred to in the Anto case (supra) in which the maxim had been held not to be applicable were cases where consent or licence was given and more important, persons to whom the consent and licence were given were all strangers to the land on which they built or cultivated. It is of further significance to note that in all those cases the rationale underlying the decisions seems to stem from the inequitable situation which would be created if the land owners were permitted to claim the property on their land which was put up by strangers with their full knowledge and consent. It is submitted therefore that in order to exclude the application of the maxim in respect of land held under customary law it must be established that:

(a) the owner of the land either consented or granted leave and licence or in the alternative, he had acquiesced in the construction of the building so that it will be inequitable to permit him to claim what is on the land and which he did not build, and

(b) that the persons who erected the building or cultivated the farm must be strangers to the land on which they built or farmed.

It is submitted further that there should be no extension of the non-applicability of the maxim to cover cases like the present one where the person constructing the building is himself a member of the family owning the land. Quite apart from the fact that the customary law covering such cases is firmly well-established, it is in consonance with equity, because whilst he lives he is permitted to do whatever he likes with the building he erects without reference to the other members of the family save that he is incapable of disposing of an interest beyond his life. In my judgment therefore on the facts of the present case the defendant cannot avail herself of the non-applicability of the maxim quicquid plantatur solo, solo cedit.

The last and perhaps the most effective and persuasive submission made on behalf of the defendant in respect of the disputed house was the submission relating to her right to occupy the disputed house with her children as the widow of lawyer Abadoo. This submission was resisted by Mr. Short who contended that only the children's right of occupation in their father's house was recognised under customary law. For authority he cited the case of Boham v. Marshall (1892) Sar.F.C.L. 193. We shall now examine the position of a husband's responsibility to provide means or support, accommodation, etc. for his wife and see where this responsibility ends in order to ascertain what the true position is under customary law.

Ollennu in his book on The Law of Testate and Intestate Succession in Ghana discusses this topic from pp. 223-229. Under the heading "Widow of the deceased," the learned author reviews exhaustively what some text-writers (notably Sarbah, Danquah, Rattray and Field) say and writes as follows at p. 225:

"So great is the importance which customary law attaches to a man's liability to maintain his wife, that his failure to maintain her is one of the very few grounds upon which a wife may obtain divorce against her husband by customary law. The liability of the husband to maintain and provide accommodation for his wife devolves upon his family or successor, a responsibility which can only determine upon death of the wife or upon the determination of the marriage in a lawful manner."

He concludes as follows at pp. 227-229:

"To conclude this part of the subject of the right of the widow to maintenance by the successor of her late husband, and particularly out of the late husband's estate, we would refer to the judgment of the Akim Abuakwa Paramount Tribunal in Bede v. Sakyiama ((1914) D.C.A.L. 201, 202.). The plaintiff in that case claimed against the defendant, successor to her late husband, allotment to her of 1\3 share of the estate of her late husband to which the

defendant had succeeded. The deceased and both parties [p.128] to the suit were christians (Presbyterians). The plaintiff was an old woman and there was no question that she could re-marry and she had no intention of taking formal divorce of her late husband's family, and it was unfair and against good conscience in such a state of affairs that the successor should divorce her formally and give her a send-off. At the same time, as a christian, the defendant felt he could not keep the woman as a formal wife and be responsible for her. The Native Tribunal held that in the peculiar circumstances of the case, natural justice required that the successor should, in lieu of permanent maintenance, give to the widow a share of her late husband's estate, and fixed that share at one-third. In the course of their judgment the Tribunal said: `Considering the matter from the point of view of the Customary Law, it has been suggested by the Defendant that a widow is not entitled to succeed to a husband's property, at the same time, according to the Native Custom, the successor of the deceased husband will be bound to look after or maintain during her lifetime the widow who is very old and unlikely to marry again. The fact that the Defendant is a Christian and not allowed to keep this woman as wife justifies the Tribunal in ordering that some provisions be made for maintaining the Plaintiff.

The Tribunal therefore decides that the cocoa plantation of Bosomtwe, deceased, not excluding Nananko farm, should be divided into three the Plaintiff to have one-third portion and the Defendant two-thirds. Further, Defendant to pay £5 to the Plaintiff for having been driven away from her deceased husband's house.'

From this decision of the Tribunal we deduce that in suitable cases, the Court can, in lieu of an order for permanent maintenance for wife and children of a deceased, direct that a specific share of the estate up to about one-third, be given to the widow or children. The parties may also agree to such an allocation and their agreement will be given effect to at law. The decision in effect also shows that the right of a widow to reside in her late husband's house is enforceable at law."

The Bede case (1914) D.C.A.L. 201 referred to by Ollennu even though decided by the Akim Abuakwa Paramount Tribunal was based on a principle of Akan customary law. It is clear from the authorities that the customary law does not only recognise the rights of the children but also of the widow to live in her deceased husband's house. I have examined also the case cited by learned counsel for the plaintiff and nowhere in that decision is the view held by counsel supported. After examining the views of some of the text-writers and some decided cases on the matter Ollennu unfortunately summed up the customary law rights of a widow of a deceased and her children as follows in his book (supra) at p. 226:

"Summing up, we would say that in both the matrilineal and patrilineal systems, the widow or widows are entitled to support from the family and to live in their deceased husband's house during widowhood. `On the death of the husband, his widows surviving and their children by him are entitled to reside in any house built by him, and the children and their issue have a life interest in such a house, subject to good behaviour."

This view according to him expresses the modern accepted customary practice at least amongst the Akan speaking tribes throughout the country. It also appears to be the view echoed by most lawyers and the courts have, on some occasions, lent some support to it. It is apparent however that the law as enunciated above appears to be confined to the self-acquired buildings of deceased persons properly so described; in other words, a house built by the deceased on his own acquired land. It does not cover cases where a house is put up by a deceased on family land under circumstances where, having regard to the then existing nature of the land, the deceased had only a life interest in the building and cases where the deceased himself had no building but stayed with his wife and children in a family house. It is also doubtful whether the phrase "subject to good behaviour" tacked on as a limitation to the right of the widow and the children to reside in the deceased's self-acquired house

represents the true position of the law. Sarbah at p. 105 of his book Fanti Customary Laws (3rd ed.), stated the customary law as follows:
"When a person such as A dies, having his own acquired property, moveable and immovable, he is not succeeded by his sons, free-born or domestic, whose only right is that of a life interest in the dwelling-house built by their father, the deceased, on a land not family property. For if the house be built on family land, the children have only right of occupation during good conduct. If anyone living in the house of his father deny the right of the proper successor, or commit waste or injure the house, or encumber or sell it, he thereby forfeits his life interest. Such person must make the necessary repairs, and may quit if the successor requires it for himself as residence."(The emphasis is mine.)

In Halmond v. Daniel (1871) Sar.F.C.L. 182 at pp. 182-183 the law was stated thus:
"The custom is that if a man had a father either by country marriage or otherwise, and the father lived in the house with wife and child, and he died, all the deceased's property, except the house, goes to his family. The father's gun and sword and house go to the son, and the saying is, `The father dies and leaves his house to the son.' The family take the property, but do not turn away the child. The son lives in the house with the family of his father, supposing they had nowhere to live, and the son does not turn them away. If it is a family house, the head occupies as head yet he does not turn away the son from the house, except the son, after he has grown up, finds himself competent to build and leaves for the purpose of doing so. But he would not under any circumstances be turned out by the head of the family. The family would not be turned out for the son's accommodation; if they had nowhere else to live, they would live in the house. Where there is room enough for all (son and family), the head of the family arranges the rooms to be allotted to each. My answer of the descent of house to the son applies in case it has been built by the father; the family would be allowed to live in it if they had nowhere else to go. If they had, they would leave the father's house to the son. Son could not sell the house except with consent of the family."

(The emphasis is mine.) It is clear from the above passages from Sarbah on whom Ollennu relied for most of his materials that the correct statement of the law of the Akans is that children at least and their mothers (i.e. the widows and their children) have a possessory life interest in their father's self-acquired buildings and that this possessory interest is only subject to the family's title to the house but takes precedence over it, so that the family cannot sell the house above their heads. So also does the customary law recognise the eldest sons' claim to the instruments of trade, swords and guns of their fathers. It appears that personal household goods including furniture go to the children: see Bentsi-Enchill on Ghana Land Law (1964 ed.) at p. 169. This view of the law is more in accord with equity than the view held that widows and children have no interest in their deceased husband's and father's estate respectively and that the ideas of the customary law as expressed in Swapim v. Ackuwa (1888) Sar.F.C.L. 191, whereby the prerogative of the family to do whatever they liked with the deceased's house to the extent of even throwing the widow and her children out in so far as the self-acquired house of the deceased is concerned have never been good customary law and that if they ever existed then those ideas belong to a different age and have no place in this second half of the twentieth century: see the case of In Krabeah v. Acquakoah (1887) Sar.F.L.R. 50. The only limitation on the widow's right to reside in the self-acquired house of her deceased husband is "during widowhood" so that if she remarries then she loses her right of occupation. It follows also that the decision in Kwakye v. Tuba [1961] G.L.R. (Pt. II) 535 that children in matrilineal societies have no interest whatever in their father's estate except that they are entitled to maintenance and "subject to good behaviour to live in their father's self-acquired property" is too much of a generalisation and needs to be qualified. Here a distinction must be made between a family house in which the father lived with his wife and

children and the father's own self-acquired house in which he stayed exclusively with his wife and children as is common these days.

In the former case (i.e. where the deceased lived in a family house with his wife and children) the widow and her children on the authorities have no well-recognised interest save a right of occupation. Thus in Swapim v. Ackuwa (supra) it was held by Smith J. at pp. 192-193 that the successor:
"could ask the children to go out on any occasion for any reasonable grounds, and where the interest of the family is at stake, or their right is disputed, or even merely to secure and promote the interests of the family.

The right of the successor as stated above is the limitation on the right of the widow and her children to reside in such family house after the death of the father. This limitation is what is summed up under the phrase "subject to good behaviour." This phrase it is submitted can be tacked appropriately to only a house originally family property and not the self-acquired house of the deceased. In the latter case (i.e. where the house is designated self-acquired of the deceased) the customary law recognises the prior possessory life interest in the use and enjoyment,i.e. occupation of the children and the widow's right of occupation during widowhood. The decision in Bede v. Sakyiama (supra) shows also that the right of a widow to reside in her deceased husband's house is enforceable at law. The injustices and hardships caused to children and widows by tacking on the phrase "subject to good behaviour" as a limitation to their rights to reside in houses which their deceased fathers and husbands respectively die possessed of, irrespective of how they came by such property, have been ignored indiscriminately in the past to the detriment of the children and widows. The conduct of the family flowing from this neglect must be frowned upon as behaviour not countenanced by customary law and calls for an urgent need for a more realistic and practical re-appraisal of this aspect of the customary law in view of the fast social changes in the country caused partly by the high rate of inter tribal marriages and partly by the development of a money economy which has provided other modes of acquiring wealth; and I am of the view that in appropriate circumstances the decision in Bede v. Sakyiama (supra) which calls for a share of the estate for widows will be given the blessing of a binding authority by the superior courts. This prior right of occupation of children and widows extends to situations like the instant case where the deceased built on family land under circumstances where having regard to the existing nature of the land his interest was limited to his life but in which house he stayed exclusively with his wife and children: see also Ankrah v. Ankrah (1957) 3 W.A.L.R.104, P.C. and Quarcoopome v. Quarcoopome [1962] 1 G.L.R. 15. These cases decide the rights of children to succeed in certain circumstances.

The possessory interest of children in respect of the deceased's self-acquired house does not however mean that they should deny the family access to the house where it is possible to accommodate those without rooms to stay in, but any undue interference against their possessory interest should be reasonably resisted. It is of some regret that some of the text-writers writing in the second half of the twentieth century failed to give any serious consideration to the law as expressed in the Halmond and Bede cases (supra). This would have gone a long way to assist in settling the confusion always created by the family in asserting their claim to the deceased's property to the extent of driving the children and widows out of the deceased's house, thereby wrongly publicising the fate of issues born out of customary marriage. In the instant case I have already held that the children of the defendant have an interest in the land conveyed by exhibit A. It follows therefore that they also have, quite apart from their customary law right of life occupation, an automatic interest in the building put up by their deceased father on that land. The defendant even though a widow of the late lawyer Abadoo by marriage under the Ordinance is a person subject to the

customary law just as her husband. Her marriage with the late lawyer Abadoo was preceded by an engagement which has all the attributes of a customary marriage (i.e. consent of the parties and their parents). She is in short the widow of the deceased in the eyes of the customary law. She was the person called upon to perform the customary rites of a widow during the funeral of the late lawyer Abadoo. She is therefore entitled under the customary law to a life occupation subject to her remaining such a widow for the rest of her life.

There will therefore be judgment for the plaintiff in his capacity as the most senior member of the donees of the plot of land conveyed by exhibit A, a declaration that the disputed house is the property of the family donee as defined in this judgment. He therefore succeeds on his claim in respect of house No. G.8/2 as if he has brought his action in that capacity. Leave is therefore granted him to have his original capacity amended accordingly: see Ababio IV v. Quartey (1914) P.C. '74-'28, 40. His action in respect of the Kotokuraba land having been brought against the wrong person and the plaintiff having also shown a want of capacity to sue in respect of that plot will be dismissed. The first leg of the defendant's counterclaim for a declaration that the disputed house and the Kotokuraba land are the self-acquired properties of lawyer Abadoo in the sense claimed by her is also hereby dismissed. Judgment is entered in her favour on the second leg of her counterclaim for a declaration that she as the widow of lawyer Abadoo is entitled to occupy the said house with her children for life in terms as stated above: see Bede and Halmond cases (supra).
Judgment for the plaintiff as head of donee family entitled to house. Plaintiff's claim for redeemed land dismissed.

DECISION.
Defendant's counterclaim upheld in part.

However, where a member makes an extension to existing family farm or improves same, the essential character of the farm remains family property, as enumerated in the case of ***Nkonnua v. Anaafi (1961) 2 GLR 559***. The subject matter of the suit was claimed to have been originally cultivated by members of the plaintiff's family, Adwoa Anto, Yaw Baduo and Kwasi Ayebiahene or Ayebiafwe, when it was forest land, and later her uncle, the late Nana Obeng Akese, developed the land into a cocoa farm; the defendant on the other hand who is not a member of her said family had wrongfully taken possession of the said farm, and has refused upon demand to surrender it to the family. The defendant contended that his family members had assisted the plaintiff's uncle in cultivating the land. The trial court found in favour of the plaintiff stating inter allia: "*where a person assisted by a member or members of his family acquires property, that property is not his individual self-acquired property; it is from its inception, property of the family to which he and his partner or partners belong..... Therefore if an occupant of a stool, acquires property with the assistance of a member or members of his family the position would be the same, that is the property will be property wearing the character of family property in which he and the person or persons with whom he acquired it has each a life interest and which all of them acting together could alienate inter vivos, but upon the death of any one of them the property becomes full family property and would remain under the control of the survivor of those who acquired it; upon the death of the last of them, it will come under the control of the head of the family or any other person appointed by the family. Since such a property is not the individual self-acquired property of the occupant of the stool it will not become merged in stool property, therefore upon death, deposition or abdication of the occupant to the stool who helped to acquire it, the property would retain its legal status as family property. Therefore it is only an occupant of the stool who is appointed from the family who owns it, who could take charge and control of that property. The successor to the occupant who helped to acquire that property if he does not belong to the family of his said predecessor, would have no right to that property*"

Nkonnua v. Anaafi (1961) 2 GLR 559.

NKONNUA v. ANAAFI [1961] GLR 559-566
IN THE HIGH COURT, ACCRA
6TH OCTOBER, 1961
OLLENNU, J.

OLLENNU J.
The plaintiff claims that she is the Queen-mother of the Odau Division in Akyem Abuakwa, and the head of the Aduana royal family of Otwereso and Osenase. She claims declaration that the land and farm thereon, subject-matter of this suit, is the property of her said family, the royal Aduana family; she also claims an order for recovery of possession of, and mesne profits from the said farm.

She pleaded that the said land was originally cultivated by members of her family, Adwoa Anto, Yaw Baduo and Kwasi Ayebiahene or Ayebiafwe, when it was forest land, and later her uncle, the late Nana Obeng Akese, developed the land into a cocoa farm; she further pleaded that the defendant who is not a member of her said family has wrongfully taken possession of the said farm, and has refused upon demand to surrender it to the family.
The defendant admitted the allegation of the plaintiff that he was in possession of the farm, but denied all the other averments of fact made in the plaintiff's statement of claim. He pleaded that the farm in dispute was cultivated by Nana Obeng Akese while he was on the Osenase stool, and that the people of Osenase helped Nana Akese to make the farm; and further that in any event, the said farm is property of the stool, because the same was cultivated by Nana Obeng Akese while he was the occupant of the Osenase stool, and therefore by customary law it became merged into stool property upon the abdication or demise of the said Nana Akese.
Now the evidence led by the plaintiff that she is Queen-mother of the Odau Division of Akyem Abuakwa and the head of the Aduana royal family was not contradicted, nor even challenged in cross-examination. I therefore accept that evidence.

Again not only was the evidence by the plaintiff that the defendant is not a member of her branch of the Aduana family, i.e. the Aduana royal family, not denied, it was in fact corroborated by D.W.2, Opanin Kwabla Poakwa, who said that "when it came to the succession to the stool of Osenase, the elders said they did not want a candidate from the royal family to occupy it, and that they would rather have a son of a chief. So we nominated Anaafi the defendant". That evidence led on behalf of the defendant must therefore be accepted.

The plaintiff led evidence that a stool treasury was introduced in Akyem Abuakwa while Nana Obeng Akese was Odauhene, that all farms belonging to the stool were listed and placed under an officer known as the stool farms officer, who accounted to the stool treasury for the proceeds of those farms; but that the farm in dispute has never been included in the farms so listed as stool property and has never come under the control of the stool farms officer. That important piece of evidence was admitted by the witnesses for the defence. In fact some of the said defence witnesses gave evidence which went further than merely confirming that the farm in dispute has never come under the control of the stool treasury as all stool farms should.

By custom an occupant of a stool or the head of a family cannot, while he remains such occupant or head, be called upon to account for stool or family property under his control: Abude v. Onano, Heyman v. Attipoe. But upon his removal from office or upon his abdication he is required to make such accounts as are reasonably necessary, and to hand over all stool

or family property which had been in his possession, to persons nominated by the family or by the elders of the stool, or to certain holders of traditional office who by custom are the custodians of the family stool properties when the stool or office of headship is vacant. As a rule the persons to whom the handing-over is made are persons who must know all the family or stool properties which the outgoing chief or head was in possession of.

For that taking-over an inventory is made and signed by both parties, i.e. the party making the handing-over and the parties taking-over. In the case of a family no property which is not family property should be included in the inventory, and in the case of a stool no property held by the outgoing chief which is not stool property should be included in the inventory. Therefore the agreement by the people taking-over that any particular property known to them to have been in the possession of the ex-chief or ex-head should be excluded from the inventory, is a positive admission by the stool or family that the property so omitted is not stool or family property.

On the evidence as a whole I find that the land is the ancestral property of the plaintiff's family, the Aduana royal family, that it was developed into a cocoa farm by Nana Obeng Akese with the assistance of the plaintiff, physical and financial, and that at the time of its said development, Nana Obeng Akese was the Odauhene, i.e. the chief of both Otwereso and Osenase, and that in or about 1951, i.e. upon his abdication, Nana Obeng Akese created separate stools for the two towns, Otwereso and Osenase, but made it quite clear that the farm in dispute is his family property not stool property. I find also that the elders of the original stool never treated the said farm as property of the stool, consequently they never had it included in the list of stool farms to be controlled by the stool treasury, and since the creation of the two stools in or about 1951 neither the stool of Otwereso nor the stool of Osenase has regarded it as stool property. Consequently none of them has had it listed for the purposes of the stool treasury and never had it included in the inventory of stool property which should have been handed over upon the abdication of Nana Obeng Akese or upon the abdication of P.W.1. Therefore although Nana Obeng Akese had charge and control of the farm and considerably improved it while he was on the stool the said farm cannot in law be stool property; that is so for the following reasons:
Firstly the land had already become the property of the Aduana royal family before Nana Obeng Akese came into possession of it, therefore only the occupant of the stool who belongs to the Aduana royal family would be entitled to occupy it, and he would do so, not as stool property, but as property of the family. In this respect this case is on all fours with the case of Serwah v. Kesse.

Secondly, where a person assisted by a member or members of his family acquires property, that property is not his individual self-acquired property; it is from its inception, property of the family to which he and his partner or partners belong: Mensah v. S.C.O.A. and Boahene. Therefore if an occupant of a stool, acquires property with the assistance of a member or members of his family the position would be the same, that is the property will be property wearing the character of family property in which he and the person or persons with whom he acquired it has each a life interest and which all of them acting together could alienate inter vivos, but upon the death of any one of them the property becomes full family property and would remain under the control of the survivor of those who acquired it; upon the death of the last of them, it will come under the control of the head of the family or any other person appointed by the family. Since such a property is not the individual self-acquired property of the occupant of the stool it will not become merged in stool property, therefore upon death, deposition or abdication of the occupant to the stool who helped to acquire it, the property would retain its legal status as family property. Therefore it is only an occupant of the stool who is appointed from the family who owns it, who could take charge and control

of that property. The successor to the occupant who helped to acquire that property if he does not belong to the family of his said predecessor, would have no right to that property. I have earlier found it proved that the defendant, the present occupant of the Osenase stool, is not a member of the Aduana royal family, i.e. the family of Nana Obeng Akese and the plaintiff, the two persons who developed the farm into its present state.

Thirdly, if an occupant of a stool develops property of his family, i.e. develops a foodstuff farm into a cocoa farm, or improves an existing family house as distinct from farms or buildings belonging to the stool, the property as improved does not change its legal character as family property to become stool property. Therefore having already found that the land was a family farm or farmstead when it was developed into a farm, even if the evidence has shown that its development was made by Nana Akese alone while he was on the stool, I would be bound to hold that the improvement made to it did not change its character from family property to that of stool property. In my opinion it would work great injustice to the family, contrary to natural justice and good conscience, to deprive the family of their ownership in such circumstances. The plaintiff has fully discharged the onus upon her, and she is entitled to succeed on her claim.
There will be judgment for the plaintiff for (1) declaration of her family's title to the land and farm as claimed, (2) an order that she should recover possession of the said farm forthwith, and (3) an order that the defendant should account to her for the mesne profits of the said land and farms. She will have her costs fixed at 75 guineas inclusive.

Where a member extends or improves existing family building such improvement does not change the character of the building which remains family property. Kumah v. Asante (1991-93) Part 1 GBR 328.
Also, where family property is lost through sale or other attachment and a member repurchase or redeem the property, it becomes family property unless members of the family were specifically informed at the time of the repurchase or redemption, that the property would not resume its former position as family property.Nwonama v. Asiedu (1965) CC 179.
In a situation where social obligations require some individuals to assist another person, when such assistance is given any property acquired is the individual property of the person so assisted. Indeed under the customary law where a child assisted his father or guardian to acquire property, he did not become a joint owner.OLLENNU J. S. C in ***Yoguo v. Agyekum (1966) GLR 482*** is a stated the principle thus; "by customary law, where a child or a ward works with his father or guardian, he does not become owner with the father or guardian of the income of their joint labour; whatever comes out of that joint effort belongs exclusively to the father or the guardian"

Yoguo v. Agyekum (1966) GLR 482.

YOGUO AND ANOTHER v. AGYEKUM AND OTHERS [1966] GLR 482-520
SUPREME COURT
13 JUNE 1966
SARKODEE-ADOO C.J., OLLENNU AND LASSEY JJ.S.C.

OLLENNU J. S. C
The respondents (hereinafter referred to as the plaintiffs), claimed a declaration of title to a house situate at Yonso near Jamasi in Ashanti.
There is no dispute as to the identity of the subject-matter of the suit; identical descriptions of it are given by the plaintiffs in their writ of summons and by the defendants in their

statement of defence and counterclaim. The plaintiffs pleaded that the house was built by their father as his self-acquired property and that their father, by a gift inter vivos made in 1955 in accordance with customary law, transferred the ownership of it to them. The defendants on the other hand pleaded that it was built by the two brothers, Kwadjo Agyekum and Kwaku Agyekum, and that the same is family property.

The issues thus joined between the parties which unmistakably appear on the pleadings and upon the evidence as stated by the trial judge at the beginning of his judgment:

"Call for the determination of three main questions, namely, first: Was the house in dispute built solely by Kwaku Agyekum or was it the joint effort of Kwadjo and Kwaku Agyekum? Secondly, was a valid customary gift of this house made to the plaintiffs? And thirdly, was the house built on family land or on land which the late Kwaku Agyekum himself acquired from the Yonso stool."

The trial judge resolved each of the three issues in favour of the plaintiffs. Against that judgment, the defendants appealed.

But more serious than all these is the misdirection of the learned judge in failing to direct himself on certain most important facts of which evidence was led by the plaintiffs as well as by the defendants, and the legal implications of such evidence. The facts in question are (a) when Kwaku Agyekum was young, he lived with and served his elder brother Kwadjo Agyekum who was then grown up and engaged in his own business as a farmer and (b) when Kwaku came of age he joined his brother Kwadjo in work, and thereafter the two brothers kept a common purse. The following are some of the pieces of evidence on this point: (i) The first plaintiff, in answer to the court, ended his evidence in the following words, "My father was a cocoa farmer all his life. He built a house in Kumasi jointly with his elder brother Kwadjo Agyekum. He was also a cocoa farmer. They were brothers of the full blood. They saved jointly and often did things together." (ii) Kwasi Krobo, the first witness for the plaintiffs, said in cross-examination, "I know that Kwaku Agyekum is the fourth child of his mother and was the third after Kwadjo. I know that before Kwaku Agyekum got married, he worked jointly with Kwadjo Agyekum." (iii) Kwaku Mosi the only witness for the defendants said in evidence-in-chief, "The two Agyekums were full brothers and always did things together so I cannot say which of them in fact built the house. I now say the house was built by Kwadjo Agyekum but he lived in the house with his brother."

Now by customary law, where a child or a ward works with his father or guardian, he does not become owner with the father or guardian of the income of their joint labour; whatever comes out of that joint effort belongs exclusively to the father or the guardian: see Bima v. Barfi, Okwabi v. Adonu, Quartey v. Martey and Adjabeng v. Kwabla. Again, under customary law, since the two brothers kept a common purse, whatever is acquired from the common purse has the character of family property, such that they could partition it during their lifetime, but upon the death of any one of them, it becomes full family property. Therefore, upon the plaintiffs' own evidence the house in dispute would be family property unless there is evidence to prove that the two brothers shared the common purse, and that the house in dispute was erected by Kwaku out of the separate share he received from the common purse. But there is no evidence of distribution of the common purse. It follows that whether the house in dispute was seen by the public to be erected by Kwaku alone or by Kwadjo alone, it is family property until the contrary is proved. Thus the defence witness Kwaku Mosi was right when he testified that although he knew that the house in dispute was erected by Kwadjo Agyekum he could not say which of them in fact built it. The learned judge's criticism of this witness's evidence is therefore not justified. Indeed the plaintiffs too in the letter, exhibit 1, written by their solicitor to the defendants prior to the institution of the action, alleged that the adjoining house was built by Kwaku as his individual property, that is, the house which was proved conclusively to be the family house of both Kwadjo and Kwaku Agyekum. If the plaintiffs would make that mistake about the family house which was erected subsequent to

1955 when the plaintiffs were grown up and mature in age, would they not make a greater mistake about the house in dispute erected when they were only of tender years?

Having failed to direct his attention to the law on the point consequent upon possession of the common purse, the learned judge failed to appreciate the legal implication and significance of this all important piece of evidence. He consequently further erred in accepting the evidence of the plaintiffs and their witness Kwaku Krobo, which evidence amounts in law to nothing more than bare allegations which were not proved as required by law. Therefore, on the second issue also, the judgment of the trial court cannot stand.

I now pass to the last issue, namely, whether a valid gift of the house was made by Kwaku Agyekum to the plaintiffs. That issue also involves both fact and law. The learned judge's decision on this point was attacked in the first of the defendants' grounds of appeal, ground (1). Learned counsel for the defendants submitted on this point that the trial judge failed to direct himself on the essentials of a gift made under customary law; he therefore submitted that legally, no basis exists for the judgment. On the essentials of a valid gift under customary law, counsel referred the court to Kwakuwah v. Nayenna, also to Asare v. Teing.

As to the facts, counsel submitted that the learned trial judge misdirected himself on the onus of proof, and consequently erred in rejecting the version of the defendants on the grounds of inconsistencies in the evidence of the defence witnesses. He submitted that the trial judge further erred in accepting the version of the plaintiffs, that a gift was made when their evidence in that regard is contradicted by their own witness Kwasi Krobo, and the other independent witnesses who were present on the occasion when the plaintiffs alleged the gift was made. Counsel finally submitted that even if the evidence led by the plaintiffs is accepted as true, it does not amount to proof of a gift according to customary law, and that, at its best, the evidence led for the plaintiffs amounted only to expression of intention to make a gift and nothing more. In reply to these submissions made on behalf of the defendants, counsel for the plaintiffs submitted that even though it does not appear on the face of the judgment that the trial judge directed his attention specifically to the essentials of a valid gift under customary law, yet the learned judge is presumed to know the customary law, and therefore he must have made his decision with that knowledge as a background; counsel submitted further that the manner in which the drink (aseda) is alleged to have been presented, i.e. given directly by the donees to the donor without being passed through a witness, is not in conformity with customary law; he contended, however, that that alone cannot affect the validity of the gift.

A valid gift, under customary law, is an unequivocal transfer of ownership by the donor to the donee, made with the widest publicity which the circumstances of the case may permit. For purposes of the required publicity, the gift is made in the presence of independent witnesses, some of whom should be members of the family of the donor who would have succeeded to the property if the donor had died intestate and, also, in the presence of members of the family of the donee who also would succeed to the property upon the death of the donee on intestacy. The gift is acknowledged by the donee by the presentation of drink or other articles to the donor; the drink or articles are handed to one of the witnesses — preferably a member of the donee's family, who in turn delivers it to one of the witnesses attending on behalf of the donor; libation is then poured declaring the transfer and the witnesses share a portion of the drink or other articles. Another form of publicity is exclusive possession and the exercise of overt acts of ownership by the donee after the ceremony: see Kwakuwah v. Nayenna, Asare v. Teing, Addy v. Armah and Asante v. Bogyabi. Sarbah emphasizes these principles of acts of transfer and acceptance and proof of those two acts when he says in his Fanti Customary Laws (2nd ed.) at pp. 80-81:

"Gift consists in the relinquishment of one's own right and the creation of the right of another, in lands, goods, or chattels, which creation is only completed by the acceptance of the offer of the gift by that other . . .
To constitute a valid gift, an intention of giving or passing the property in the thing given to the donee by the donor, who has power so to do, is necessary . . .
The giving and acceptance must be proved and evidenced by such delivery or conveyance as the nature of the gift admits of."
In the evidence there is no performance of the most important act or ceremony of transfer of property in the house to the plaintiffs; no publication to the living and the dead that ownership in the house had, as from that date moved from Kwaku to the plaintiffs, and no libation was poured.
Above all the manner in which the drinks are alleged to have been handed over by the second plaintiff to Kwaku is contrary to all principles of customary law. Counsel for the plaintiffs was obliged to admit this. Under customary law it is most disrespectful for a person making presentation to his elder, particularly his benefactor, to put the drinks or other article straight into the hands of the elder or benefactor. And particularly, in the case of aseda to indicate acceptance of a gift of land, the presentation of the aseda is never made direct by the donee, it is made through a representative of the family of the donee who in turn delivers it to a representative of the donor who then shows it finally to the donor. The donor may just touch it, but never actually receives it into his hands; a bottle of drink is therefore opened, libation is then poured and thereafter the drinks are served to all witnesses to the gift. On the other hand, if a father or an elder sends his child or relation to bring him some article or any other thing from somewhere, a room for example, it is usual for the child to hand it personally to the father or the other person who sent him.

Thus the evidence given by the plaintiffs of the manner in which the second plaintiff handed the drinks to Kwaku affords support to the evidence of Kwaku Mosi, the second defendants' witness, that Kwaku applied to Kwadjo and the family to permit him to make a gift of the house; for in such a case, if he had sent the second plaintiff to bring him some drinks from his room, so that in case Kwadjo and the family agreed, he might formally present the drinks to the family, it would be reasonable that the second plaintiff would hand the drinks direct to her father Kwaku, and that is the only way in which the direct delivery of the drinks to Kwaku by the second plaintiff may be reasonably explained.

It must here be emphasized that it is a misconception to think that the bottle or so of drinks which may be given by a prospective donee to a donor on an occasion when a donor expresses an intention to make a gift or says he is making a gift is the aseda which the customary law requires to substantiate acceptance of a gift made. The aseda which makes a gift perfect is a personal presentation made with a ceremony, and the ceremony usually takes place on a fixed date subsequent to the date of the formal gift. The donor is notified of the date when the presentation of the aseda would be made, and he and his relations and friends then assemble on that day to receive the presentation in a formal way. The presentation is made by the donee through members of his family and his friends, and the donor receives the same through relations and friends. As a rule, the donee himself does not accompany the party to make this presentation on his behalf. The principle behind that procedure is that the persons who make the presentation should have confirmation from the donor in the absence of the donee, but in the presence of relation and friends both of the donor and the donee, that the gift is in fact made. In Addy v. Armah it is stated that:
"Custom lays it down that the donee does not join such a delegation, members of his family and his friends are the proper persons who must go on his behalf, though he himself should supply the articles to be presented. And where the donee is a child, and the donor happens

to be one of his parents, the other parent provides the articles and leads the delegation to make the presentation to the donor parent assembled with members of his or her family."
The principle underlying this procedure is that since a gift by customary law once perfected, is irrevocable and since as Sarbah in his Fanti Customary Laws (2nd ed.) at p. 81 says:
"What is given by a person in wrath or excess of joy, or through inadvertence, or during minority or madness, or under the influence of terror, or by one intoxicated, or extremely old, or afflicted with grief or excruciating pain, or what is given in sport, is void," a donor should have opportunity at a date subsequent to making the gift to retain the gift if he has in fact made it.
If the learned trial judge had directed his mind to the essentials of a gift by customary law, and the need as Sarbah says at pp. 80-81 that "the giving and acceptance must be proved and evidenced by such delivery [i.e. act of delivery] or conveyance as the nature of the gift [in this case, land] admits of," he would most probably have realised that the uncorroborated evidence given by the plaintiffs contains nothing which proves and evidences any act of delivery or passing of property in the house from Kwaku Agyekum to the plaintiffs and that the plaintiffs failed to prove the gift they alleged.
For these reasons, I would allow the appeal.
JUDGMENT OF SARKODEE-ADOO C.J. I concur.
JUDGMENT OF LASSEY J.S.C. [Wrote a dissenting opinion which has been omitted]

5. Alienation of Family Property

As a general rule or at least best practice, a family meeting should be convened to secure the necessary consents required for a valid alienation of family land.Awortchie v. Eshon (1872) Sarbah F.C.L. Page 170.

The main issue is who must participate in and consent to an alienation of family land in order to validate the transaction?

Woodman identifies different categories of transactions. For example Head joined by (a) all the principal members; (b) a majority of the principal members; and (c) a minority of the principal members.

He also mentions situations in which the Head does not participate in the transaction or where the Head alone makes a disposition of family land.

The general rule was stated by Ollennu J, as he then was in the case of Allotey v. Abrahams (1957) 3 WALR 280, at page 286 is as follows:

> "According to native law and custom it is only the occupant of the stool or the head of family who is entitled, with the consent and concurrence of the principal elders of the stool or family, to alienate stool or family land. There can be no valid disposal of stool or family land without the participation of the occupant of the stool or the head of family; but there can be a valid alienation of stool or family land if the alienation was made by the occupant of the stool or the head of family with the consent and concurrence of some, but not necessarily all, the principal elders of the stool or family. The occupant of the stool or head of family is an indispensable figure in dealing with stool or family land."

There have been situations where the alienation was by the head of family acting alone. The rule was stated in the case of Beyaidee v. Mensah (1878) (Sarbah F.C.L.) at Page 171 as follows:

> "Now although it may be, and we believe it is the law, that the concurrence of the members of the family ought to be given in order to constitute an unimpeachable sale of family land, the sale is not itself void, but capable of being opened up at the instance of the family provided they avail themselves of their rights timeously and under circumstances in which, upon rescinding of the bargain, the purchaser can be fully restored into the position in which he stood before the sale."

In Manko v. Bonso (1936)3 WACA 625 the court refered to the case of *Quassie Bayaidie v. Kwamina Mensah* (F.C.L. 150) where the Full Court had to consider the effect of a sale by family land by occupant of a stool. That Court in the course of its judgment stated:-
.. Now although it may be, and we believe it is, the law that the concurrence of the members of the family ought to be given in order to constitute an unimpeachable sale of family land, the sale is not in itself void, but is capable of being opened up at the instance of the family, provided they avail themselves of their right timeously and under circumstances in which, upon the rescinding of the bargain, the purchaser can be fully restored to the position in which he stood before the sale."

See also the cases of:
Manko v. Bonso (1936)3 WACA 625.

MANKO AND ORS Vrs Bonsu [1936] 3 WACA 625
Accra, 9th May, 1936.
Cor. KINGDON, PETRIDES and WEBBER, C.JJ.

KWESI MANKO AND ORS. ***Plaintiffs-Appellants.***
1st Appeal ***v***
CONSOLIDATED **BONSO AND OTHERS** ***Defendants-Respondents.***
. **AND**
KWESI MANKO AND ORS. ***Plaintiffs-Appellants.***
2nd Appeal ***v.***
ABA KOKODEY AND ANOR ***Defendants-Respondents***

PETRIDES, CJ, GOLD COAST.

This is an appeal and a cross-appeal from a judgment of the Acting Deputy Commissioner, Central Province, given by him after he had retried two separate actions originally tried by the Tribunal of the Paramount Chief of Gomoa Assin.

In the action against Bonso and others the plaintiffs' claim was for"ejectment, or ownership or possession" of a piece of land with a two-storey house which the plaintiff alleged was the property of the late Kojo Botsio's family, which said ownership of the said property was confirmed by a judgment of the Supreme Court, Accra, dated the 8th October, 1885, in the case of *Coffie Patsie v. Boatoe and two others* and for £100 damages.

The Deputy Commissioner found that the land on which the two-storey house was built belonged to Botsio and his family. Although the land was family property, Botsio (described as Cudjoe Buatoe in the Deed) purported to sell it with the house thereon to Cudjoe Buatoe Bentil as evidenced by a Deed dated the 30th December, 1885. The Deputy Commissioner found that this sale was valid, and that even if the family had not given prior consent, they subsequently acquiesced in the sale by allowing Bentil and his successors in title to occupy the house rent free from the year 1885 until the present time without protest.

Appellants' Counsel contended at length that this Deed was a forgery, but entirely failed to satisfy us that such was the case.

He then contended that the alleged sale of 1885 by Botsio to Bentil was absolutely void as Botsio could not sell the land as it was family property, and that the Deputy Commissioner was wrong in holding that the family had acquiesced in the sale by allowing Bentil and his successors in title to occupy the house rent free from the year 1885 until the present time without protest. He contended that the family could not have acquiesced in the sale as they knew nothing about it at the time and never saw the Deed of sale. He pointed out that as Bentil had married Botsio's niece he was entitled to live in the house. We think that this contention is right, and that in consequence the fact that Bentil and those who inherited from him paid no rent is no evidence that the family acquiesced in the sale of the property to Bentil.

In 1914 the house was sold by Essie Gyan, who inherited indirectly from Bentil, to H. E. Thompson as evidenced by Exhibit D. When Thompson died Okwesi succeeded to the property and sold it to Kwa Baubin, who died and was succeeded by Kofi Acquah, who placed the defendants in possession as caretakers.
It appears from the evidence that from 1914 up to date the upper storey of the house was occupied by persons like Thompson who had no right to be there unless there had been a sale in 1885. The presence of these people from 1914 to date is only intelligible upon the footing of title as in the ordinary course of events strangers do not live in other people's houses. On the other hand until 1933 the ground floor was occupied by the plaintiff's family.
In the case of *Quassie Bayaidie v. Kwamina Mensah* (F.C.L. 150) the Full Court had to consider what was the effect of a sale by family land by occupant of a stool. That Court in the course of its judgment stated:-
.. Now although it may be, and we believe it is, the law that the concurrence of the members of the family ought to be given in order to constitute an unimpeachable sale of family land, the sale is not in itself void, but is capable of being opened up at the instance of the family, provided they avail themselves of their right timeously and under circumstances in which, upon the rescinding of the bargain, the purchaser can be fully restored to the position in which he stood before the sale."

If this judgment is sound, and the contrary is not suggested by appellants' Counsel, then it appears clear that the sale of 1885 was not void, but merely voidable and the plaintiffs having taken no steps to set it aside have no title to the land in dispute.

The burden of proof in an action such as this for ejectment, possession and a declaration of title clearly lies on the plaintiff, and as it has been shown that Kofi Acquah has a title to the land, even though it may be a defeasible one, his caretakers cannot be ejected or a title granted to the plaintiffs in respect of this land while Kofi Acquah's title subsists.
The plaintiffs' appeal must therefore be dismissed.
As to the cross-appeal, we think that the Deputy Commissioner's decision was right and we dismiss that appeal.

Yawoga v. Yawoga (1958) 3WALR 309.

YAWOGA *v.* YAWOGA AND ATUTONU [1959] GLR 67.
High Court, Eastern Judicial Division, Land Court
Ollennu J

OLLENNU J.

The plaintiff is a son of the first defendant, and the claim is for an order declaring null and void a sale of a farm which the first defendant has made to the second defendant, and for recovery of possession of the farm so sold. It is common ground between the parties that the

farm in dispute was the 'self-acquired property of one Yawoga, the father of the first defendant, and grandfather of the plaintiff, and was therefore family property.

Succession in the tribe to which the plaintiff and the first defendant belong is patrilineal. And it is admitted that upon the death of the said Yawoga, his family, who became entitled to the property, consisted of his children and their descendants. The plaintiff admits that the first defendant is the head of the said family, and that the only other child of Yawoga is one Afua Yawoga. Now, according to native custom, rank among members of a family is determined by the relative proximity of a member to the founder of the family or the remotest ancestor that is remembered in the family. Therefore children of a deceased person rank first with equal status as the principal members of the family. Next in rank are their children. Upon the death of anyone of the deceased person's children that child's own children step into his or her shoes and the head among those grandchildren takes position among the uncles and aunts as a principal member of the family to fill the gap thus created. A child, however, can, during the lifetime of his parent, be accorded the rights of a principal member of the family, depending upon his services to or achievements in the family.
The evidence in this case shows that the only principal members of the Yawoga family at the date of the sale of the farm were the first defendant-the head of the family-and his sister Afua Yawoga.

Although by native custom the head of the family is the proper person to sue or be sued in respect of family property yet, where the head of the family fails or neglects to sue or take appropriate steps to save family property, any member of the family is entitled to take action to save the family property. A sale of family property by the head purporting to be with the concurrence of the principal members of the family is voidable, not void, if not in fact made with such concurrence, and it can be set aside at the instance of the family if members of the family act timeously.

The plaintiff, upon the evidence on the record, is not a principal member of the Yawoga family, his father being still alive. He is entitled, however, to reclaim, for the family, property of the family which has been wrongly alienated. To succeed in .this he must prove that the alienation was without the consent and concurrence of the people who constitute the principal members of the family. In short he should prove that the sale of the farm to the second defendant was made without the knowledge and consent of Afua Yawoga. Under cross-examination the plaintiff himself said: "If you had informed Afua Yawoga before you sold this farm I would be satisfied that you had consulted and informed a member of the family."

The plaintiff's knowledge that, the farm was the self-acquired property of his grandfather Yawoga, and that his father, the first defendant, sold it some years ago, was obtained by means of information given him by his said father. He admitted that the first defendant told him that he gave £2 out of the proceeds of the farm to Afua Yawoga. Moreover, Afua Yawoga herself gave evidence for the defence and proved that she gave her consent before the first defendant sold the farm to the second defendant. Thus not only did the plaintiff fail to establish that the sale was without the necessary consent and concurrence, but the first defendant, upon whom there was no onus, placed the matter beyond doubt by establishing that the necessary consent and concurrence were obtained before the sale was made. It is abundantly clear therefore that the trial Native Court was wrong in entering judgment for the plaintiff. Consequently the Native Appeal Court was also wrong in upholding that judgment.

For these reasons the appeal is allowed, the judgments of the Native Appeal Court and of the Native Court "B" are each set aside. The plaintiff's claim is dismissed and judgment entered for the defendants.

Appeal allowed.
S. G. D.

The Court of Appeal clarified the rule stated in Beyaidee v. Mensah in the case of Adjei v. Appiagyei (1958) 3 WACA 401, at 404 as follows:
"A sale by the head of family without the assent and concurrence of the rest of the family is not void. It is voidable at the instance of the family, but the court will not avoid the sale if it not satisfied that the family has acted timeously and with due diligence and that the party affected by the avoidance of the sale can be restored to the position in which he stood before the sale took place."
The Court of Appeal outlined the conditions to be satisfied by the family seeking to avoid a transaction thus:

- That the person seeking to set aside the transaction was the proper person to represent the family in a suit relating to family land;
- That the members of the family were wholly ignorant of the transaction;
- That the family had not by any conduct subsequent to the date mentioned acquiesced in the transaction;
- That the family had acted timeously and with due diligence, and
- The defendant could on a declaration by the court avoiding the transaction be put in the same situation that he stood before the transaction.

The burden of establishing the above facts is on the person seeking to set aside the sale.
Ata v. Aidoo (1968) GLR 362.

ATTAH v. AIDOO AND OTHERS [1968] GLR 362 -372
HIGH COURT, CAPE COAST
4 APRIL 1968

ARCHER J.

The plaintiff, as customary successor of his late uncle Kobina Gurah, on behalf of himself and the family of the late Gurah, claims a declaration of title to and recovery of six farms, described in the statement of claim, from the four defendants, which said properties were unlawfully pledged by the first defendant Kobina Aidoo to the third defendant Alagbade and the fourth defendant Anaman, and later were unlawfully sold at the instance of the third defendant by the second defendant Minnow as auctioneer to the fourth defendant.
The plaintiff seeks also an order setting aside the said sale. He also claims £G10,000 damages for trespass and an account of the defendants' occupation of the said cocoa farms and for mesne profits.

The plaintiff's story is that his late uncle Gurah obtained land at Kwanyaku and Dunkwa and cultivated the land into cocoa farms. On his death, Gurah was succeeded by the first defendant, Kobina Aidoo as customary successor who took over the properties of Gurah. During Kobina Aidoo's administration of the properties, he pledged these farms, without the knowledge and consent or approval of the family, to the fourth defendant and the third defendant. Subsequently, the third defendant Alagbade obtained judgment against Kobina Aidoo in respect of the pledge-debt and seized all the farms (except one) in dispute under a writ of fi. fa. and the farms were sold by the second defendant Minnow, an auctioneer, to the fourth defendant Anaman, by private treaty and not by public auction as required by law. The plaintiff's case is therefore that as the pledges were made without the knowledge and consent of the head of family and the principal elders, the pledges were of no legal effect according to customary law. Moreover as the sale of the farms was not advertised and the sale did not take place by public auction, the sale should be set aside.

The next point I wish to deal with is to find out whether or not these properties belonged to Kobina Gurah alone so as to transform them into family property on his death. The plaintiff maintained that it was Gurah himself who obtained the land and cultivated the farms. The first defendant also maintained that he came to the land after he had been appointed customary successor and that he was not a joint grantee. The third and fourth defendants, that is, Alagbade and Anaman on the other hand took the view that Kobina Gurah and his two brothers Kwesi Gyan and Kobina Aidoo, the first defendant, took the grant jointly and cultivated the farms and therefore on the deaths of the two brothers, Kobina Aidoo, the first defendant, continued to be in possession of the farms as a joint owner with a life interest and therefore the properties could not be strictly classified as family properties. Alagbade stated that he settled in the area about 1914 and he used to go round the surrounding villages to buy cocoa and he knew that the three brothers worked together on the land although their village was known as Gurah's village. Yaw Gyasi the third defence witness, the mankrado of Kwanyaku, stated that the land was granted originally to the three brothers and that he was present when the land was measured and granted because as a member of the grantor-family his presence was desirable. Nevertheless, Yaw Gyasi the mankrado was not the person who granted the land. It was his predecessor who made the grant. There is evidence from exhibits H1-H3 that all receipts for the rent paid to the stool were issued in the name of Kobina Gurah in 1935 by Yaw Kurantsi II, the then mankrado of Kwanyaku. The first defendant also revealed in his evidence that as a young boy he stayed with his own father. When Kobina Gurah died, and the first defendant was appointed successor, the necessary customary rites were performed before Yaw Gyasi the third defence witness as landowner and in his own evidence, he recognized the first defendant as the new tenant. What puzzles me is why did Yaw Gyasi recognise the first defendant as the new tenant when he knew that the first defendant was already before the death of Kobina Gurah a joint tenant. I have considered the evidence very carefully and I am convinced that, as the village was known as Gurah’s village, as the receipts were issued in Gurah's name, and as there is no evidence that the three brothers cultivated separate portions to the land, it is safe to hold that the land was originally granted to Kobina Gurah. I therefore find that the farms in dispute belonged to Kobina Gurah and on his death, they became family property [p.365] under the management and control of the first defendant as customary successor.

The third point I wish to tackle is whether the pledges to Anaman and Alagbade were lawful and valid according to customary law. Ollennu's book on Principles of Customary Land Law in Ghana at p. 122 states, "The pledge of land has many things in common with the sale and gift of land. Like those other two forms of alienation, pledge must be given wide publicity." Then at pp. 127-128 the following principle is stated:

"By customary law, no valid alienation of a stool or family land can be made except by the occupant of the stool, acting with the consent and concurrence of the principal members of the family.

The one indispensable person in the alienation of stool or skin land is the occupant of the stool or of the skin, and the one indispensable person in the alienation of family land is the head of the family. But the occupant of the stool or skin alone, or the head of the family alone, is incapable of making a valid alienation of stool or family land. Any conveyance made by the occupant of the stool alone, or by the head of family alone, is null and void ab initio, and any alienation made by the principal elders alone without the occupant of the stool or the head of the family is likewise null and void ab initio.

An alienation of stool or family land which on the face of it purports to have been made by the occupant of the stool or the head of the family acting with the consent and concurrence of the principal elders, and with that consent and concurrence evidenced by at least one principal member of the family (e.g., a holder of traditional office like a linguist) is not void,

but it is voidable; that is to say, it is valid until it is declared void by a court of competent jurisdiction, at the suit of the family."

That above are the principles which govern the alienation of family land and the necessary consents which must be obtained. Mr. Gordon R. Woodman, in an exhaustive article on "Developments in pledges of land in Ghanaian customary law" in [1967] J.A.L. 8 at pp. 9-10 states:
"There is no direct authority on the consents necessary for a valid pledge of an interest held by the customary-law corporate persons the stool and the family. Since however a pledge involves incurring a debt and the possible future loss of the interest, it would seem reasonable for the same consents to be necessary for a pledge as for the incurring of a debt without security, or the outright alienation of an interest in land."
As the action of customary pledge is akin to a mortgage in certain essential aspects, I wish to rely on what Granville Sharp J.A. said in Adjei v. Appiagyei (1958) 3 W.A.L.R. 401 at p. 404, C.A.:
"A sale of land by the head of family without the assent or concurrence of the rest of the family is not void. It is voidable at the instance of the family, but the court will not avoid the sale if not satisfied that the family has acted timeously and with due diligence and that the party affected by the avoidance of the sale can be restored to the position in which he stood before the sale took place: Manko v. Bonsu ((1956) 3 W.A.C.A. 62). This applies as much in the case of a mortgagee as in the case of a sale if cancellation is sought."
Then Granville Sharp J.A. continued at the same page as follows:
"It seems to me that in the circumstances of the present case, and in the state of the pleadings, the plaintiff was under the duty to prove (a) that he was the proper person to represent the family . . . in a suit relating to the family property; (b) that the members of family were wholly ignorant of the transaction . . . (c) that the family had not by any conduct subsequent to the date mentioned acquiesced in the transaction; (d) that they had acted timeously and with due diligence; and (e) that the defendant could, on a declaration of the court avoiding the transaction, be put in the same situation that his predecessor occupied before the mortgage was entered into by him."
In the present case before me, I intend to abide by the above five principles or requirements. But in doing so, I wish to remind myself that in such a suit the onus is upon the family to prove that in fact no consent of the principal elders was obtained: see Quarm v. Yankah II (1930) 1 W.A.C.A. 80.
I have considered the evidence very carefully and I have noted that although Asher the defendant's first witness who prepared exhibit 4D1 is related to the fourth defendant, I find that it was Yaw Gyasi the defendant's third witness and the first defendant who called him to prepare that document. On the strength of the evidence of the fourth defendant supported by the evidence of Bikorang the defendant's second witness and Yaw Gyasi the defendant's third witness, I find that Kobina Kartah the family linguist was present when exhibit 2 was executed
However it seems to me that, in Ghana, rules of court enable the immovable properties of a judgment debtor to be attached including his equity of redemption. I have not been able to find any decided authority which disables a pledgee from purchasing the pledged property under a writ of fi. fa. In the absence of such prohibition, it follows that the fourth defendant was at liberty to purchase the pledged farms which were already in his possession. As he bought only the equity of redemption vested in the first defendant, the fourth defendant stepped into the shoes of the first defendant. The only absurd result is that the fourth defendant has to redeem the pledged farms from himself. The title of the first defendant is therefore extinguished by the sale and his right to redeem has been transferred to the fourth defendant. It seems therefore that the first defendant has lost his equity of redemption notwithstanding the maxim in customary law that once a pledge always a pledge. The pledge

debt is also transferred and the fourth defendant cannot claim it from the first defendant. The only aspect of this case which has exercised my mind is that each of the two certificates of purchase—exhibits 4D2 and 4D3 states that the purchaser has bought the right, title or interest of Kobina Aidoo the first defendant. I have already held these farms were family properties and that the first defendant was the customary successor of these farms. He therefore had a right to deal with these farms with the consent of the principal members of the family. There is also evidence that these debts were incurred by the first defendant to meet funeral expenses of members of the family. There is also evidence that some members of the family were present on the two occasions when the first defendant approached Anaman for the loans. These members of the family allowed the first defendant to represent himself to Anaman and the other witnesses as a person who had capacity to deal with these farms. I therefore hold that as these debts including that due to Alagbade were incurred on behalf of the family with their knowledge the properties of the family could properly be attached and the family members are already estopped from saying that only the right or interest of the first defendant was sold.

Kobina Kartah, the family linguist, Kwesi Kwakye, the present head of family, Kofi Arku struck me as persons who pretended that they did not know of the first defendant's activities with Anaman. They want this court to believe that from 1950 to 1960 they took no interest in these farms and were completely ignorant of the sales which took place in 1950 and 1952 when in the words of Kobina Kartah, his own father had farms near the farms in dispute. My conviction on a reasonable balance of probabilities is that although the [p.372] first defendant became customary successor on the death of Kobina Gurah, the principal members of the family assisted him to dissipate these properties and allowed him to deal with these properties as if they were his own properties. For a period of eleven years, that is, from 1950 until 1961 they did not assert any rights in a court of law challenging these pledges or these sales in execution. My feeling is that they knew what was happening and they did not bother because the first defendant had incurred these debts on behalf of the family. Yaw Gyasi, the defendant's third witness stated in evidence in chief that when Anaman complained that notices of sale had been posted on the pledged farms, he saw both the first defendant and Kobina Kartah and asked why the farms had been pledged and the first defendant confirmed the attachment. Kobina Kartah is the family linguist and he must have been aware of the attachment of these family properties by Alagbade but he did nothing.

I therefore hold that as there is evidence that the plaintiff's family have lost these properties and valid certificates of purchase have been issued, the plaintiff has failed to prove his claim and his claim for a declaration of title is hereby rejected. The first defendant committed no trespass when he pledged the farms to Anaman. As to the two executions, he had no hand in them and did not commit trespass. There is no evidence that the second and third defendants have committed any trespass. The fourth defendant was legally entitled to possession of farms Nos. 2, 4 and 5 and became legally entitled also to farms Nos. 1 and 3 after the sale of the said farms to him. The fourth defendant therefore committed no trespass. As the plaintiff's family knowingly divested themselves of these properties through the first defendant's activities, the plaintiff is not entitled to an account.

I have tried in vain to find any just grounds on which to rely to set aside the sales but it seems to me that the farms were in the possession of the fourth defendant twelve to thirteen years before the plaintiff's writ was issued. There is no doubt that it is a long period within which one would expect the fourth defendant to husband these farms at great expense. It is now too late for the plaintiff and his family to complain.

For the above reasons the plaintiff's claim is dismissed. In view of the first defendant's deception of Anaman, I order that he should not be entitled to any costs. The second, third and fourth defendants are awarded their costs assessed at N¢200.00.

Action dismissed.

Where the head does not participate in the transaction such alienation is void *ab initio*The rule was stated in Agbloe v. Sappor (1947) 12 WACA 187 as follows:
"The principal members of a family cannot give any title in a conveyance of family land without the participation of the head of family. The head of family may be considered to be in a position analogous to a trustee from which it follows that it is quite impossible for land to be legally transferred and legal title given without his consent. The alleged deed transferred was therefore void *abinitio* and the respondents derive no right of absolute ownership by virtue thereof."

6. Litigation in Respect of Family Property

The issue of who is the proper person to represent a family in litigation involving family land often arise as a preliminary or threshold question. Because it may require calling evidence, judges are reluctant to dispose of it as a preliminary matter.

The High Court (Civil Procedure) Rules, 2004 (C.I. 47), Order 4 Rule 9, provides As follows
Rule 9--Representation of stools and families
(1) The occupant of a stool or skin or, where the stool or skin is vacant, the regent or caretaker of that stool or skin may sue and be sued on behalf of or as representing the stool or skin
(2) The head of a family in accordance with customary law may sue and be sued on behalf of or as representing the family.
(3) If for any good reason the head of a family is unable to act or if the head of a family refuses or fails to take action to protect the interest of the family any member of the family may subject to this rule sue on behalf of the family.
(4) Where any member of the family sues under subrule (3) a copy of the writ shall be served on the head of family.
(5) A head of family served under sub rule (4) may within three days of service of the writ apply to the Court to object to the writ or to be substituted as plaintiff or be joined as plaintiff.
(6) If the head of a family is sued as representing the family but it appears that he or she is not properly protecting the interests of the family, any member of the family may apply to the Court to be joined as a defendant in addition to or in substitution for the said head.
(7) An application under sub rule (5) or (6) shall be made on notice to the parties in the action and shall be supported by an affidavit verifying the identity of the applicant and the grounds on which the applicant relies.
The general rule therefore is that it is the head of family who may sue or be sued in respect of family land.The exeption to this rule was stated in the case of ***Kwan v. Nyieni (1959) GLR 67*** where the family members of kojo, purportedly removed the Head of family; Osei Kojo was on the grounds that he was squandering family property. They then appointed Kojo kwan as the nwe Head of family, who acting as such, instituted an action against Osi Kojo and another person. The court of Appeal stated the following principles;
"*(1) as a general rule the head of a family, as representative of the family, is the proper person to institute suits for the recovery of family land;*
(2) to this general rule there are exceptions in certain special circumstances, such as:
(i) where the family property is in danger of being lost to the family, and it is shown that the head (either out of personal interest, or otherwise) will not make a move to save or preserve it; or
(ii) where, owing to a division in the family, the head and some of the principal members will not take any step; or
(iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.

In any such special circumstances, the Court will entertain an action by any member of the family, either upon proof that he has been authorised by other members of the family to sue, or upon proof of necessity, provided that the Court is satisfied that the action is instituted in order to preserve the family character of the property"

Kwan v. Nyieni (1959) GLR 67.

KWAN v. NYIENI & ANOR. [1959] GLR 67-74
IN THE COURT OF APPEAL
26TH FEBRUARY, 1959.

VAN LARE AG. C.J., GRANVILLE SHARP J.A., AND OLLENNU J.

VAN LARE, AG. C.J.

The appeal is from a judgment of Benson J. in the Land Court, Kumasi, in a suit which had been instituted in Kumasi West District Court "B", Goaso, and which was transferred to the said Land Court. by

The facts of the case are as follows: Kojo Kwan and Osei Kojo were members of the same family, whose head was the said Osei Kojo. Sometime between the years 1953 and 1954 the members of this family purported to remove Osei Kojo from the headship, on the ground that he was squandering the family property. Osei Kojo caused an arbitration to be held on the matter of his removal, and the arbitrators decided that his removal was not in order. Notwithstanding this decision the family, still not satisfied, appointed Kojo Kwan as another head.

The family's real property consisted of six cocoa farms. In April, 1953, the said Osei Kojo (then still head of the family), together with one female member of the family, mortgaged four of the six farms to Kwesi Nyieni. This fact came to the knowledge of Kojo Kwan's family in January, 1954, upon Nyieni's advertising the said four farms for sale in exercise of a power of sale under the mortgage.

Thereupon Kojo Kwan, purporting to act as head of the family, instituted an action in the Kumasi West District Court "B," Goaso, against Osei Kojo and Nyieni, claiming:

(a) a declaration that the said four farms were property of his family;

(b) a declaration that the mortgage of the said farms by Osei Kojo was without the knowledge and consent of the family;

(c) an order for recovery of possession of the said farms; and

(d) an order for interim injunction.

In a judgment delivered in that suit the Court made the following findings of fact:

(a) that the award of the arbitrators with respect to the headship of the family was binding on the family, and therefore Osei Kojo was still the head of the family; and, further, that the appointment of Kojo Kwan as head of the family was not in order;

(b) that the farms in dispute were family property; and

(c) that the mortgage thereof was without the knowledge of the principal members of the family.

The Court, however, entered judgment for Nyieni for the recovery of the sum of £900 for which the farms were mortgaged to him. It was also ordered that

(a) the said £900 due to Nyieni should be paid by Yaw Donkor, the family's caretaker of the farms, and that such payment should be made by him out of proceeds of the farms for the 1953/54 cocoa season, the balance to be paid during the 1954/55 cocoa season; and

(b) the farms in dispute should not be sold.

From this decision Kojo Kwan appealed to the Asantehene's Court "A2," specifically against the order for the payment of the £900 to Nyieni out of the family property. His appeal was dismissed. In expressing their opinion on the case, the members of the Asantehene's "A2" Court said, in effect, that if they had been trying the case at first instance they might on one point have come to a conclusion different from that to which the trial-Court came, namely, they might have come to the conclusion that the mortgage by Osei Kojo and another to Nyieni

was with the knowledge of the family. However, they merely dismissed Kwan's appeal without in any way varying or modifying the findings of fact made by the trial-Court. Nyieni did not appeal against those findings of fact.
Notwithstanding the decision of the Kumasi West District Court "B" and the result of the appeal, Nyieni sold the farms in dispute to Kwaku Duah on the 6th March, 1954. , because, as he alleged, the debt of £900 had not been paid as ordered by the trial-Court. To challenge this sale Kwan instituted proceedings (which were transferred to the Land Court, Kumasi) against Nyieni and Duah, claiming:
(a) a declaration that the farms were still the property of his family;
(b) an order to set aside the sale of the farms, and
(c) the value of 700 loads of cocoa collected from the said farms during the 1953/55 cocoa seasons, and, in the alternative, damages for trespass.
Kwan's action was dismissed by Benson J. mainly on the grounds:
(1) that Kwan was not head of the family, nor a person authorised by the family to sue;
(2) that the mortgage by Osei Kojo to Nyieni was valid in spite of the finding by the West District Court "B" that the mortgaged property was family property, and their finding that the mortgage was without the knowledge and consent of the family;
(3) that the finding of the Kumasi West District Court "B" that the property was a family property was conditional upon the family's paying Osei Kojo's debt of £900, and failure to pay such debt made the property an individual property of Osei Kojo, and liable to be sold under the mortgage.
Kwan appealed to the Court of Appeal (Civ. App. No. 52/58). That Court allowed the appeal. Final leave to appeal to the Privy Council was given on the 9th May, 1959.

We are unable to agree, however, with any of the reasons advanced in the judgment of the learned Judge. Counsel for the respondents, supporting the judgment, submitted that the declaration of native custom (that the appellant, not being the head of the family, is not competent to sue in respect of family property) is a correct statement of the custom. He argued that the only exception to that well established custom is in the case of interpleader suits where, under the Rules of Court, any member of the family who claims to be in possession, active or constructive, of family property which has been attached in execution of a decree of the Court, can resort to the Courts for the removal of the attachment.
Firstly, however, the Kumasi West District Court "B", who are presumed to know the native custom, made the declaration prayed for by the appellant in the former suit, although it found in very clear terms that the appellant was not the head of the family. The inference is that, though not the head of the family, the appellant as a member of the family is entitled, in the special circumstances of the case, to sue on behalf of the family. As already pointed out, that judgment of the trial District Court "B" was not varied by the superior native court, which is a higher authority on the native customary law than the District Court "B". In this connection we wish to repeat the opinion we expressed in the judgment delivered on 2nd February, 1959 in Civil Appeal No.47/58 (Anane v. Mensah) as follows:
"Native customary law is peculiarly within the knowledge of the native courts, and the opinion of a superior native court on native custom must be preferred to the opinion of an inferior native court, unless it is either contrary to a decision of the Supreme of the Privy Council on the point or 'is repugnant to natural justice, equity and good conscience' (sec. 87, cap. 4)."
Again, in their judgment the District Court "B" found that it was after the arbitration award (setting aside the deposition of Osei Kojo from the headship) that the family met, and appointed the appellant as an additional head. Thus, although the appellant's appointment was declared ineffective at the arbitration, the findings of the Court in that former case show that he went to Court upon the authority of the principal members of the family.

In the case of Mahmudu v. Zenuah (2 W.A.C.A. 172), family property was attached for sale in execution of a decree obtained against the head of the family in his personal capacity. A member of the family other than the head interpleaded, and lost. Aiken J., sitting on appeal from a judgment of the Police Magistrate (now District Magistrate) who was the Court of first instance, referred the following point of law to the West African Court of Appeal for their opinion:

"Is the rule of native customary law to the effect that only the head of family can sue on its behalf not contrary to justice, equity and good conscience in a case like this, and therefore not applicable thereto?"

Graham Paul J., as he then was, delivering judgment in the West African Court of Appeal, stated:

"It is to my mind clear that such a native customary law is 'repugnant to justice, equity or good conscience,' and that it is, therefore, under section 19 of the Supreme Court Ordinance, not a rule of native customary law which the Supreme Court have the right to observe and enforce the observance of."

(Section 19 of the Supreme Court Ordinance is now section 87 (1) of the Courts Ordinance). Graham Paul J. concluded by saying that that did not mean that the general principle of native custom that only the head of the family could sue to recover family land was no longer the native custom. With these views Kingdon C.J. (Nigeria), and Yates Ag. C.J. (Gold Coast), concurred.

There is also the case of Koran v. Dokyi & ors. (7 W.A.C.A. 78). In that case, family property was sold in execution of a decree against one Danso, a member of the Ekuona Family of Akyem Abuakwa, in respect of his personal debt. The plaintiff therein, one of the principal members of Ekuona Family, but not the head, sued the judgment-creditor, the auctioneer and the purchasers in the then Tribunal of the Paramount Chief of Akyem Abuakwa, and claimed precisely the same reliefs as the appellant claims in this suit. The Tribunal after making findings of fact similar to those found by the Kumasi West District Court "B" referred to, declared that "the properties claimed are the properties of the Ekuona Family, and were not liable to be sold for the debt due from Danso personally." They also held that according to native custom the plaintiff was empowered to bring the action. They concluded with an order in these words: "That the plaintiff, for herself and on behalf of her family, do recover the said properties, for and on behalf of herself and the said Ekuona Family, without any further liability on the part of the defendants."

That judgment was upheld on appeal by the then Court of the Provincial Commissioner, who among other things stated that he accepted the custom as laid down by the Tribunal, and said "It seems to me that no one is better qualified to define Akyem Abuakwa native custom than the Omanhene and his Councillors."

Upon further appeal to the West African Court of Appeal, the sole ground argued was that although "family property had been wrongly sold under a writ of Fi.Fa. issued in execution of a judgment against an individual member of the family for his own personal debt, and the purchasers have entered into possession and occupation of the family property, no member of the family except the head of the family may take action in Court against the purchasers to claim a declaration that the property in question is family property and not liable to be sold for the debt in question, and for recovery of possession for and on behalf of the family." The West African Court of Appeal agreed with the observations made by the Court of the Provincial Commissioner as to the native custom, and dismissed the appeal.

The conclusions we have come to, upon careful consideration of the judgments in the two cases to which we have referred, and other judicial decisions on the native custom in this regard, are as follows:

(1) as a general rule the head of a family, as representative of the family, is the proper person to institute suits for the recovery of family land;

(2) to this general rule there are exceptions in certain special circumstances, such as:
(i) where the family property is in danger of being lost to the family, and it is shown that the head (either out of personal interest, or otherwise) will not make a move to save or preserve it; or
(ii) where, owing to a division in the family, the head and some of the principal members will not take any step; or
(iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.
In any such special circumstances, the Court will entertain an action by any member of the family, either upon proof that he has been authorised by other members of the family to sue, or upon proof of necessity, provided that the Court is satisfied that the action is instituted in order to preserve the family character of the property.
Applying these principles to this case, we are of the opinion that the learned Judge of the Land Court misdirected himself on the native customary law in holding that the appellant was not competent to sue on behalf of the family. It was manifestly clear that the action was instituted solely to preserve the family character of the property; further, there was evidence on record that the appellant, though not head, was authorised by the family to institute the action. We would go further, and say that the learned Judge erred in challenging the competency of the appellant to bring the action, when the native courts (which are the repositories of native custom) had not challenged the appellant's right to do so, even though they found him not to be the head.

Thus,Where the head of family sues on behalf of the family, the face of the Writ must show that he is suing in representative capacity.
Where the capacity of the person suing in representative capacity on behalf of the family is challenged, the burden of proof lies on the person suing to show that indeed he has the power to sue as representing the family; Nyamekye v. Ansah (1989-90) 2 GLR 152, at 161.
Wherealso, the person suing leads evidence to show that he is the head of family, the burden shift to the person denying such status to show that someone else was indeed the head of family.Akrofi v. Otenge (1989-90) 2 GLR 245.

AKROFI v. OTENGE AND ANOTHER [1989-90] 2 GLR 244-252
SUPREME COURT, ACCRA
16 MAY 1989

SOWAH C.J., ADADE AND FRANCOIS J.J.S.C., OSEI-HWERE AND AMPIAH J.J.A.

ADADE, JSC.
This case commenced in the High Court, Koforidua where the plaintiff, describing himself as head of family, sued to set aside the sale of a farm by public auction in execution of a judgment obtained against one Lawrence Mark Gyewu alias Yaw Gyewu in his private personal capacity. The said Gyewu is a member of the plaintiff's family. The plaintiff says that the farm did not belong to Gyewu personally, and therefore could not be sold to satisfy his personal debts. Accordingly, he sought a declaration of the family's title to the farm; recovery of possession; an order for accounts from the date of the sale till the date of judgment; perpetual injunction; and lastly, an order to set aside the sale.

The trial High Court judge found for the plaintiff on declaration of title, recovery of possession and perpetual injunction. But he dismissed the claim for accounts, and refused to set aside the sale. On appeal, the Court of Appeal, by a majority of two to one, came to the conclusion that on the evidence the probabilities are that the farm was not family property. The court therefore reversed the High Court, and dismissed the plaintiff's claim. From that decision the plaintiff had come to this court on further appeal.

It is clear that the main issue for determination is whether the farm is family property, or was the private property of Gyewu, the judgment debtor. In this court the plaintiff has filed five grounds of appeal, but these are adequately covered by the first two grounds only, namely:
"(1) The Court of Appeal erred in holding that the plaintiff-respondent did not discharge the onus of proof.
(2) The Court of Appeal erred in law in holding that the plaintiff-respondent had no capacity to sue as head of family."
Although the plaintiff's capacity was in issue, the trial judge made no direct finding on it. In the Court of Appeal, one of the majority opinions expressed the view that the plaintiff failed to prove his capacity as head of family, and on that ground his action should have been dismissed. The learned judge said:
"I hold that on the evidence available the plaintiff completely failed to discharge the onus on him in proving that he was the head of family of the Okanta family of Larteh. Having failed to prove his capacity the law is that he should fail in his action. I am therefore of the opinion that his action ought to have been dismissed on this ground alone by the trial court."

I am afraid I do not share this assessment of the evidence. After all what is proof? It is no more than credible evidence of a fact in issue. This may be given by one witness, or by several witnesses; what matters is the quality of the evidence. The plaintiff led evidence that he was the head of family, and he was supported by a member of the family. If the defence deny this, they should have put forward an alternative story, in the event mentioning the person they contend is the head of family, and calling witnesses, if need be, to support them in that. After all, in our local communities the heads of the various families are fairly well known, especially by the elderly members of the towns and villages. Evidence of these heads should not be difficult to come by. As it happened the defence made no effort to get this evidence. They rested their case on a mere suggestion in cross-examination, which was stoutly rejected. Beyond this, they did nothing else. Therefore on the question of the headship of the Okanta family, the only evidence on record is that of the plaintiff and his witness, the second plaintiff witness. The court did not express itself as disbelieving that evidence; indeed there could have been no reasonable grounds for disbelieving it. Thus the plaintiff, having led some credible evidence, the burden shifted on to the defence, since they stood to lose on that issue if no further evidence were introduced. The defence did not even take the first step to discharge their burden; they led no evidence. Accordingly, they had to lose on that issue. I find, contrary to the pronouncement by the Court of Appeal, that the plaintiff sufficiently succeeded in discharging the burden, and establishing his capacity as head of the Okanta family of Larteh, Akwapim.

On the whole, I find that the plaintiff failed to prove that the farm belonged to his family. The balance of probabilities are clear to me. The farm was for Gyewu, the chief of Larteh and the Benkumhene of the Akwapim Traditional Area. Having lost it as a result of the fi:fa, he now tries to get it back by putting forward the family. It is a ploy which must be seen through and rejected. I would dismiss the appeal.
Incidentally, because of exhibit 1, the deed of pledge, the impression is created by certain pronouncements on record that Christian Otenge Odonkor was, and through him the first defendant is, in possession of the farm as a result of the loan transaction between Odonkor and Gyewu. This is erroneous. Odonkor bought the farm at a public auction, which has been found to be regular in all respects. The sale was independent of the loan transaction between him and Gyewu. Of course, he might have taken an interest in the auction sale because of his special relationship with the farm; it had been pledged to him, and he would not like to lose his security. But he paid for the purchase, as any other purchaser would have done. The evidence is that he paid ¢5,000. There is no evidence that Gyewu has himself repaid the loan he took from Odonkor. That loan must therefore still be outstanding.

DECISION
Appeal dismissed.

On the other hand where a person sued as a representative of a family denies being a lawful representative of the family to be sued, the burden of proof lies on the plaintiff to show that indeed the person sued is capable of being sued on behalf of the family.
reference can be made to the general rule as set out inKwan v. Nyieniwhich in turn listed three exceptions to the general rule in which persons other than the head of family are allowed to sue in respect of family property:

1. Where the family property is in danger of being lost to the family and it is shown that the head (either out of personal interest, or otherwise) will not make any move to save or preserve it, or
2. Where owing to a division in the family, the head and some of the principal members will not take any step, or
3. Where the head and the principal members are deliberately disposing of family property in their personal interest, to the detriment of the family as a whole.

Where such special circumstances are established an action by any member of the family will be entertained by the court:
Where it is proved that such member has the authority of the other members of the family to sue, or
Upon proof of necessity, provided that court is satisfied that the action is instituted to preserve the family character of the property.

See also:

Lamptey v. Neequaye (1968) GLR 357.

LAMPTEY AND ANOTHER v. NEEQUAYE AND OTHERS [1968] GLR 257-266
HIGH COURT, ACCRA
19 MARCH 196?

CAMPBELL J.

The plaintiffs and the defendants are by Ga-Mashie customary law of intestate succession all members of the immediate family of Madam Amorkor Abbey, deceased, being respectively her children and uterine grandchildren through one Madam Koshie Lamptey deceased, a sister of the plaintiffs. On the evidence, apart from one Kotchou Neequaye, a younger sister of the defendants, there are no other persons who rank in the class of her immediate family. The present head of Madam Amorkor's wider family is one Tei Nortey who is a patrilineal cousin of the aforesaid Madam Amorkor.

The present dispute arises out of a house, No. 405 Kaneshie Estate, Accra, which the plaintiffs assert is the self-acquired property of their mother. They therefore claim a declaration to that effect also that they are entitled as against the defendants to succeed and inherit the said property, that they are entitled to the control and management of the house, to an account of rents and profits accruing therefrom from June 1962, the date of death of Madam Koshie Lamptey, to date of judgment; in addition they claim damages for trespass against the defendants, an order of ejectment against them and perpetual injunction restraining them from interfering with the premises.

The house in question was a rental unit allocated to Madam Amorkor in or about 1939 of which she died possessed on 26 July 1950. Subsequent to her death Madam Koshie Lamptey, her eldest daughter, exercised control and management and had her name substituted for

Madam Amorkor in 1953 in order to exercise an option to acquire a permanent four bedroomed dwelling-house the construction of which was then contemplated by the Department of Housing in substitution for the temporary building then existing on the site. The permanent building was constructed somewhere between 1 November 1953 and April 1954 during which period vacant possession of the premises was delivered up to the Department of Housing; the keys of the reconstructed premises were handed over on completion to Madam Koshie Lamptey on or about 6 May 1954. Subsequently in January 1956, in conformity with the conditions for the exercise by her of the option to acquire this permanent building, she executed a lease tendered in evidence as exhibit E wherein she undertook to pay off £G740 being the freehold purchase price of the premises in equal monthly instalments of £G3 18s. per month over 30 years and in fact down to the date of her death had paid off a little over £G150 of the purchase price in addition to the pure rent element contained in the monthly payments.

These facts are not readily apparent from the oral evidence given in court, but become clear from a perusal of the Housing Corporation file relating to this house which was tendered in evidence as exhibit B.

The defendants in evidence admit that the property in dispute belonged to their grand-mother; in their defence filed to the plaintiffs' claim in 1963 they had asserted that the property was the self-acquired property of their mother, Madam Koshie Lamptey, no doubt relying on exhibit E, however, during an adjournment of the case for settlement in 1964 they had delivered over all documents in relation to the house to the second plaintiff and he on his own evidence, had been in receipt of the rents from two rooms and a store of the premises from 1964, the second, third and fourth defendants being in occupation of two rooms and a kitchen.

There can be no doubt on the evidence that the property in question is the self-acquired property of Madam Amorkor and that despite its reconstruction on the initiative of Madam Koshie Lamptey, her defraying of the instalments thereon, the execution of the lease in her name in January 1956, the aforesaid property throughout, retained its original character of self-acquired property of her mother. This is so because once it is shown that Madam Koshie Lamptey exercised control and management of the original rental unit as caretaker or de facto head of Madam Amorkor's immediate family of which she is herself a member, the strong presumption which arises is that improvements made on the premises by her are for and on behalf of the immediate family in whom both the title and the beneficial interest vests eo instanti with the death of Madam Amorkor. The defendants most likely were advised of this fact, consequent on which the documents including exhibit E were handed over to the second plaintiff in or about 1964.

This having been done, it is difficult to understand why this internecine family dispute should have been continued in court involving the odious spectacle of the plaintiffs as uncles litigating with nephews and nieces for nothing less than a declaration of their right, if such they have, of ejecting the defendants from the partial occupation by them of family property and for restraining them from interfering with the premises.

The defendants having admitted that the property was family property and having pursuant to that, handed over the document to the second plaintiff from as early as 1964, I think it is an abuse of the process of the court to have litigated this particular issue. This court will therefore merely declare formally that the property in question is the self-acquired property of Madam Amorkor and that having regard to the admission by conduct of the defendants in

1964, the plaintiff would, notwithstanding this declaration, not have been awarded any costs arising from this issue.
The second plaintiff said in evidence that as the eldest child of Madam Amorkor he took possession of her belongings including the documents relating to the house in question. He communicated this fact to one Tei Nortey the head of Madam Amorkor's family who confirmed that he should look after his deceased mother's estate. He said further that because he was working and residing at Sekondi he asked the defendants' mother, Madam Koshie Lamptey, to control the estate as caretaker during his sojourn in Sekondi. From this evidence he would like the court to draw the inference that he is the lawful successor to the estate of Madam Amorkor with the right as successor to control the property and determine which members of the immediate family of the deceased, if any, should occupy the house and in what proportion. The defendants not having received the second plaintiff's consent to occupy the rooms which they presently occupy would be trespassers liable to ejectment on this thesis and could be enjoined not to interfere with the premises in perpetuity.

The rule of customary law does not provide for the unilateral appointment by the head of family of a successor to an intestate's estate, and this is so even where the head of family is the deceased's mother; a fortiori the head of family could not lawfully acquiesce or confirm unilaterally the self-appointment by a person of himself as successor. The second plaintiff has not shown that there was any family convocation at which he was selected as successor. Tei Nortey who is alive has not been called as a witness to testify on the second plaintiff's averment that he Tei Nortey confirmed the appointment of the second plaintiff even assuming that such unilateral confirmation could have validated the alleged self-appointment.

I hold on the evidence that the second plaintiff was at no time appointed successor to Madam Amorkor and is not therefore entitled to control and manage the estate. The only person presently entitled to control the said estate is Tei Nortey by virtue of his headship of Madam Amorkor's wider family. The only person entitled to call for an account of rents and profits of the estate, to determine who may or may not occupy the premises in what proportion, and whose consent is requisite to occupy the said premises is the existing head of family by virtue of his right as successor pending the special appointment of a successor to Madam Amorkor. In the absence of evidence that the estate is in jeopardy or is being dissipated with the head of family merely standing by and refusing to act, or that he is biased in favour of the defendants against the plaintiffs necessitating the latter bringing this action in defence of the property or for an order of the court declaring no more than their right to a fair share in the enjoyment thereof, I must hold that the plaintiffs not having on the pleadings or on the evidence established that the suit was brought in the name of and on behalf of the head of Madam Amorkor's family or with his authority and consent have no locus standi in this court and on this ground alone ought to be non suited.

I have already found that the declaration sought by the plaintiffs that the property in question was Madam Amorkor's self-acquired and individual property had ceased to be an issue in this litigation from 1964 and ought not to have been pursued. I have equally found that the plaintiffs are not entitled exclusively to succeed and inherit the estate in question, that they are not on the facts in evidence entitled to an account from the defendants even if in law they were persons who would otherwise be entitled to call for an account, that further as a matter of customary law they were not the persons entitled to call for an account, or in the absence of appointment as successor, to control and manage the property as an inherent right flowing from their being children of Madam Amorkor. On the other reliefs claimed, namely, damages for trespass, ejectment and perpetual injunction the plaintiffs in my opinion must necessarily fail in any case, even if I am wrong in holding that they have no locus standi in this court.

The evidence shows that the defendants occupied the rooms and kitchen with the consent of Madam Koshie Lamptey who was put in control of the property by the plaintiffs and without any objection from Tei Nortey the head of family, they have been occupying the said premises without objection from the plaintiffs from 1960 even though the plaintiffs were in Accra at the time when Madam Koshie Lamptey put them in occupation. Two rooms and a store are in the possession of the plaintiffs who are collecting the rents therefrom; no objection appears to have been raised to the defendants' occupation of the premises until after the death of Madam Koshie Lamptey and the only objection has been from the plaintiffs, leading to the present litigation but not from Tei Nortey the head of the family. This court must therefore presume that the portions of the premises occupied by the defendants were properly allotted to them in accordance with customary law and being members of the immediate family of Madam Amorkor they are entitled to remain in occupation and enjoyment of their allotted portion of what is now family property. The claim of the plaintiffs for damages for trespass, for an order of ejectment and perpetual injunction restraining the defendants from interfering with the said premises is therefore not well founded in customary law and is accordingly dismissed.

In the circumstances the plaintiffs' claim in respect of all the issues which were still open for adjudication by this court are dismissed. The defendants will have the costs of this action assessed at ¢105.00 against the plaintiffs jointly and severally.
DECISION
Action dismissed.

In a situation where the head of family sues in representative capacity, he is held personally liable for the payment of costs awarded against him.Daatsin v. Amissah (1958) 3 WALR 480.

DAATSIN *v.* AMISSAH [1958] 3WALR
(High Court, Central Judicial Division, Divisional Court
Adumua-Bossman J

ADUMUA-BOSSMAN J
"Uncle Sam," a member of the Anona family, owed £28 to Kwesi Asafuah, a member of the Anona family (Kumah branch). Debtor and creditor both died, and Kwaw Daatsin (head of Asafuah's branch of the family) sued Chief Sam Amissah (head of Uncle Sam's branch of the family) for the £28.

The action was tried in the Municipal Court" B," Cape Coast, which gave judgment for the plaintiff. An appeal by the defendant to the Magistrate's Court was unsuccessful. He took a second appeal to the High Court, where it was argued that the plaintiff was not the proper person to sue for the debt, nor the defendant the proper person to be sued.
The case of *Asiedu* v. *Ofori and Another* would therefore seem to cover this case, so far as it concerns the allegation that the defendant is liable to pay solely on the ground that he is the head of the larger Anona family, of which the late" Uncle Sam" (the debtor) was in his lifetime a member.

But it seems to me that the question of the plaintiff's right to sue to claim payment of the debt which he says was due to Kwesi Asafuah, deceased, who was a member of that Anona family (Kumah branch) of which the plaintiff claims to be head, ought also to be considered. Indeed, logically, that question ought to have been considered first, since a plaintiff's *locus standi* to maintain an action ought to be considered before any: other question arising in it. On that question-the plaintiff's right (according to the now recognised prevailing native customary law) to sue to claim a debt due and owing to a deceased member of his family-it seems to me that the decision must be adverse to the plaintiff.

The prevailing customary law on that point also was lucidly enunciated by the same Chief Justice in unmistakable terms, in the case of *Larkai* v. *Amorkor and Others* in which the head of the wider family sued in respect of the property of an individual member of the family, in respect of which property the latter had died intestate. The court said as follows:
"Now the plaintiff has claimed this land as being the head of the Larkai family. Ahuru, it is true, was called 'Ahuru Larkai,' and it seems was a member of the Larkai family, but individually owned property of his would, on his death intestate, become the family property, not of the Larkai family, but of his own family The plaintiff is the present holder of the Larkai family stool but ... certainly he would not be a member of Ahuru's family so as to become the head of his family and as such entitled to the family property of Ahuru so as to sue for it in this court." *Larkai* v. *Amorkor* has been adopted and followed in many subsequent cases including *Arthur* v. *Ayensu.*

In the result, I am of opinion that authority is now clear and decisive that in the existing state of native customary law the plaintiff has no right to claim the debt due to a member of the family of which he is the recognised head, or the defendant liable for payment of the debt of a member of the family of which he is the recognised head. The decision of the Municipal Court, confirmed by the Magistrate's Court, contravenes the now recognised and settled native customary law, and the decision cannot be supported.
The appeal is therefore allowed, and the judgment of the Municipal Court (confirmed by the Magistrate's Court) is hereby set aside. In place thereof judgment is entered dismissing the plaintiff's claim with costs.
Appeal allowed.

7. Head of Family

Appointment / Election

The head of family is appointed by the principal members of the family.The Spreme Court held in the case of ***Welbeck v. Captan (1956) 2 WALR 47*** that only the principal members of a family can validly appoint someone as the head of the family, and that for such an appointment to be valid, all the principal members in the family must be given notice of the meeting whereby the resolution to appoint the head of the family will be passed. The Court also added that it is immaterial if the principal member after been served notice of such a meeting refuses to attend the meeting, the resolution passed in his absence will hewever be valid and the person so appointed as the head of the family will discharge his duty accordingly.

Walbeck v. Captan (1956) 2 WALR 47.

WELBECK *v.* M. CAPTAN LTD. AND HAMMOND.
Supreme Court of the Gold Coast, Eastern Judicial Division, Divisional Court, Accra
Smith Ag.J.

Until 1942 Mr. Hammond, the co-defendant, was the head of the family. For reasons involving finance and alleged squandering of moneys, Mr. Hammond was relieved of his office and the

plaintiff Mr. Welbeck With one Thompson (now dead) were elected caretakers and administrators of the Kreshie family by a family resolution dated July 4, 1942. This was confirmed by the judgment dated January 18, 1945, of the Tribunal of the Paramount Chief of the Ga State. In this judgment it is set out how the head of the Kreshie family is appointed and I quote at this stage the relevant passage:
"The members of the family are chosen from two ancestors, namely Nyan Abodiamo and Kreshie, so that the descendants of these two ancestors put together bear a common name, known as 'Kreshie Family,' the head of which can only be properly appointed by descendants of Nyan Abodiamo and Nah Kreshie."

In 1945 after this judgment these caretakers leased two family properties, D. 775 /2, Janet's House, Accra, and D. 774/2, Maxwell House, to Mr. Karam -the leases being assigned to M. Captan Ltd.the defendants in this action.
In 1946 the co-defendant and a Mr. O. D. Hammond claimed to have been made joint heads of the family by another family resolution dated February 7, 1946. This at once led to litigation, and in some way or other two suits arose. In suit No. 1175/47 the Ga Native Court "B" on October 7, 1948, gave judgment in favour of Mr. Welbeck and Mr. Thompson on a claim by Mr. Hammond and Mr. O. D. Hammond that they were the appointed joint heads of the Kreshie family of Accra. In suit No. 1350/48 the Ga Native Court " B " held that A. H. Hammond arid O. D. Hammond were duly appointed by the members of the family in accordance with custom. The judgment in this case was as follows:-

JUDGMENT:-
"The court is satisfied on the evidence that the plaintiffs were duly appointed by the members of the family in accordance with custom, and that the object of the appointment of the second plaintiff to act jointly with first plaintiff was because of the first plaintiff's old age.
"The defendants and co-defendants were summoned on three occasions to the family meeting, the object of which, was to appoint a Head. They could have attended and objected to the"' appointment of anybody they did not like, but failed to avail themselves of the opportunity offered them.
.. Judgment is therefore given for the plaintiffs. No order as to costs."
On appeal the Magistrate held that the meeting in February, 1946, was not constituted by representative members of the family. On appeal from the Magistrate, Coussey J. in *Hammond and Another* v. *Thompson and Others* , dismissed the appeal for a different reason, namely, that the matter was res judicata by virtue of the decision of October 7, 1948 (Suit 1175/47) from which there had been no appeal. Except for this Coussey J. seems to me to indicate that on the merits he was rather more favourably inelined to the Ga Native Court" B " judgment in the Suit 1350/48.

Following this judgment of October In, 1951, the plaintiff's son Nii Okai Kasablofo II by letter dated October 30, 1951, was invited to attend a meeting on November 1, 1951, to appoint a head of family. He refused but his father, the plaintiff, attended. A further meeting was held in the absence of the plaintiff and his son on November 4, 1951, at which a resolution was passed appointing Mr. Hammond bead of the family. The question is whether this meeting was a representative meeting of the members of the family, which could validly appoint Mr. Hammond head of the family.

I have referred to Suit No. 1350/48 before the Ga Native Court B and the reason for dismissing the appeal. In his judgment of October 13, 1951, dismissing the appeal Coussey J. also indicated that he would perhaps have come to the same conclusion as the Native Court on the facts, as it was unreasonable for a member of the family deliberately to avoid attending a meeting and thus hold up the making of an appointment. Mr. Bossman, however, argued that

there must be a move to reconciliation and pacification of the rival elements of a family before a meeting can be held to make an appointment. He cited the decision of Quashie-Idun (then acting judge) in *Ankrah* v. *Allotey and Others*. I think that case is distinguishable in that it only goes so far as to lay down that where two opposing sections of a family have subsequently become reconciled, a meeting of one or other of such opposing sections cannot appoint or remove a head of family. Such an act can only be done by the united family.

It seems to me that following the judgment of the Native Court in Suit 1350/48 and that of Coussey J. it is open to principal members of a family, to appoint a head in the absence of a principal who refuses to attend a meeting after invitation.) The plaintiff and his son in this case refused to attend the meeting although invited. According to the evidence before me "most members of the female and male sides of the family attended .... The interest dealt with was the Kreshie family." There was no dissension. So far as I have evidence the signatories to the document of resolution of November 4, 1951, are representatives of both sides of the family. In view of the evidence on this point for the co-defendant-particu!arly that of Emmanuel Borquaye-it was I think for the plaintiff to show, if such was the case, that the meeting was not representative and that members were absent whose presence was indispensable.
I have not taken into account the proceedings at the arbitration before the Gbese Division council. I would dismiss this action by the plaintiff and give judgment for defendant and co-defendant with costs.
Judgment for the defendants.

The authority for the proposition that the appointment of the head of family must be made by all the principal members of the family isLartey v. Mensah (1958) 3 WALR 410.
Also, the meeting at which the appointment is done mush be convened specifically and solely for the purpose of appointing the head and notice to that effect should be sent to all the principal members.Lartey v. Mensah (1958) 3 WALR 410.
However, where some principal members absent themselves after having been duly notified, those present can duly appoint the head of family and such appointment shall be binding on the absentees.Lartey v. Mensah (1958) 3 WALR 410.
Where some of the principal members are not duly notified, upon proof of such failure of notification, they may move to set aside the decision taken at the meeting.Lartey v. Mensah (1958) 3 WALR 410.
Also, where there is a division in the family, one faction cannot appoint a head for the whole family. Ankrah v. Allotey (Ollenu PCLLG, 1st Ed p. 167).
Strangers (non-members) could be invited to the meeting as observers and possibly participate in the deliberations, however, they cannot take part in the decision to appoint the head of family. For instance, in the case ofBanahene v. Adinkrah and others (1976) 1 GLR 346-354, it was held that strangers (people who are not members of the family) could be invited in a family meeting where the head of the family is to be apointed, but that such a stranger will not vote in the meeting, he may only facilitate the meeting. It was also held in the above case that where a member of the family is challenging the validity of the appointment of a person as the head of a family, the general onus of proving that the appointment was in accordance with the custom of the people and hence valid, is on the person so appointed, and when he (the person appointed) discharges this burden, the onus then shifts to the person challenging the appointment for him to prove his claim.

BANAHENE v. ADINKRA AND OTHERS [1976] 1 GLR 346–354
COURT OF APPEAL, ACCRA
24 FEBRUARY 1976

APALOO, ANIN AND FRANCOIS JJ.A.

ANIN J.A.

This is the second appeal in a succession suit originally heard and determined in favour of the plaintiff-appellant herein (called in this judgment simply the plaintiff) in the Akim Oda District Court Grade II . The defendants-respondents herein (referred to in this judgment simply as the defendants) were successful in their appeal before the Cape Coast High Court, which reversed the trial magistrate's decision and dismissed the plaintiff's claim. It is from this judgment of the Cape Coast High Court that the plaintiff has now appealed to this court.

The plaintiff, suing as customary successor to the late Kwadwo Asante of Ayirebi, claimed against the defendants jointly and severally an order of declaration of title to, and recovery of possession of, three specified farms alleged to be the properties of his late uncle Kwadwo Asante whom he had succeeded. Even though the parties were represented by learned counsel at the trial court, the action was heard in a summary way and no pleadings were ordered.

It was common ground between the parties that the three disputed farms were ancestral family properties inherited by the late Kwadwo Asante from deceased ancestors upon his appointment as successor and head of the Bretuo family, to which both parties belonged. The main controversy was whether or not the plaintiff had been duly appointed customary successor to the late Kwadwo Asante who died on 23 December 1971.

At the hearing of the case before the district magistrate, the plaintiff was represented by his uncle Nsonowah, who had been authorised by his absent nephew under a power of attorney to testify for and on his behalf. In his evidence, Kofi Nsonowah disclosed that after Asante's death, his family met and elected as his successor the plaintiff, who duly accepted the appointment by rendering customary thanks with the sum of ¢9.60 and a full bottle of schnapps. Among the principal members of the Bretuo family who participated in the election meeting were Asare Duodu, the plaintiff's first witness, Asaboro, Kofi Berkoe and Kwadwo Kwenin, the defendants' first witness; while the Gyasehene Nana Kwabena Antwi, the plaintiff's second witness of the Aduana clan, presided over the election meeting.

The defendants denied that Banahene was appointed successor to the late Asante. According to their spokesman, Yaw Adinkra the first defendant, who gave evidence for himself and on behalf of the other defendants, "I do not know the one who succeeded Asante. It is not correct that Banahene succeeded to the property. I am now in charge of the whole property left by Asante." He explained that the disputed farms were ancestral family properties which were inherited by Asante (deceased) from seven ancestors upon his appointment as successor and head of family about ten years before his death. He further revealed that in the lifetime of Asante, he and the other defendants "were working on the lands in question."

The rule is that where the evidence of one party on an issue in a suit is corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good reason (which must appear on the face of the judgment) the court found the corroborated version incredible or impossible: see the dictum of Ollennu J. (as he then was) in Tsrifo V v. Dua VIII [1959] G.L.R. 63 at pp. 64–65 as applied in such cases as Osei Yaw v. Domfeh [1965] G.L.R. 418 at p. 423, S.C.; Asante v. Bogyabi [1966] G.L.R. 232 at pp. 240–241, S.C. and In re Ohene (Decd.); Adiyia v. Kyere [1975] 2 G.L.R. 89 at p. 98, C.A.

In the present case the plaintiff's evidence that he was appointed customary successor to the late Asante at a family meeting attended by the principals of his Bretuo family and the Gyasehene, and that he duly rendered necessary customary thanks for his election was

corroborated to the hilt by the defendants' own witness, Kwadwo Kwenin, who was also present at the family meeting. The defendants' denial of these facts was bare and uncorroborated. The other witness called by them, Kwabena Adom, only retailed hearsay information: "I heard from somewhere that the land in dispute had been given to the plaintiff. Beyond that I know no more." The trial magistrate who had the advantage —denied to the appellate High Court judge and us—of hearing the parties and their witnesses and assessing their demeanour and credibility accepted as truthful the plaintiff's testimony on the main issue of his appointment as successor corroborated as it was by the defendants' star witness. In my opinion these primary findings of fact made by the trial magistrate were wholly warranted by the evidence on record and by the application of the above-cited rule of evidence on the effect of the corroboration of a party's case by a witness called by the opposing party.

On the contrary the reasons advanced by the learned judge in rejecting the magistrate's findings are with respect erroneous. In the first place, the learned judge posited five so-called vital issues of his own some of which were either irrelevant or else tendentious. He seemed to be moulding a new case for the parties and to be settling new issues which were not canvassed before the trial court. For example he stated as a third issue the question "Had the defendants been in possession for some years even during the lifetime of Kojo Asante himself, the last ebusuapanyin?" In my view, this question is irrelevant to the central issue, whether the plaintiff was in fact appointed successor after the death of Asante. Assuming for purposes of argument only the defendants' possession of the disputed farms at a time prior to Asante's death, it is nevertheless indisputable that the prerogative to appoint a successor to the deceased Asante vests in his family; and the eligibility of a candidate for the succession is not dependent upon his prior possession of the estate during his ancestor's lifetime. If the issue of possession be deemed relevant for the claim of recovery of possession, then the evidence on record shows that the defendants were merely invited "to work on the farms"; they were not in possession on their own account as beneficial owners.
The farms in question were ancestral family properties; consequently, it was the successor (in the absence of a head of family) who was entitled to their custody, management and administration for and on behalf of the immediate family group in this matrilineal society. It was the successor who was entitled to either appoint or dismiss at will a caretaker for the farms; and the defendants had no prescriptive right under the customary law or otherwise for insisting on being retained as caretakers. In any event, by challenging the plaintiff's title as successor, they had disqualified themselves for being considered by him as possible caretakers.

The last two "vital" issues of the learned judge were respectively (1) was there a family meeting properly convened for the expressed purpose of appointing a successor to the late Asante; and (2) who convened the said meeting as the current ebusuapanyin, Kwadwo Asante himself, was dead? No doubt, if pleadings had been ordered and filed in the present case, issues such as these might well have been raised by astute counsel, depending of course on instructions received from their clients and admissions made by them. Be that as it may, the evidence in fact adduced by the plaintiff's side was about the due holding of a family meeting attended by all the principal members and presided over by the Gyasehene; the election of the plaintiff as successor; and his acceptance of the office signified by his rendering of customary thanks; and all these pieces of material evidence were corroborated by the defendants' own witness. That being so, the extra details insisted upon by the learned judge did not, in my respectful view, remain to be resolved by the court on the evidence as a whole. They were an unnecessary elaboration of a simple factual question of who had been appointed successor to the late Asante.

Furthermore, in my respectful opinion, the learned judge erred by applying the decision in Re Dua Agyeman (Decd.); Sarpong v. Agyeman [1962] 2 G.L.R. 138 to the facts of the present case and by holding that the Gyasehene had intermeddled in the family business of the Bretuo family to which he did not belong. The material facts in the two cases could not be more dissimilar. The evidence in the present case establishes that the Bretuo family permitted the Gyasehene to participate in their family meeting. He was not a meddlesome interloper; and no misconduct was alleged against him. On the contrary, in Re Dua Agyeman (supra) the learned trial judge found as a fact that the appointment of the defendant as successor to the deceased was a pious farce; since it was done by a body, convened by the Krontihene of Mampong (a stranger to the family), which comprised for the most part stool elders and strangers to the family concerned, who had not the slightest semblance of right to take unto themselves what was the plaintiff's business. The learned judge did not lay down any rule that a properly constituted family meeting for the purpose of electing a successor to a deceased member of the family cannot be presided over by a respected elder or dignitary, who is a non-member of the family, if duly invited by the family concerned. Indeed, as can be seen from the quotation from Ollennu's Principles of Customary Land Law in Ghana at pp. 148–149 relied upon by the trial magistrate, such a course of action is permissible under the customary law:

> "The meeting for the appointment of the head of the family may be convened by the most senior member of the family, male or female, by two or more elders or principal members of the family or even by any respectable member of the community, an elder or chief of the quarter, or town, upon the request of members of the family."

(The emphasis is mine.)

I would respectfully add in this connection that it is not only reasonable but also prudent and desirable in cases of internal dissension in the family for such a meeting convened for the purpose of electing a successor to be chaired by a neutral person of standing in the local community who is acceptable to all sides. His wisdom, tact and experience may be in great demand at such a meeting; and in the event of later litigation about what transpired at the meeting, his independent evidence should prove invaluable. In the premises, I hold that the learned judge's conclusion that "the authority of the Gyasehene to meddle in the family affairs of the parties was not well established," was erroneous and unwarranted in law and on the facts.

Another ground stated by the learned judge for overruling the magistrate was that "the onus incumbent on the plaintiff to establish that he has in accordance with customary law been validly appointed successor was not well discharged." Learned counsel for the appellant submitted that "the judge was wrong in shifting the onus probandi on the plaintiff; since it was the defendants who were challenging the fact of appointment of the plaintiff as successor." It was held in the headnote to the case of Welbeck v. Captan (M.) Ltd. and Hammond (1956) 2 W.A.L.R. 47 at p. 48 that:

"(iv) Where a member of a family seeks to avoid a decision taken at a family meeting on the grounds that the meeting was not representative or that indispensable principals were not in attendance, the burden of proof is upon him to establish the non-representative character of the meeting or that the attendance of absent members was essential to the validity of the proceedings."

In the present case, the true legal position about the incidence of the burden of proof appears to be as follows: The plaintiff shouldered the general onus probandi on his claim to have been duly elected successor at a family meeting; while the first defendant, who raised the negative averment of ignorance of whom had been appointed successor as an answer to the plaintiff, shouldered the shifting or provisional burden of satisfying the court on this particular issue raised by him or else run the risk of non-persuasion of the court on the issue. In the event, the defendant's own witness corroborated the plaintiff's testimony in all essential details, while

the defendant's bare denial and averment of ignorance received no support from any quarter. On the totality of evidence in this case, the balance of probability tilted heavily in favour of the plaintiff, whose testimony was corroborated by the defendant's main witness; and I see no justification for the learned judge's conclusion that the onus incumbent on him had not been well discharged.

For the defendants, learned counsel submitted that, even if it be conceded that the evidence warranted the trial magistrate's conclusion that the plaintiff was duly appointed successor, nevertheless, he ought not to succeed on his claim for ejectment of the defendants from the ancestral farms which had long been in their possession. As members of the Bretuo family, he contended, they were as much entitled to remain in possession of the farms as any other member. He relied on the case of Quartey v. Quartey (1951) D.C. (Land) '48-'51, 401 where the plaintiff, a senior member of the wider family, had lived in family premises and collected rents from the tenants for a long time. Owing to her failure to pay the rates, the premises were sold, and other members of the family instituted action to recover them. They were successful, and now disputed her right to remain in control of them. It was there held by Jackson J. that the appellant could only be removed from her position by a family meeting at which misconduct on her part was established, and at which she was entitled to be heard. The courts would interfere with the family's decision only when there had been a complete denial of justice. Since it had not been proved that there had been such a meeting, she could not be dispossessed.

In my opinion, the present case is distinguishable on the facts from Quartey v. Quartey (supra). In the present case, the defendants were not in possession of the disputed farms in their right as family members; and there was no evidence that they enjoyed the proceeds accruing therefrom. Their status appears to be that of mere caretakers "working on" the farms on undisclosed terms. By contrast, Madam Helena Oyoe Quartey in the case cited was found to be in possession as a beneficial owner letting out rooms in the premises to tenants, and pocketing the accruing rent with the consent of the family.

In the present case, moreover, a successor duly appointed by the whole family at a regular family meeting was being challenged and obstructed in the discharge of his customary duties by the defendants, dissenting junior members, who did not even recognise him as successor, but rather claimed ancestral family farms as their own separate property. For instance in an affidavit sworn to on 25 March 1972, the first defendant, spokesman for all the defendants, deposed "That we have no other place to farm for a living apart from the farms we own on the land. That it would be inequitable to restrain us from going on our farms which we have occupied for so long seeing that the land is owned by our family." (The emphasis is mine.) On the undisputed evidence, the three disputed farms were ancestral family properties which remained continuously in the possession of Kwadwo Asante (deceased) qua successor and family head until his death about four months prior to the hearing of the action; and the defendants had been merely invited to work on them. There was no evidence on the record that the defendants were in beneficial enjoyment of the farms in their own right during Asante's reign as successor and family head. That being so, I fail to see how they can successfully dispute the plaintiff's vested right and duty under the customary law to administer, control and manage these ancestral family properties by virtue of his position as successor to Asante (deceased).

For the above reasons, I would allow this appeal.
JUDGMENT OF APALOO J.A.
I agree.
JUDGMENT OF FRANCIOS J.A.

I also agree.

DECISION
Appeal allowed.

Similarly, the appointment of a person as the head of family is neither automatic nor does it devolve on any person as a matter of right or entitlement. It was held in the case of Hervie v. Tamakloe and others (1958) 3 WALR 342 that under native custom, a person does not authomatically become head of a family as of right, he must either be appointed or elected by the principal membes of the family when the post becomes vacant by any means, or he must be acclaimed and acknowledge as such be the said principal members of the family, for example, by the principal members supporting acts he performed as head of the family. The court also added that the appointment of the head of the family is not tied down to any particular person; the principal members are entitled to appoint any eligible person in the family.

Hervi v. Tamakloe (1958) 3 WALR 342.

HERVIE *v.* TAMAKLOE AND OTHERS [1958] 3 WALR 410.
High Court, Eastern Judicial Division, Land Court(Ollennu J.

OLLENNU J.

The plaintiff's claim is for damages for trespass to two creeks, Avilor and Aviloklue, and for an injunction. He pleaded that he is the head of the Avu family in the male line; that by a judgment of this court delivered on December 21, 1958, by Coussey J., as he then was, descendants in the male line of the Avu family were held to be the proper persons to manage and control the two creeks for and on behalf of themselves and of all other members of the family. The cause of action, he alleged, was entry upon the creeks without his leave and licence by the defendants, who he says are not members of the Avu family.

The defendants denied the plaintiff's claim to membership of the Avu family in the male line and to the headship of the family. They admitted entry upon the creeks but averred that such entry was in exercise of their right, the first defendant as head of the family, and the other defendants as members of the family.

The decision of Coussey J. of December 21, 1948, and its effect as alleged by the plaintiff was admitted by the defendants. There are therefore only two issues in controversy between the parties, namely: (I) whether the plaintiff is a descendant of Avu in the male line right through; and what is most important, (2) whether he is the head of the .Avu family. For the plaintiff to succeed he has to prove each of those issues.

The plaintiff gave evidence on his behalf and deposed that his father was one Alakpogo, son of Avu's son Lotu, and therefore that he was a descendant of Avu in the direct male line. His witness, Awuku Wuse Yao, on the other hand, deposed that the plaintiff's father Alakpogo was a brother of Avu. Again, his witness, Awuku Alakpogo, his paternal half-brother, in his evidence-in-chief gave the genealogical tree of their father Alakpogo as follows: "Avu's son begat Alakpogo's mother Atiakpi whose father was Glimeo."
The defendants admitted that the plaintiff's mother Tswerkowo was a member of the Avu family.

Upon such evidence it is imposssible to hold the plaintiff to be a direct descendant of Avu right through in the male line.

To contradict the plaintiff, on the evidence of who his father was, the defendants put in evidence a record of evidence that he, the plaintiff, had given in the Native Court B of Bator Dufor in 1953, in another suit that the plaintiff had instituted against the first defendant in this case and against eight others. In that evidence the plaintiff in answer to the question " Who begat you? " replied as follows: "I was begotten by one Kofi Gah, a native of Volo." The plaintiff denied giving that piece of evidence; but the first defendant also asserted that he was present in the Native Court, heard the evidence given by the plaintiff, and that what appears in the record of proceedings tendered in evidence is exactly what the plaintiff said on that occasion.

I accept it as a fact that the plaintiff gave that evidence and that it is true. I believe that it is with the purpose of deceiving this court to procure judgment in his favour in this case that the plaintiff now says that his father was Alakpogo.

On the second issue, namely the headship of the Avu family, I have the bare assertion of the plaintiff and his two witnesses that he is the head of the Avu family. How he came to be the head, neither he nor any of his witnesses was able to tell the court. The only significant piece of evidence which they each gave was that the plaintiff is the Mankralo of Bator. There is no evidence that a Mankralo of Bator is automatically the acknowledged head of the Avu family. By native custom a person does not automatically become head of a family as of right. He must either be appointed-elected-by the principal elders of the family when the post becomes vacant by any means, or he must be acclaimed and acknowledged as such by the said principal members of the family, for example, by the principal members supporting acts he performs as head. In the appointment of the head the family is not tied down to choose any particular person; they are entitled to appoint any eligible person in the family; thus in the non-Akan areas, such as Bator, where the family consists principally of descendants in the male line, the family can, if in their opinion there is no suitable candidate among the descendants in the direct male line, appoint a descendant in the female line; the principle is the same as that applicable to the appointment of a successor to a deceased person; see the case of *Makata* v. *Ahorli and Others*, a case of appointment of a successor.
Thus, although the plaintiff is not a descendant in the direct male line, he could nevertheless have succeeded in this suit if he had been able to prove that the principal elders of the family had appointed or acclaimed him as head of the family in accordance with native custom. But there is no such evidence. Therefore the plaintiff must fail on the second issue also.
The defendants have not counterclaimed for any declaration, and consequently I cannot make any declaration in their favour. All I can do is to dismiss the plaintiff's claim and enter judgment for the defendants. The plaintiff's claim is accordingly dismissed, and judgment is entered for the defendants.

Removal of the Head of Family

The decision to remove the head of family must be taken at a family meeting. All the principal members must be invited to attend the meeting.It was held in the case of Quagraine v. Edu (1966) GLR 406-421 that for the head of a family to be validly removed, a family meeting must be convened and all the principal members of the family must be given notice of such a meeting. The court further stated that failure to give notice of such a meeting to all the principal members may render the meeting void and the removal invalid. Nevertheless, where notice of such a meeting is given to a principal member and he refuses to attend the meeting, he cannot subsequently challenge the removal of a person as the head of the family on the ground that he was not at the meeting where the person was removed. However, in the above case, the court also stated that where an important principal member is absent from the

meeting, the other members should take further steps to try and know why he is not present at the meeting. The court also added that where one branch of the family is in conflict with the other brach of the family, one of such branches cannot validly hold a meeting removing the head of the family, there must be a joint meeting by both branches to remove the head of the family.

Quagraine v. Edu (1966) GLR 406.

QUAGRAINE v. EDU [1966] GLR 406-421
HIGH COURT, CAPE COAST
31 MAY 1966

ARCHER J.

The plaintiff as the customary successor of the late James Brodie Apprey, claims from the defendant £G500 damages for trespass committed by the defendant who posted notices on seven houses forming part of the property the plaintiff succeeded to on Apprey's death. The form of notice attached to the writ of summons reads:
"The public are hereby informed that as from the date hereof no payment of rents in respect of the estates of James Brodie Apprey and Joseph Edward Biney, deceased, may be made to Mr. Kobina Abaka Quagraine, his agents or servants.

The said Kobina Abaka Quagraine has been removed as successor to late James Brodie Apprey, Cape Coast, and whoever overlooks this notice [warning] does so at his or her own risks.
Ebusua Panyin Kow Edu, Head of Deshina Family of Anyanmaim, for himself and on behalf of all families. Dated 17th August, 1964."

The plaintiff also claims a perpetual injunction restraining the defendant, his agents or servants or both from having anything whatsoever to do with the lands with the houses thereon described in the writ. The facts of the case are straightforward. One Joseph Edward Biney, a wealthy man on his death appointed one James Brodie Apprey his sole heir and administrator. Accordingly, on a true construction of the will in exhibit C, Apprey became the beneficial devisee of certain real properties in addition to other properties bequeathed to him by Biney. Apprey therefore enjoyed these properties absolutely in his own right. Apprey, however, died intestate and in accordance with Fante customary law, the estate of Apprey became family property. It is not in dispute that the present plaintiff was appointed customary successor to Apprey and he has, since the death of Apprey, been controlling these properties.

In November 1964, the defendant claiming to be the head of the Deshina family of Anyanmaim posted notices warning the entire world against paying any rents to the plaintiff in respect of the properties left by Apprey on the ground that the plaintiff had been removed as customary successor to Apprey. The plaintiff maintains that he is still the customary successor and has not been removed by his head of family and denies further that he comes from Anyanmaim. In his evidence, the plaintiff stated that after the death of his senior and uterine brother, Apprey, on 17 November 1951 and after the funeral rites in January 1952, his mother conferred with the head of family, one Kwesi Wiah, and appointed him successor to his brother Apprey and thereupon he became the head of his brother's immediate family of the Deshina family of Gura-Anamoa, Saltpond and Anomabo. The mother of the plaintiff was one Aba Tomo who had five sons all of whom, including James Brodie Apprey, are dead except the plaintiff and his other brother Kofi Tawiah also known as King Brodie Quarshie. The plaintiff rightly maintains that according to Fante customary law, the immediate family of James Brodie Apprey are his mother, his brothers and sisters, if any. Moreover the head of his wider family is now Kobina Dodu who is the head of the Gura-Anamoa, Saltpond and Anomabo Deshina

family. According to the plaintiff, the defendant is not a member of his immediate family and does not come from the Gura-Anamoa, Saltpond, and Anomabo Deshina family but the defendant comes from Anyanmaim and he does not share any funeral debts with the plaintiff's immediate or wider family.

The court also heard the evidence of Kobina Dodu, whom the plaintiff claims to be the head of his wider family. Kobina Dodu was emphatic that he had never seen the defendant at their family and funeral meetings and that he did not know him. Next, the Omanhene of Anomabo also confirmed that to his knowledge, the plaintiff comes from the Deshina family of Anomabo and GuraAnamoa. But the most interesting and fascinating piece of evidence which the court heard was that of James Brodie King Quarshie also known as Kofi Tawiah. This witness, a brother of the plaintiff and a son of Aba Tomo, admitted in cross-examination that he was once Omanhene of Anyanmaim under the stool name of Nana Ampadu Kwame II. He agreed that his mother Aba Tomo was queenmother of Anyanmaim during his reign. This witness said his family came from the Deshina family of Anomabo and that the head of his family was Kobina Dodu. Furthermore, he knew the defendant at Anyanmaim but he was not the head of his family.

Then Mr. Yorke alias Nyarku the defendant's third witness, stated in examination-in-chief:
"The members of the family from Anyanmaim (about ten) attended the meeting. The Cape Coast section also attended and Agona. About 30 members of the Cape Coast branch attended. About six senior members of the family attended the meeting. Nyame Ayeh was the head of the Cape Coast branch. Nkrumah and his elders came from Agona. No other branches of the family attended the meeting."

The question I have asked is whether this family meeting was fully representative? I did not have the benefit of the testimony of Chief Tandoh of Cape Coast and I was not told whether he was alive or dead. No members from the Gura-Anamoa, Saltpond and Anomabo branches were present yet the meeting proceeded although the head of those three branches of the family, Kobina Dodu, was bereaved that day. Was it reasonable to proceed with the meeting at all? The plaintiff's brother was in the witness-box and it was never suggested to him that he was informed of this meeting although, as a uterine brother and a member of the plaintiff's immediate family, he was interested in the beneficial enjoyment of the estate. Griffith C.J. in Yerenchi v. Akuffo said that, "native custom generally consist of the performance of the reasonable in the special circumstances of the case." In the present case, it was alleged that Kweku Nkrumah was sent to call the plaintiff who refused to come. Assuming that is true, was it reasonable to proceed with the meeting forthwith? In Welbeck v. M. Captan Ltd. and Hammond, it was held that although the absence of principal members from a family meeting may render nugatory decisions taken at such a meeting, yet this will not be so if the members concerned have been invited to the meeting but for reasons of their own have not attended. Secondly, where a member of a family seeks to avoid a decision taken at a family meeting on the grounds that the meeting was not representative or that indispensable principals were not in attendance, the burden of proof is upon him to establish the non-representative character of the meeting or that the attendance of absent members was essential to the validity of the proceedings.

The impression I gathered from the evidence for the defendant was that Nyame Ayeh was the head of all these members in the domestic household including Mr. Yorke. There is no doubt that the will of Biney did not impose any legal obligations on Apprey so far as the domestic household is concerned. The members of the domestic household belonged to the family of Biney and they and their descendants of female members are entitled to be appointed successors to deceased members of Biney's family in preference to children of male

members of the family of Biney. See In re de Graft-Johnson (Decd.); de Graft-Johnson v. de Graft-Johnson and Ambah v. Libra. The domestic household of Biney do not belong to the immediate family of Apprey because Apprey did express such a wish. It would appear that this household of Biney formed the majority of those who attended the meeting convened to remove the plaintiff as customary successor. I find therefore that the meeting was not fully representative of all the branches of the Deshina family. Moreover, there is no evidence that any member of the plaintiff's immediate family were invited to be present. The whole dispute arose in my opinion, because the plaintiff was demanding rents from the domestic household of Biney and in fact, it was Mr. Yorke who in answer to questions by the court revealed what properties had been sold and what gold bangles had been sold when in fact the domestic household had no interest. None of the alleged ten members who came from Anyanmaim came to court to testify. The family branches at Gura-Anamoa, Saltpond and Anomabo were also not present when it was obvious that Aba Tomo must have near blood relations there.

It is also settled law that where one branch of the family is in dispute with another branch, the law will not permit one branch or faction alone by themselves to appoint a head for the whole family or to remove the head of the whole family. Such an appointment can only be made by the united family and so the two factions must be reconciled before a head can be validly elected: see Ankrah v. Allotey. This principle also applies to the removal of a head or a successor. A council of the whole family must meet specifically to deal with the complaints concerning the administration of the family property:
see Mould v. Agoli and also Botchway v. Solomon. In the latter case, Yates J. said:
"The family meeting was convened four times, and the defendant (Solomon) refused to attend; he was further summoned before the James Town Manche and refused to attend — in fact the defendant had denied the family — and I therefore hold that he was properly removed, . . ."
My view is that in order to clothe customary usage with sanctity and respect, it is incumbent on those who perform these rites to ensure that custom is not performed haphazardly, recklessly and hurriedly. In the present suit, it is alleged that a meeting was convened in the plaintiff's house and he refused to come down from his apartment upstairs. Immediately afterwards, charges were read in his absence and he was deposed. In my opinion, the family could have taken further steps, the principal elders could have gone upstairs to see him in view of the fact that he was blind. The estate is not a small one, and the family could have approached prominent personalities to assist in the matter seeing that there was disagreement between the plaintiff and Biney's domestic household. No complaint was made to the branch families of Gura-Anamoa, Saltpond, and Anomabo that a meeting had been convened and the plaintiff had refused to attend. No representations were made either to the Omanhene of Anyanmaim or the Omanhene of Anomabo with regard to the plaintiff's refusal.

I am aware, of course, that in such gatherings, tempers are bound to soar high and some elders tend to behave indiscreetly but it is important that sanity should prevail — the elders should do what is reasonable in the circumstances. And in this respect, I wish to quote what Barrett Lennard J. said in Sappor v. Amartey:
"Now it seems to me that the majority of a family can depose a head whom they dislike, and that under ordinary circumstance no Court ought to interfere with this domestic discipline. Assuming however, that the head of a family can carry a majority of it with him, and his intentions are entirely selfish and unjust, I have no doubt whatever that, upon a proper writ being drawn and a proper case made, a Court of justice can afford relief."
I have weighed the cumulative effects of one group of severally inconclusive items against the cumulative effects of another group of severally inconclusive items and I have decided to make the following findings out of the exercise:

(1) That the plaintiff is still customary successor of the late J. B. Apprey as the family meeting which attempted to remove the plaintiff was not valid at customary law in view of the fact that the meeting was not fully representative of the whole wider family.
(2) That the late Apprey's immediate family, now headed by this plaintiff, i.e. his mother, uterine brothers and sisters and the issue of such sisters are entitled to the immediate beneficial enjoyment of the estate.
(3) That the wider family now headed by the defendant have no right whatsoever to the immediate beneficial enjoyment of this estate as their rights have been postponed until Apprey's immediate family should be extinct. The wider family have only a spes successionis.
(4) That as the defendant as head of the wider Deshina family has a duty to preserve the family property, he did not commit any trespass when he posted the notices on the houses because he bona fide believed that he had the right to do so.

(5) That the defendant as head of the wider family has to watch the interest of not only the immediate family but also the wider family and it would be contrary to customary law to grant a perpetual injunction restraining him forever from protecting these properties. The plaintiff is in full control of these properties as head of the immediate family and a perpetual injunction if granted would be in vain since the whole family with the defendant as head can for good cause shown remove the plaintiff from office.
Finally, I may remark that although the plaintiff is educated, he is blind and none of the defendants witnesses alleged that he was incapable of discharging his duties on account of his loss of sight. It is therefore my hope that the plaintiff and the defendant representing the wider family will be reconciled and a satisfactory solution found in order to carry out the hope and desire of the late Biney with regard to his domestic household now resident in the same house as the plaintiff.

Action dismissed

Also, the head could be removed by a decision of a majority of the principal membersas was held inAbaka v. Ambradu (1963) 1 GLR 456 [SC].
However, the head of family must be served with the notice to attend the meeting (but purpose of the meeting should not be stated in the notice), and where the head fails to attend without good reason, the meeting may proceed and he could be removed absentia.In the case of Abaka v. Ambradu (1963) 1 GLR 456 [SC]. Where it was held that for the head of a family to be removed, notice of the intention to remove him must be given to all the principal member especially the prominent members of the family, the court also held that a majority vote of the principal members is needed in order to validly remove the head of a family. The court also added that notice of the meeting must also be served on the person to be removed and if on the date of the meeting he is absent from the meeting without reasonable excuse, the principal members can however proceed with the meeting and validly remove him as the head of the family.

Abaka v. Ambradu (1963) 1 GLR 456 [SC].

ABAKAH AND OTHERS v. AMBRADU [1963] 1 GLR 456-464
IN THE SUPREME COURT
20TH MAY, 1963
VAN LARE, MILLS-ODOI AND AKUFO-ADDO JJ.S.C.
MILLS-ODOI J.S.C.
The defendant had held office as the recognised head of the Ewan Kweku Anona family at Sekondi since 1939. Some elders of the family being dissatisfied with the manner in which the

defendant was managing family property authorised Kwao Aidu, the second plaintiff, to write to the defendant requesting him to attend a family meeting to be held on the 9th July, 1961, and there to render account of all rents collected by him in respect of certain family property. The defendant replied to this letter, and, inter alia, challenged the authority of Kwao Aidu to call upon him to account, whereupon Kwao Aidu on behalf of the family wrote a second letter to the defendant attaching a copy of charges preferred against the defendant for irregularities allegedly committed by him in his management of the family property.

On the 9th July, 1961, the meeting was held as arranged before five arbitrators chosen by the plaintiffs. The defendant attended but left without answering the charges because, as he alleged, the meeting was not properly constituted. Another meeting was arranged for the 16th July, 1961, but on that date the defendant was absent: he was attending the funeral of a member of the family. The meeting nevertheless continued, the charges against the defendant were gone into and found proved, and the defendant was removed from office and replaced by the first plaintiff.

The defendant was informed of these proceedings by a letter dated the 20th July, 1961, and requested to hand over to the family all family documents. The defendant refused to comply with the terms of the letter and the plaintiffs sued him in the High Court claiming an injunction restraining him from further dealing with family property and delivery to the family of all family documents in his possession. The High Court dismissed the plaintiffs' claim holding, inter alia, that the family meeting of the 16th July, 1961, was not properly constituted in that some principal members whose presence was indispensable were not present and were not notified of the meeting, and further that on the authority of Lartey v. Mensah (1958) 3 W.A. L.R. 410 the letter informing the defendant of the convening of a family meeting was defective in that it did not inform him that the main purpose of the meeting was to depose him as head of the family. The plaintiffs appealed to the Supreme Court.

The main ground of appeal argued by learned counsel for the appellants in this court is that: "The passage of the judgment quoted from Lartey v. Mensah 3 W.A.L.R. 410 deals with notices convening a family meeting for the purpose of appointing or electing a new head of family. That principle of customary law will not necessarily apply to all cases where a head of family is to be deposed for misconduct and gross mismanagement."

Dealing first with learned counsel's submission that the meeting held on the 16th July, 1961, was properly constituted and therefore the learned trial judge's finding that four elders of the family were absent at that meeting because they were not notified, I would refer to the principle of customary law enunciated by Sarbah in his Fanti National Constitution (1906 ed.), p. 42:

> "The right of removing a ruler belongs to the people immediately connected with the stool; in the case of the head of a family the right is in the senior members, and the act of the majority is binding on the rest."

Applying this principle to the instant case, the right of removing the defendant from office was vested in the principal heads of the family and the act of the majority would be binding on the rest. The crucial matter for consideration therefore is whether the meeting of the 16th July, 1961, was attended by all or by a majority of the principal heads.

It is clear from the evidence of the defendant that the family meeting which was held on the 9th July, 1961, was not properly constituted according to custom i.e., that the meeting was not representative and that some principal members, whose presence was indispensable, were absent. His evidence challenging the constitution of that meeting reads as follows:

> "On the 9th July, 1961, I attended the meeting with my friend Mr. Dadzie and I found that the majority of the sectional heads of the family from the villages did not attend. It was the sectional heads of the family who appointed and installed me as head of the

family. There are eight sectional heads of the family and only three of them attended the meeting on the 9th July, 1961. It is the duty of the sectional heads of the family who are to investigate charges against a member of the family including the head of the family. When I saw only three sectional heads of the family had attended the meeting on the 9th July, 1961, I asked where were the other five sectional heads of the family and the second plaintiff said that they did not attend. As a result I told them that they should adjourn the meeting so that all the sectional heads could attend."

The three sectional heads recognised by the defendant as being present at the meeting on the 9th July, 1961, were the first, second and third plaintiffs. He did not acknowledge the fourth and fifth plaintiffs as sectional heads. He regarded them as members of the family. The remaining five principal members of the family were Ekra Kwamina of Enno, Kwesi Mensah of Sekondi, Gyame Kakraba of Mpintsin, Kwabena Wu of Ketan and Kwesi Nworokow of Nkroful. Apart from Kwesi Nworokow all these sectional heads gave evidence in the court below on behalf of the defendant and testified that they were not summoned to attend any family meeting either on the 9th July, 1961, or on the 16th July, 1961, and that in fact they never attended any meeting on these dates. At the trial their status as sectional heads was not called in question by the plaintiffs.

Ntaah Esson, an independent witness called by the plaintiffs to substantiate their claim, gave evidence admitting that Ekra Kwamina was not present at the family meetings on both occasions. He stated, inter alia, as follows:

"Ekra Kwamina is the elder of our family living at Enno. Ekra Kwamina never came with me to the family meeting on the 9th July, 1961. Ekra Kwamina did not attend the family meeting . . . because he sent me to represent him at the meeting . . . On the 16th July, 1961, Ekra Kwamina sent me to represent him at the family meeting and I attended. Ekra Kwamina said they were sharing a family debt for the funeral expenses of Ekua at Enno so he could not attend."

It became apparent from the evidence of Ekra Kwamina that he did not ask the plaintiffs' witness, Ntaah Esson, to represent him at any family meeting, neither was he (Ekra Kwamina) aware of any family meeting either on the 9th July, 1961, or on the 16th July, 1961. At the trial court he deposed that:

"I know Ntaah Esson who lives at Enno. I did not know of any family meeting to be held on the 9th July, 1961. I was busy with the funeral. I saw Ntaah Esson on the 9th July, 1961. He was with us throughout the whole day at the funeral. I did not send Ntaah Esson anywhere. I never instructed Ntaah Esson to represent me at any meeting on the 9th July, 1961, or on the 16th July, 1961.

Still convinced that the meeting on 16th July, 1961, was not property constituted, and in order to be more certain of his conviction, the defendant summoned a family meeting shortly after his alleged deposition and four of the sectional heads who attended that meeting, viz., Ekra Kwamina (sectional head of Enno), Kwasi Mensah (sectional head for Sofokrom), Gyame Kakraba (sectional head for Mpintsin) and Kwabena Wu (sectional head for Ketan) told him that they were not summoned to attend any family meeting on the 16th July, 1961, and in fact they were not present at that meeting. It is not surprising therefore that the learned trial judge held that "Ekra Kwamina, Kwasi Mensah, Kwame Tonto and Kwabena Wu . . . are elders of the family and they were not notified of meeting on the 9th and 16th July, 1961," which finding is amply supported by evidence.

I am of the opinion that in the instant case the defendant was removed from office without notice of the meeting to all the sectional heads of the Ewan Kweku Anona family. The act of the sectional heads who were present at the meeting on the 16th July, 1961, cannot therefore be binding on the rest; and unless it was acquiesced in by the rest, it is ineffective.

Learned counsel for the appellants has urged vehemently and forcefully before this court that the defendant was not at Enno village on the 16th July, 1961, for the funeral ceremony of Ekua, a deceased member of the family, and that his absence at the meeting on the 16th July, 1961, constituted grave disrespect for the other sectional heads of the family who were entitled to remove him in his absence. In support of this submission, Mr. Hayfron-Benjamin referred to Sarbah's Fanti Customary Laws (1st ed.), p. 35, which reads as follows:
"Where the penin [father or head of family] suffers from any mental incapacity, or enters upon a course of conduct which, unchecked, may end in the ruin of the family, or persistently disregards the interests of the family, he can be removed without notice by a majority of the other members of the family, and a new person substituted for him.

Before considering the forcefulness of learned counsel's argument on this matter, one crucial and pertinent question is: Was the defendant bound to be at Enno at all for the funeral of Ekua? The answer to this question is given by Sarbah in his Fanti Customary Laws at p. 36:
"On the decease of a member, all persons who are members of the family take part in making the funeral custom and contribute in defraying its expenses, for which they are primarily liable . . . It is usual for the local senior member of the clan, with the head of the family of the deceased, to preside over the funeral custom, to receive the expression of condolence from sympathising neighbours, and to accept funeral donations."
It would seem that the two principal members of the family who were required by custom to be present at Ekua's funeral were the head of the family and the local senior member of the clan, i.e., the defendant and Ekra Kwamina respectively. That the defendant was bound by custom to be present at Enno on the 16th July, 1961, and to participate in the celebration of Ekua's funeral was also borne out by the evidence of Nana Bray VIII, the second plaintiff, who under cross-examination by learned counsel for the defendant at the trial deposed as follows:
"On the 16th July, 1961 [meaning the 9th July, 1961] Ekua of Enno, a member of the family died before the meeting was held on 16th July, 1961, at 9 a.m. and all the members of the family knew of her death before the meeting on the 16th July, 1961. Ekua died about three weeks prior to the 16th July, 1961, and the final funeral celebrations were to take place on the 16th July, 1961, at about 2 p.m. at Enno. Enno is about six miles from Sekondi . . . The head of the family [who was then the defendant] had to be present at Enno on the 16th July, 1961."

It is in conformity with the observance of custom that the defendant by virtue of his position as head of family had to attend the funeral at Enno on the 16th July, 1961, and the fact that he was actually present at Enno on this date came out clearly from his evidence at the trial which stood unchallenged. It reads:
"On the 16th July, 1961, I did not attend the meeting because I as head of the family had to attend the final funeral ceremony when the members of the family were to share the funeral debt. I left for Enno at 5.30 a.m. None of the plaintiffs attended the funeral ceremony. The funeral ceremony finished at 5 p.m. and I returned to my house in Sekondi."
The defendant's absence at the family meeting on the 16th July, 1961, therefore was not without justification.

Turning now to Mr. Hayfron-Benjamin's submission that a head of family could be removed, on certain grounds, in his absence and without notice, it would seem that such a removal would be invalid and ineffective unless it was made by a majority of the family and on notice not only to all the principal members but also to the head of the family who would be affected thereby.
The head of family occupies a very important position in the family. He has control over the family properties and over all the members of the family and the issue of such members. He is vested with authority to manage and direct the affairs of the family. As such, he is the

natural guardian of every member within the family. His position vis-a-vis a ruler is analogous to that of the pater familias in Roman law—see Sarbah's Fanti Customary Laws (1st ed.), pp. 34-35. It will be out of tune therefore to accept the proposition that a person of such standing in the family could be removed from office without notice. I am of the opinion that such a view will be contrary to natural justice, equity and good conscience.

According to custom the head of a family is appointed by the principal members of the family. They are also cloaked with authority to depose him, but the deposition will be invalid unless a complaint is lodged against him and he is summoned to answer it . The complaint must show what offences the head of family has committed against the family in order to afford him an opportunity to meet them. If the complaint is proved he may be removed by a majority of the principal members of the family present at the meeting.

But where the head of family who is summoned by the principal members of the family to attend a family meeting to answer the complaint against him fails to attend the hearing, and does not give good reason for his absence, he may be removed. It is of great importance also that all the principal members of the family should be invited to the meeting because any decision taken is by the majority of the principal members attending the meeting.

In the instant case, and as Dr. Danquah, learned counsel for the defendant, rightly submitted in reply, the defendant who failed to attend the family meeting at the 16th July, 1961, gave a good reason for his absence, viz., that at that crucial moment he was at Enno, a village about six miles from the meeting place at Sekondi, performing an important family function, which he was bound to do by virtue of his position as head of family. Even if the explanation which the defendant gave for his absence at the family meeting at the 16th July, 1961, was found to be unsatisfactory, which was not so in this case, I have already expressed my opinion that that family meeting was not properly constituted, and was therefore invalid.

As already stated, the main ground of appeal argued by learned counsel for the plaintiffs in this court is that the case of Lartey v. Mensah upon which the learned trial judge based his judgment deals only with notice convening a family meeting for the appointment of a head of a family; the procedure, Mr. Hayfron-Benjamin then submitted, is different when a head of family is to be deposed. It therefore becomes necessary at this stage to set out in detail that part of the judgment which has been made the subject of criticism. It reads thus:

"According to native custom the head of a family is appointed at a meeting of all the accredited elders of the family summoned for that purpose. The meeting at which an appointment is to be made should be convened for that purpose and notice of it should be given to all members of the family entitled, by custom, to participate in the appointment. If then some elders stay away from the meeting, those who do attend can make an appointment in the absence of the former. Where notice given to the members of the family shows that some particular business is to be transacted at a meeting, for example the settlement of disputes, and a head is appointed at that particular meeting, that appointment of a head is null and void, prior notice of the appointment not having been given to all concerned. A member of the family may not be interested in the settlement of disputes between other members of the family but he has by custom an inherent right to a say in the appointment of the head; and it is unjust that some only of the members of the family should appoint the head when others have not had an opportunity of being heard on the matter."

After the learned trial judge had held that the witnesses for the defendant were elders of the family and that they were not summoned to attend the meetings on the 9th and 16th July,

1961, he went on to apply the law enunciated by Ollennu J. (as he then was) in Lartey v. Mensah (supra) to the instant case as follows:
"Moreover the meeting was summoned for the 9th July, 1961, and adjourned to the 16th July, 1961, but there is no evidence that notices were sent out informing the members of the family that the main purpose of the meeting was to depose the defendant as head of the family. Furthermore the letter, exhibit A [meaning exhibit E], did not inform the defendant that the purpose of the meeting was to depose him as head of the family. The main purpose of the meeting according to exhibit E was for the defendant to answer the charges levelled against him. It was only if the charges were proved against the defendant that he could properly be removed as head of the family."

The learned trial judge fell into grave error when he held that exhibit E should have stated that the main purpose of the meeting which the defendant and the members of the family were summoned to attend on the 9th July, 1961, (which was adjourned to the 16th July, 1961) was to depose the defendant as head of family, for, as he himself stated in the latter part of his judgment, "it was only if the charges were proved against the defendant that he could properly be removed from office as head of family."
Learned counsel for the appellant submitted, and rightly so in my view, that it is not necessary to state in the notice that the meeting is being convened for the purpose of deposing the head of family, because nobody would know whether the head would be removed until the charges preferred against him were proved. It is worthy of note that Lartey v. Mensah (supra) applies only to cases where the head of family is to be appointed. In the case of the appointment of head of family, the headship must as a matter of course first become vacant to the knowledge of the family. The appointment is then made at a meeting of the council of the family, consisting of such of the elders or principal members as accept the invitation to the meeting. However, if notice of the meeting was given to all the principal members who are entitled to be invited to it, an appointment made at the meeting would be valid and effective notwithstanding the absence of some of the principal members from the meeting.

The judgment of the learned trial judge was based on wrong application of the law in Lartey v. Mensah (supra) which cannot be supported. But a court of appeal is entitled to uphold a judgment, if proper grounds exist on the record to justify the judgment, even though it cannot be supported for the reasons given by the court which gave it. I have already stated that the meeting which was convened by the family on the 16th July, 1961, and which purported to depose the defendant was not properly constituted in accordance with custom in that notice of the meeting was not given to all the principal members of the family. The decision taken at that meeting alleging that the defendant had been deposed as head of the Ewan Kweku Anona family is therefore rendered nugatory.
Appeal dismissed.

Further more, the courts will not interfere with the merits of the family's decision to remove a head unless it is proved that there was substantial departure from the tenets of natural justice.This was the judicial position stated in the case of Allotey v. Quarcoo (1981) GLR 208-218 that where a person is deposed as a family head, and he allerges that the procedure adopted to depose him was contrary to the natural justice and also to the custom of the people, the burden of proving these alligations rest on him. Secondly, that the court have no jurisdiction over the merit of a family meeting where a person was deposed as the head of a family, the court can only have jurisdiction on issues dealing with substantial compliance with the custom of the people and also whether the removal is in line with the principle of natural justice.

Allotey v. Quarcoo (1981) GLR 208.

ALLOTEY AND OTHERS v. QUARCOO [1981] GLR 208-218
COURT OF APPEAL, ACCRA
22 JANUARY 1981

ANIN J.S.C., EDUSEI AND MENSA BOISON JJ.A.

ANIN J.S.C.

Since the death of Dr. C. E. Reindorf on 11 April 1968, the Onamrokor Adain family of Gbese, Accra, has been embroiled in protracted internecine litigation concerning his successor as head of family. The first suit entitled B. A. Quarcoo v. Manye Adorkor Allotey and Messrs. C.F.C. ended in a judgment incorporating an amicable settlement promoted by the La Mantse and Mr. Justice Nii Amaa Ollennu and filed in the court below on 23 December 1974. Under the terms of settlement, the plaintiff and the first defendant who incidentally fill the same roles in the present suit, were appointed joint family heads and it was also agreed that accredited representatives of the six constituent branches of the family should constitute elders and councillors to assist the joint heads in their administration of the family and its properties. The six elders who were selected by their respective branches of the family are the second plaintiff-non-respondent (now deceased) and the second, third, fourth, fifth and sixth defendants-appellants in the present action—the second in the series, commenced by a writ of summons filed on 3 June 1976. The reliefs claimed therein were: (a) a declaration that the first plaintiff is still the joint head of the Onamrokor Adain family and that he has not been constitutionally and customarily deposed, and (b) an injunction restraining the defendants from dealing with the family lands until the determination of the suit.

In the amended statement of claim, the plaintiffs first referred to the earlier suit and settlement reached and the formation of the council of elders as briefly recounted above. It was next stated that the defendants herein invited the first plaintiff to a family meeting to answer five specified charges preferred against him, i.e. mismanagement of family property; failure to account for family moneys collected by him; unauthorised sale of family lands; refusal to co-operate with family council; and lack of respect and consideration for the other joint head, Manye Adorkor Allotey, as well as the elders of the family constituting the family council. These charges were allegedly answered by the first plaintiff in a letter dated 20 February 1976. It was further stated in paragraph 10 of the statement of claim that the plaintiffs attended the proposed family meeting on 21 February 1976 and that "the first plaintiff answered all the specific charges and therefore the meeting came to an end." (The emphasis is mine.) However, by a poster dated 23 February 1976 he is alleged to have been deposed as joint head of family. Finally, the statement of claim made counter allegations of improper sale and irregular conveyances of family lands against the defendants during the pendency of the first suit.

In an amended defence, it was the first averred that at the family meeting held on 21 February 1976, the plaintiff "was lawfully, constitutionally and in full accordance with the relevant customary law and practice deposed as a joint head of the family," whereby he lost his place on the family council and the first defendant was left as the sole head of family. Next, objection was taken to the plaintiffs' attempt to invest the court with jurisdiction—which it lacked—either to hear charges preferred for the deposition of a family head or to pronounce on the merits of such charges or to evaluate any evidence adduced for the purpose. In short, it was contended, the court has no jurisdiction, whether original or appellate, to inquire into the m\erits of the matters raised in the amended statement of claim which touched on the substantive merits of the deposition charges duly brought against the first plaintiff before the only competent body, i.e. the Onamrokor Adain family. In paragraph 10 of the amended defence it was averred that:

"The plaintiff contemptuously withdraw from and walked out of, the said meeting before its conclusion and that after the plaintiff's said withdrawal, the meeting, which was a full assembly

of the family, unanimously decided and resolved that the first plaintiff be deposed from the position of joint head of the family with immediate effect, whereafter the meeting came to an end."

In our judgment, these criticisms are well founded and justified. The eight new issues introduced by the learned judge and adjudicated upon by him in favour of the plaintiff considerably widened the area of controversy and resulted in the infringement of the fundamental rule laid down in such cases as Dam v. Addo [1962] 2 G.L.R. 200, S.C. that a court must not substitute a case proprio motu nor accept a case contrary to, or inconsistent with, that which the party himself has put forward, whether he be the plaintiff or the defendant. In the present case, the plaintiff's upon whom the burden lay of alleging and proving particulars of impropriety of the family meeting, neglected to do so and failed to disclose any specific grounds in support of his claim that his deposition as joint family head was uncustomary and unconstitutional. The opposing party took elaborate care to expose and attack the plaintiff's defective pleading and even twice moved for the striking out of the writ and claim for disclosing no reasonable cause of action. By his ruling on the motion, the learned judge himself acknowledged the correctness of most of the criticism levelled at the plaintiff's pleadings and confined the trial of the action to the solitary factual issue set out above. The parties had therefore every right to expect that the judgment would be confined to that one issue. Instead, the appellants have had the misfortune of being adjudged on new issues not previously pleaded by their adversary; and have in the event been condemned without an opportunity being afforded them to adduce evidence to meet the new issues stated in the judgment.

As Lord Normand said in Esso Petroleum Co., Ltd. v. Southport Corporation [1956] A.C. 218 at pp. 238-239, H.L. a case of negligence in which the majority of the Court of Appeal raised the issue of inevitable accident for the first time:
"The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. In fact the evidence in the case was concerned only with the negligence alleged ... To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

Apart from the learned judge's error in adjudicating on facts not pleaded by the respondent, the rule that the burden of alleging and proving specific grounds of invalidity of either the appointment or removal of a family head at a family meeting rests with the family member seeking to avoid a decision reached at a family meeting laid down in Welbeck v. M. Captan Ltd. (1956) 2 W.A.L.R. 47, seems to have been infringed in this case; the plaintiff's pleadings did not disclose any specific grounds of invalidity but the learned judge attempted to supply the omission in his judgment by considering such novel issues as the voting procedure adopted at the meeting, the appropriateness of the question put to vote and the manner in which the votes were carried.
Even though the learned judge correctly recognised the court's lack of jurisdiction to pronounce on the merits of the decision of the family to depose its head at a fully representative meeting and after due notice of the meeting and the charges given beforehand, since, both the common law and customary law have for centuries reposed that jurisdiction in the families themselves, yet he included the "propriety of the alleged deposition" in the issues for determination. And in his insistence upon the non-violation of any fundamental principle of the administration of justice, especially the rules of natural justice, he stated the limited supervisory role of the courts in family elections and depositions a shade too broadly; for it is not the infringement of any fundamental principle or rule of natural justice or the breach of every procedural step that suffices to invoke the court's jurisdiction. As Jackson J.

held in Quartey v. Quartey (1951) D.C. (Land) '48-'51, 401, the courts would interfere with the family's decision only when there has been a complete denial of justice or a substantial denial of justice. In the words of Jackson J. at p. 403:
"It is not within the competence of the Courts to arrogate to themselves decisions which customary law has for so many centuries reposed in the families themselves, and it is an interference in the subject's rights which they rightly resent, and which aid is sought only when there has been that complete denial of justice."
(the emphasis is ours)
In this case the propriety of the decision reached, not having been pleaded, was not an issue for the court to adjudicate upon. In any event, it is within the domestic jurisdiction of the family to decide on what they regard as good grounds for deposing their head of family, and unless there is clear proof of substantial departure from the tenets of natural justice, the courts will not interfere. There must be a substantial denial of natural justice before the court will strike the family decision down. If it was part of the plaintiffs' case that there was a substantial or complete denial of natural justice, he should have averred the same with particulars in his pleading: see Quartey v. Quartey (supra) and Amon v. Wesleyan Methodist Missionary Society (1929) D.Ct. '28-'29,7 where it was held that where a minister has been expelled from a missionary society the court would not interfere to re-instate him or to recoup him for his losses if it is clear that the procedure laid down in the rules of the society has been followed and that no principle of justice has been violated. As Sawrey-Coomson J. observed in the course of his judgment:

"such a meeting of the executive council [of the society] has its prescribed procedure and as long as on a broad view of it, that council does not depart seriously from that procedure, although the more meticulous practice and procedure found in a court of justice are not necessarily followed, no exception will be taken to its findings."
Turning to the solitary factual issue set down for trial, learned counsel for the defendants contended that the judgment of the court below was totally against the weight of evidence and that the learned judge erred in holding that the family meeting at which the plaintiff was removed as head did not come to a conclusion required by law especially since the account of the plaintiff's own witnesses showed the contrary. It would be recalled that the main controversy between the parties was whether or not the family meeting of 21 February 1976 came to an end. In his evidence, the first plaintiff gave the following account of what transpired at the said meeting:

> "When I attended the meeting, it was opened, then the charges were read over to me. I answered all the charges orally. At that time I had also prepared a written reply so I handed a copy to the secretary and another one to the second plaintiff who is now dead. The answers I gave orally were not considered at all. After handing over the reply to the secretary, one Alex Quarcoo asked me a question about quarry money and I replied that all moneys collected were paid into court during the first trial. During the cross-examination on my evidence certain words were used which provoked me and my followers. This led to a situation which made us leave the meeting. What actually happened was that I told the meeting that the quarry money after the trial and settlement of the case was being collected by my elder brother who happened to be present. He admitted having collected the moneys but said he had not been called to account to the family. When he said this, one Victor Quarcoo got up and said 'you thieves what about the lands you have been selling?' When he said this another brother of mine got up and said we were not thieves and accused the defendants for being responsible for the sale of lands. At this stage Victor and Alex Quarcoo got up with a view to fight us. They were followed by the others with them. The meeting developed into an uproar so amidst the confusion we all dispersed. Since then no other meeting was called. About an hour after arriving at my residence a leg of a sheep was sent to me. I did not take it because the

messengers could not tell me who had sent them. I therefore left for my father's house and on my return I came to find the leg of the sheep lying in the yard of my house. When I rejected it at first the messengers returned the leg of the sheep. When I came to find it lying in the yard I went back to my father's house and informed my brothers who came to collect the leg and threw it in front of the house from where it was brought. A week after this, notices were sent out to advertise that I had been deposed. On seeing the notices I brought this action for the declaration sought in my writ of summons."

Under cross-examination, the first plaintiff admitted that "when we were leaving the meeting, Mr. Amarteifio (i.e. the second defendant) invited us back but we did not believe the honesty of his intentions. Even the first defendant invited us but we knew it was all a camouflage." The plaintiffs' first witness, Mr. Samuel Allotey Otoo Sackey, who hails from his own branch of the family, corroborated his account up to the point of the plaintiffs' withdrawal. This witness stayed behind and saw the meeting continue to an end, after the family spokesman, the second defendant, had invited the members to consider the charges and answers of the first plaintiff and then called "on those who feel the charges have been proved against the plaintiff and wish him removed as co-head of family to raise their hands." After a positive vote against the plaintiff, a bottle of gin was produced and sheep was also produced; at which point the witness left the meeting. In answer to the court, Mr. Sackey said that "at the stage when the plaintiff and his followers left I found no reason to leave. There were other followers of the plaintiff who remained with me after the plaintiff had left." And he gave the names of two such followers of the plaintiff as Captain Michael Tetteh Quarcoo and J. O. Lamptey Mills.

The last named also testified for the plaintiff and corroborated his account of the uproar in the course of proceedings after an accusation of theft had been made by one of his uncles and a counter-accusation had been made by another uncle, both of whom almost came to blows. The decision of the family to remove the first plaintiff as joint head had been taken "after things had died down." And this was followed by the pouring of libation and slaughtering of a sheep. He confirmed that as the plaintiff and his followers were leaving, they were persuaded not to leave. Mr. Lamptey Mills' evidence was important because he confirmed that after his uncles had been calmed down, "the meeting continued thereafter and that while the plaintiff and some of his followers left, he personally saw no reason to leave." In answer to the court, he emphasised that before he left, the charges had been preferred against the plaintiff and answers given by him; he was aware of the attitude of members of the family towards what happened and he knew of the decision taken, after the second defendant had proposed that the plaintiff should be removed by vote.

The overwhelming impression one gets from reading the evidence of the plaintiff 's own witnesses as well as the testimony of the second defendant is that the meeting came to a decisive conclusion that first plaintiff should be removed as joint family head; that the hold-up or social disorder caused by the heated exchange between the two septuagenarians, Ahele Tufo and Victor Quarcoo, was only short-lived and did not result in bringing the meeting to an end; that the plaintiff acted perhaps hastily in withdrawing from the meeting since neither his own followers nor witnesses nor indeed any person came to any physical harm; and since no assault or battery was directed at the plaintiff personally. One could compare what transpired in this case with a temporary hold-up in a football match when two or more players suddenly flare up and hold up the game for a few minutes while steps are quickly taken by the referee, officials and even spectators, to placate the irate players and restore order for the game to resume. In this family contest, the final whistle or conclusion came with the taking of the vote to remove the first plaintiff as joint family head, accompanied by the symbolic and evidentially significant customary pouring of libation and slaughtering of sheep to seal the act of removal. Whether those definitive steps ought to have been taken in all the circumstances of the case, and whether they were even properly taken or not, are in our

opinion extraneous matters in this case, having regard to the sole factual issue set down for trial and the want of pleading on these issues. We accordingly express no opinion on these extraneous matters in this litigation.

Before concluding, it is only proper to mention that learned counsel for the plaintiff was also of the view that, after the withdrawal of the plaintiff following the social disorder, the meeting continued in fact, albeit with a different agenda. He submitted therefore that he was unable to support the finding of the learned judge to the contrary. Appeal allowed.

However, the burden of proving specific grounds of invalidity of either the appointment or removal of the head of family lies with the particular member seeking to avoid the decision of the family.This was why it was held in the case of Welbeck v. Captan (1956) 2 WALR 47 that where a member of the family after being served notice of meeting fails to attend the meeting, the principal members present at the meeting (if majority of them are present) can proceed with the meeting and so appoint or remove a member of the family as the head of the family.

Walbeck v. Captan (1956) 2 WALR 47.

WELBECK *v.* M. CAPTAN LTD. AND HAMMOND.
Supreme Court of the Gold Coast, Eastern Judicial Division, Divisional Court, Accra
Smith Ag.J.

Until 1942 Mr. Hammond, the co-defendant, was the head of the family. For reasons involving finance and alleged squandering of moneys, Mr. Hammond was relieved of his office and the plaintiff Mr. Welbeck With one Thompson (now dead) were elected caretakers and administrators of the Kreshie family by a family resolution dated July 4, 1942. This was confirmed by the judgment dated January 18, 1945, of the Tribunal of the Paramount Chief of the Ga State. In this judgment it is set out how the head of the Kreshie family is appointed and I quote at this stage the relevant passage:
"The members of the family are chosen from two ancestors, namely Nyan Abodiamo and Kreshie, so that the descendants of these two ancestors put together bear a common name, known as 'Kreshie Family,' the head of which can only be properly appointed by descendants of Nyan Abodiamo and Nah Kreshie."

In 1945 after this judgment these caretakers leased two family properties, D. 775 /2, Janet's House, Accra, and D. 774/2, Maxwell House, to Mr. Karam -the leases being assigned to M. Captan Ltd.the defendants in this action.
In 1946 the co-defendant and a Mr. O. D. Hammond claimed to have been made joint heads of the family by another family resolution dated February 7, 1946. This at once led to litigation, and in some way or other two suits arose. In suit No. 1175/47 the Ga Native Court "B" on October 7, 1948, gave judgment in favour of Mr. Welbeck and Mr. Thompson on a claim by Mr. Hammond and Mr. O. D. Hammond that they were the appointed joint heads of the Kreshie family of Accra. In suit No. 1350/48 the Ga Native Court " B " held that A. H. Hammond arid O. D. Hammond were duly appointed by the members of the family in accordance with custom. The judgment in this case was as follows:-

JUDGMENT:-
"The court is satisfied on the evidence that the plaintiffs were duly appointed by the members of the family in accordance with custom, and that the object of the appointment of the second plaintiff to act jointly with first plaintiff was because of the first plaintiff's old age.

"The defendants and co-defendants were summoned on three occasions to the family meeting, the object of which, was to appoint a Head. They could have attended and objected to the"' appointment of anybody they did not like, but failed to avail themselves of the opportunity offered them.
.. Judgment is therefore given for the plaintiffs. No order as to costs."
On appeal the Magistrate held that the meeting in February, 1946, was not constituted by representative members of the family. On appeal from the Magistrate, Coussey J. in *Hammond and Another* v. *Thompson and Others* , dismissed the appeal for a different reason, namely, that the matter was res judicata by virtue of the decision of October 7, 1948 (Suit 1175/47) from which there had been no appeal. Except for this Coussey J. seems to me to indicate that on the merits he was rather more favourably inelined to the Ga Native Court" B " judgment in the Suit 1350/48.

Following this judgment of October In, 1951, the plaintiff's son Nii Okai Kasablofo II by letter dated October 30, 1951, was invited to attend a meeting on November 1, 1951, to appoint a head of family. He refused but his father, the plaintiff, attended. A further meeting was held in the absence of the plaintiff and his son on November 4, 1951, at which a resolution was passed appointing Mr. Hammond bead of the family. The question is whether this meeting was a representative meeting of the members of the family, which could validly appoint Mr. Hammond head of the family.

I have referred to Suit No. 1350/48 before the Ga Native Court B and the reason for dismissing the appeal. In his judgment of October 13, 1951, dismissing the appeal Coussey J. also indicated that he would perhaps have come to the same conclusion as the Native Court on the facts, as it was unreasonable for a member of the family deliberately to avoid attending a meeting and thus hold up the making of an appointment. Mr. Bossman, however, argued that there must be a move to reconciliation and pacification of the rival elements of a family before a meeting can be held to make an appointment. He cited the decision of Quashie-Idun (then acting judge) in *Ankrah* v. *Allotey and Others*. I think that case is distinguishable in that it only goes so far as to lay down that where two opposing sections of a family have subsequently become reconciled, a meeting of one or other of such opposing sections cannot appoint or remove a head of family. Such an act can only be done by the united family.

It seems to me that following the judgment of the Native Court in Suit 1350/48 and that of Coussey J. it is open to principal members of a family, to appoint a head in the absence of a principal who refuses to attend a meeting after invitation.) The plaintiff and his son in this case refused to attend the meeting although invited. According to the evidence before me "most members of the female and male sides of the family attended .... The interest dealt with was the Kreshie family." There was no dissension. So far as I have evidence the signatories to the document of resolution of November 4, 1951, are representatives of both sides of the family. In view of the evidence on this point for the co-defendant-particu!arly that of Emmanuel Borquaye-it was I think for the plaintiff to show, if such was the case, that the meeting was not representative and that members were absent whose presence was indispensable.
I have not taken into account the proceedings at the arbitration before the Gbese Division council. I would dismiss this action by the plaintiff and give judgment for defendant and co-defendant with costs.
Judgment for the defendants.

8. Accountability of Head of Family

The general rule was stated in the case of Fynn v. Gardiner (1953) 14 WACA, as:
"Members of the family cannot call upon the head of family for and account their remedy is to depose him and appoint another person in his stead".
Position was affirmed in:
Abude v. Onano (1946) 12 WACA.
Abude v. Onano was followed in Hansen v. Ankrah (1987-88) 1 GLR 639.
The decision in Hansen v. Ankrah prompted the enactment of PNDCL 114, the Head of Family (Accountability) Law, 1985. PNDCL 114 has three sections:
Section 1 makes the head of family accountable to the family for family property.
Section 2 requires the head to prepare an inventory of family property in his custody.
Section 3 empowers members with beneficial interest in property to bring an action after certain preliminary procedural requirements have been satisfied.

Compare accountability of head of family and that of a chief. Are the incidents of family land similar to that of stool land?

9. Rights of Spouses and Children

Two issues arise. First rights of spouses (and children) following a divorce. Second, rights of spouses (and children) following death intestacy of one spouse.

a. Upon Divorce

Marital property upon divorce could be handled by pre-nuptial settlement or by the court as an ancillary relief after a formal decree of dissolution.
Article 22(2) of the Constitution of 1992 enjoins Parliament to enact legislation regulating the property rights of spouses.
Clause 3 of Article 22 provides for joint access to property acquired during marriage and further mandates the equitable sharing of matrimonial property between the spouses upon divorce.

Prior to constitutional and legislative interventions, Ollennu J, as he then was stated the law in Quartey v. Martey (1959) GLR 337, as follows:
"By customary law it is a domestic responsibility of a man's wife to assist him in the carrying out of the duties of his station in life; i.e. farming or business. The proceeds of this joint effort of a man and his wife and or children, and any property which the man acquires with such proceeds are by customary law the individual property of the man. It is not the joint property of the man and the wife and or children. The right of the wife and children is a right to maintenance and support from the husband and father."
See also:
Clerk v. Clerk (1968) GLR 353.
Later customary law was prepared to accept a different treatment in situations where the wife's contribution exceeds mere assistance given by a wife under the customary law. In such situations where the courts found that the wife's contribution was substantial, the court would hold that she had become a joint owner of the property.
Abebreseh v. Kaah (1976) 2 GLR 46.
Annang v. Tagoe (1989-90) 2 GLR 8.
However, see the recent case of:
Mensah v. Mensah [1998-99] SCGLR 350.
Where it was held that upon dissolution the parties become joint owners of the matrimonial property and that the ordinary rules of contract have no place in the context of a marriage.

b. Upon Death Intestacy

Refer to Matrilineal and Patrilineal societies in Ghana. Biggest problem was among the matrilineal communities. Specifically among the Akans the customary law before September 1985 was that the self acquired property of an Akan man, upon his death intestate becomes family property and the maternal family become the successors.

This position was severely criticised by the court in:

In re Antubam (1965) GLR 138.

Examine Hayford v. Moses (1980) GLR 757, decided in 1979 in which the court seemed to be extending the rights of widows and children.

The courts have held that the rights of Akan children to reside in their father's house subject to good behaviour, was limited to their father's self-acquired property.In the case of Yeboah v. Kwakye (1987-88) 2 GLR 50-59, the Court of Appeal stated that where a member of the family, with or without the consent of the head of the family and that of the principal members of the family, invest on a family land, such a member can only acquire a usufructuary life interest over the said piece of land, although the life interest is fully alienable (e.g. it can be given as security for a loan). It is not open to the life tenant, unless he acts with the concurrence of the head and principal members of the family, to alienate any greater interest than his life estate. On his death, the interest in the property vests in the family

Yeboah v. Kwakye (1987-88) 2 GLR 50

YEBOAH AND OTHERS v KWAKYE [1987-88] 2 GLR 50-59
COURT OF APPEAL, ACCRA
5 JUNE 1986

ABBAN, OSEI-HWERE AND AMPIAH JJA

OSEI-HWERE J.A.

The properties in dispute may conveniently be lined up in two groups. In one group is the plot of land at Nsukwao, Koforidua which is partly developed into swish and cement-block buildings. In the other are the three cocoa farms at Suhien Aboye, a sugar-cane farm a Nsukwao, Koforidua Old Estate Road and a foodcrops farm near the cemetery, Koforidua. The cement-blocks building comprise one storey structure (the main buildings and two outbuildings commonly called "boys quarters." Because all these building stand in close proximity, they have been registered at the Koforidua Municipal Council as one unit with the registration number T 29. The registered owner is given as Afua Pokua /J Y Donkor.

Afua Pokua (now deceased) was the mother of JY Donkor, described as Yaw Donkor at the trial. Afua Pokua had two sisters and two brothers, namely Abenaa Mframa, Amma Tanoa, Kwame Adjabeng and Tuffour. It does appear Amma Tanoa predeceased Afua Pokua. On the death of Afua Pokua her sister Abenaa Mframa was by-passed as her successor because she had voluntarily disclaimed her ties with her matrilineal family. Consequently her only surviving child, Yaw Donkor, was appointed successor. On the death of Yaw Donkor his family appointed Kwaku Kwakye, the son of Abenaa Mframa (the plaintiff herein) to succeed. The plaintiff mounted this action now on appeal against the defendants because Yaw Donkor, by his will, purported to dispose of the disputed properties to his wife and children.

The evidence of both the second plaintiff witness and the first defendant witness is consistent with the acquisition of the virgin forest by Adjabeng as family land. There was no evidence of a gift of the land to his sisters by Adjabeng. That being so the customary law made its full impact. That law is that where a family member made a farm on vacant family land even by

his own private resources and unaided by the family, whether with or without the prior permission of the family, he acquired only a usufructuary life interest therein. Although the life interest is fully alienable (e.g. it can be given as security for a loan) it is not open to the life tenant, unless he acts with the concurrence of the head and principal members of the family, to alienate any greater interest than his' life estate. On his death, the interest in the property vests in the family. It follows that any disposition by the life tenant purporting to have any other effect, such as a devise under his will, shall be ineffective: see Amoabimaa v Okyir [1965] GLR 59, SC; Biney v Biney [1974] 1 GLR 318, CA and Osei Yaw v Domfeh [1965] GLR 418, SC.

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Also,in the case ofBoateng v. Boateng (1887-88) 2 GLR 81-86 the court affirmed the principle that where a member of a family invest (builds) on a family property, upon his death, such property vests on the family.

Boateng v. Boateng (1887-88) 2 GLR 81.

BOATENG AND OTHERS v. BOATENG [1987-88] 2 GLR 81-86
COURT OF APPEAL, ACCRA
7 JULY 1988

WUAKU J.S.C, AMPIAH AND ESSIEM JJ.A.

ESSIEM JA

This appeal concerns the ownership of house No EJ/174, Ejisu, Ashanti.

One George Boateng made a will and devised the said house to his children. The defendants in this action are the children of the said George Addo Boateng who are the devisees in terms of the last will of the said George Addo Boateng.

After the death of the testator, the executors duly took out probate. The late Boateng before his death, lived in the house with his children.

The plaintiff who is the respondent in this appeal sued the appellants before the High Court, Kumasi claiming in his writ of summons:

"1. Declaration that the house situate on plot No GC 3, Ejisu, Ashanti is the property of the plaintiff's family.

2. Recovery of possession of the said house from the defendants.

3. Damages for unlawful and wrongful trespass.

4. Perpetual injunction restraining the defendants, their servants or agents or both from interfering with the plaintiffs' possession of the said house."

The learned trial judge after a very detailed examination of the evidence adduced before him made the following findings, among others: That the land on which the house stands was obtained jointly by the fifth plaintiff witness (Mrs Beatrice Peprah), the plaintiff and the late George Boateng. He further found that the house was jointly put up by these four persons. In the end he found the plaintiff's case proved and gave him judgment in terms of the reliefs sought in the writ of summons. He however dismissed the plaintiff's claim for damages for trespass against the defendants holding that the same was misconceived. The trial judge made the following declaration in favour of the plaintiff.

"I . . . declare that the land together with the dwelling-house on plot No GC 3 Ejisu, Ashanti is the family property of the plaintiff. The plaintiff is entitled to immediate possession of the said house and I do so order. The defendants, their agents, servants and assigns are hereby and forthwith perpetually restrained from entering the said land and house"

He dismissed the defendants' counterclaim.

The defendants have appealed to this court on three main grounds which are:

"(a) The judgment of the learned judge was against the weight of evidence.

(b) The plaintiffs are estopped from claiming that the two-storey house situate on plot No EJ 174, Ejisu is a family property and not the self-acquired property of the late George Boateng especially when to the knowledge of the plaintiff and his family, the late George Boateng, the lessee, had been dealing with the property openly as his own, ie using it as security for bank loans.
(c) The learned High Court judge misdirected himself in coming to a conclusion that the late George Boateng had no means of building the said house by himself since he kept on borrowing money from his sister Mrs Peprah."
Counsel for the appellants, Mr Bossman, abandoned ground (b) and argued grounds (a) and (c). The main submissions were based on the fact and he invited us in effect to reverse the trial judge on his findings of facts and the conclusions he drew from those facts. He also urged upon us in the alternative to vary the judgment of the court below in order to allow the children, i.e the defendants, to remain in the house in dispute subject to good behaviour.
In reply Mr Totoe for the respondents argued that the judgment is supported by the evidence on record and as such this court should dis miss the appeal. As to the rights of the children, if any, he asked that the court should leave that to the discretion of the family. He urged us to reject the invitation to vary the orders made by the trial judge.
Where, as in this case, the appellant contends that a judgment is against the weight of the evidence, he assumes the burden of showing from the evidence on record that this is so. After a careful examination of the evidence on record as well as submission of counsel, I am of the opinion that the findings of fact made by the trial court are amply supported by the evidence on record. I therefore find no basis for interfering with the main conclusions of the learned trial judge.
Similarly, I do not see any justification for varying the orders of the court below in favour of the children. The house was not the self-acquired property of their deceased father. It is their father's family house. They will have an interest in it if they belong to that family. The evidence does not suggest that they belong to their father's family.
In these circumstances the court cannot make any valid orders for the benefit of the children. When it is said that children under the Akan system of inheritance are entitled to remain in their father's house subject to good behaviour, that only relates to "the father's house", ie the self-acquired property of the father: see Sarbah, Fanti Customary Laws (3rd ed) at 50.
For the reasons given I will dismiss the appeal.

DECISION. Appeal dismissed.

PNDCL 111 changes the customary position and provides for a proportional distribution of the estate of a deceased spouse in accordance with the formula prescribed in the law.
Reports are that law is not functioning effectively on the ground. Outreach conducted by Raymond Atuguba and myself in selected villages in the Western and Northern Regions showed that there is a large measure of public awareness about the law.
Article 22(1) of the Constitution of 1992, guarantees every spouse a reasonable provision from the estate of the other spouse, upon death testate or intestate.

CASES
ACQUISITION

In the case of NKONNUA v. ANAAFI [1961] GLR 559-566 where the court held that if a man is occupying a traditional stool, it does no authomatically mean that all the properties he occupied will be stool properties. In the above case, despite the fact that the deceaced occupied the Osenase stool, he nevertheless made it quit clear that the farm in dispute is his family property and not stool property, and also elders of the original stool never treated the said farm as property of the stool. Hence, the court held that it will cause great injustice to the family of the deceaced and also that it will be contrary to natural justice and good conscience to deprive the family of the deceaced ownership of the said property.

NKONNUA v. ANAAFI [1961] GLR 559-566
IN THE HIGH COURT, ACCRA
6TH OCTOBER, 1961
OLLENNU, J.

OLLENNU J.
The plaintiff claims that she is the Queen-mother of the Odau Division in Akyem Abuakwa, and the head of the Aduana royal family of Otwereso and Osenase. She claims declaration that the land and farm thereon, subject-matter of this suit, is the property of her said family, the royal Aduana family; she also claims an order for recovery of possession of, and mesne profits from the said farm.

She pleaded that the said land was originally cultivated by members of her family, Adwoa Anto, Yaw Baduo and Kwasi Ayebiahene or Ayebiafwe, when it was forest land, and later her uncle, the late Nana Obeng Akese, developed the land into a cocoa farm; she further pleaded that the defendant who is not a member of her said family has wrongfully taken possession of the said farm, and has refused upon demand to surrender it to the family.
The defendant admitted the allegation of the plaintiff that he was in possession of the farm, but denied all the other averments of fact made in the plaintiff's statement of claim. He pleaded that the farm in dispute was cultivated by Nana Obeng Akese while he was on the Osenase stool, and that the people of Osenase helped Nana Akese to make the farm; and further that in any event, the said farm is property of the stool, because the same was cultivated by Nana Obeng Akese while he was the occupant of the Osenase stool, and therefore by customary law it became merged into stool property upon the abdication or demise of the said Nana Akese.
Now the evidence led by the plaintiff that she is Queen-mother of the Odau Division of Akyem Abuakwa and the head of the Aduana royal family was not contradicted, nor even challenged in cross-examination. I therefore accept that evidence.

Again not only was the evidence by the plaintiff that the defendant is not a member of her branch of the Aduana family, i.e. the Aduana royal family, not denied, it was in fact corroborated by D.W.2, Opanin Kwabla Poakwa, who said that "when it came to the succession to the stool of Osenase, the elders said they did not want a candidate from the royal family to occupy it, and that they would rather have a son of a chief. So we nominated Anaafi the defendant". That evidence led on behalf of the defendant must therefore be accepted.

The plaintiff led evidence that a stool treasury was introduced in Akyem Abuakwa while Nana Obeng Akese was Odauhene, that all farms belonging to the stool were listed and placed under an officer known as the stool farms officer, who accounted to the stool treasury for the proceeds of those farms; but that the farm in dispute has never been included in the farms so listed as stool property and has never come under the control of the stool farms officer. That important piece of evidence was admitted by the witnesses for the defence. In fact some of the said defence witnesses gave evidence which went further than merely

confirming that the farm in dispute has never come under the control of the stool treasury as all stool farms should.

By custom an occupant of a stool or the head of a family cannot, while he remains such occupant or head, be called upon to account for stool or family property under his control: Abude v. Onano, Heyman v. Attipoe. But upon his removal from office or upon his abdication he is required to make such accounts as are reasonably necessary, and to hand over all stool or family property which had been in his possession, to persons nominated by the family or by the elders of the stool, or to certain holders of traditional office who by custom are the custodians of the family stool properties when the stool or office of headship is vacant. As a rule the persons to whom the handing-over is made are persons who must know all the family or stool properties which the outgoing chief or head was in possession of.

For that taking-over an inventory is made and signed by both parties, i.e. the party making the handing-over and the parties taking-over. In the case of a family no property which is not family property should be included in the inventory, and in the case of a stool no property held by the outgoing chief which is not stool property should be included in the inventory. Therefore the agreement by the people taking-over that any particular property known to them to have been in the possession of the ex-chief or ex-head should be excluded from the inventory, is a positive admission by the stool or family that the property so omitted is not stool or family property.

On the evidence as a whole I find that the land is the ancestral property of the plaintiff's family, the Aduana royal family, that it was developed into a cocoa farm by Nana Obeng Akese with the assistance of the plaintiff, physical and financial, and that at the time of its said development, Nana Obeng Akese was the Odauhene, i.e. the chief of both Otwereso and Osenase, and that in or about 1951, i.e. upon his abdication, Nana Obeng Akese created separate stools for the two towns, Otwereso and Osenase, but made it quite clear that the farm in dispute is his family property not stool property. I find also that the elders of the original stool never treated the said farm as property of the stool, consequently they never had it included in the list of stool farms to be controlled by the stool treasury, and since the creation of the two stools in or about 1951 neither the stool of Otwereso nor the stool of Osenase has regarded it as stool property. Consequently none of them has had it listed for the purposes of the stool treasury and never had it included in the inventory of stool property which should have been handed over upon the abdication of Nana Obeng Akese or upon the abdication of P.W.1. Therefore although Nana Obeng Akese had charge and control of the farm and considerably improved it while he was on the stool the said farm cannot in law be stool property; that is so for the following reasons:
Firstly the land had already become the property of the Aduana royal family before Nana Obeng Akese came into possession of it, therefore only the occupant of the stool who belongs to the Aduana royal family would be entitled to occupy it, and he would do so, not as stool property, but as property of the family. In this respect this case is on all fours with the case of Serwah v. Kesse.

Secondly, where a person assisted by a member or members of his family acquires property, that property is not his individual self-acquired property; it is from its inception, property of the family to which he and his partner or partners belong: Mensah v. S.C.O.A. and Boahene. Therefore if an occupant of a stool, acquires property with the assistance of a member or members of his family the position would be the same, that is the property will be property wearing the character of family property in which he and the person or persons with whom he acquired it has each a life interest and which all of them acting together could alienate inter vivos, but upon the death of any one of them the property becomes full family

property and would remain under the control of the survivor of those who acquired it; upon the death of the last of them, it will come under the control of the head of the family or any other person appointed by the family. Since such a property is not the individual self-acquired property of the occupant of the stool it will not become merged in stool property, therefore upon death, deposition or abdication of the occupant to the stool who helped to acquire it, the property would retain its legal status as family property. Therefore it is only an occupant of the stool who is appointed from the family who owns it, who could take charge and control of that property. The successor to the occupant who helped to acquire that property if he does not belong to the family of his said predecessor, would have no right to that property. I have earlier found it proved that the defendant, the present occupant of the Osenase stool, is not a member of the Aduana royal family, i.e. the family of Nana Obeng Akese and the plaintiff, the two persons who developed the farm into its present state.

Thirdly, if an occupant of a stool develops property of his family, i.e. develops a foodstuff farm into a cocoa farm, or improves an existing family house as distinct from farms or buildings belonging to the stool, the property as improved does not change its legal character as family property to become stool property. Therefore having already found that the land was a family farm or farmstead when it was developed into a farm, even if the evidence has shown that its development was made by Nana Akese alone while he was on the stool, I would be bound to hold that the improvement made to it did not change its character from family property to that of stool property. In my opinion it would work great injustice to the family, contrary to natural justice and good conscience, to deprive the family of their ownership in such circumstances. The plaintiff has fully discharged the onus upon her, and she is entitled to succeed on her claim.
There will be judgment for the plaintiff for (1) declaration of her family's title to the land and farm as claimed, (2) an order that she should recover possession of the said farm forthwith, and (3) an order that the defendant should account to her for the mesne profits of the said land and farms. She will have her costs fixed at 75 guineas inclusive.

Also, it was stated in the case of LARBI v. CATO AND ANOTHER [1960] GLR 146-155 that where a person after having the support of his family, become successful in life, and then acquires a property, the property so acquired can not be called family property simply because his family supported him (either by sending him to school, or to set up a trade). In this case, plaintiffs were of the opinion that the property acquired by the deceaced should be family property simply because with the help of the family, he (the deceaced) became successful in life and so therefore the property which the deceaced acquired as his personal property should be decleared as their family property. The court dismissed the claims of the plaintiffs on the ground that despite the fact that the family supported the deceaced to become who he was (a successful lawyer), it does not mean that the deceaced cannot acqiure personal properties, even if the deceaced took loan from the family to acquire the said property.

LARBI v. CATO AND ANOTHER [1960] GLR 146-155
IN THE COURT OF APPEAL
6TH JUNE, 1960

KORSAH, C.J., VAN LARE, J.A. AND GRANVILLE SHARP, J.A.

GRANVILLE SHARP J.A.

A. O. Larbi died in, 1956. In 1937 he had built House No. C276/1, Nsawam Road, Accra, Adabraka on self-acquired land. He added to the buildings in 1950. By deed of gift dated 24th March, 1952, he conveyed the property to his son A. O. Cato-Larbi and confirmed the deed in

his will dated 19th September, 1952. At his death, the ownership of the property was therefore vested in A. O. Cato-Larbi.

In 1957 the brother of the deceased brought an action in which he claimed inter alia a declaration that the said property was family property (and therefore property of which the deceased was not entitled to dispose). The defendants were the brother-in-law and the widow of the deceased. The basis of the plaintiff's claim was that the deceased had built the premises with the financial assistance of various members of the family. The action was dismissed by Ollennu, J. and the plaintiff appealed. At the hearing of the appeal it was further argued on behalf of the plaintiff that as the deceased had been educated with the assistance of family funds, his subsequent earnings and property acquired were stamped with the mark of family property.
On this evidence the learned judge, in our opinion, was fully entitled to find, and was right in finding, that the plaintiff had not proved his case. On our own reading of it, the evidence for the plaintiff stands out as quite unreliable, and such inferences as are to be drawn from it cannot support the claim put forward by the plaintiff. The learned judge had the additional advantage that he heard and saw the witnesses, whose demeanour no doubt assisted him in his assessment of their reliability.

It was in these circumstances that Dr. Danquah felt himself to be justified in presenting (not once, but with constant and quite unnecessary repetition) an argument that because the deceased had, together with other members of the family, been given the advantage, with the support of family funds, of an education which had enabled deceased to practise with distinction and consequent self-enrichment at the Bar and as a solicitor, therefore everything he enjoyed as the result of his early education, and everything that was purchased by him out of his own efforts and earnings, took upon itself the character of profits earned by the use of family funds, and that therefore the House No. C276/1 in Adabraka, and (presumably) the substantial bank balance from time to time available to the deceased, belonged, not to the deceased but to the Obuadabang Larbi family of Larteh.

It is material to point out that the plaintiff himself said that sons of the family, assisted by the family in the way in which the deceased was, were under no obligation to repay the sums expended upon them. This statement is in full accord with our understanding of custom in Ghana. Support so extended is by way of gift for the advancement of the younger generation, and, while it places upon them certain recognised moral obligations towards the family, it does not stamp with the mark of the family everything that they afterwards acquire by their own efforts, whether as lawyers, doctors, or merchants, or by activity in other fields. If the contrary were the correct view there is hardly a person of distinction in the country who could claim to possess anything that he could call his own, and much of the body of customary law on the disposal and inheritance of self-acquired property would be cast away, which is the reductio ad absurdum of the whole argument.

According to Dr. Danquah, if a person were building a mud house for himself in a village, and a member of his family came near at a moment when the builder (overtaken with thirst and fatigue) begged and received from the visitor refreshment to the value of a shilling, this would suffice to stamp the building with the mark of the family. We do not doubt for one moment that those family members who make contribution to the building of a house are entitled to share the enjoyment of the building, but this is (and must be) on the basis that, by accepting support and contribution from the family, the builder recognises that he is building a house for the family. It is quite otherwise when, as the learned judge upon ample evidence here found, a person is building his own house and seeks assistance by way of loan, or as his personal share of a family fund, in order to complete his building. If the family as a whole is

in fact assisting in the building of the house it would not affect the situation if the contribution of one member was greater than another's. In such circumstances the slightest assistance (which is to say contribution) would give to the provider an interest in the enjoyment of the house, but in our view, as in that of the trial judge, one single member of the family cannot by carrying one brick, or one board of wood, stamp the building with the mark of the family. Where, as in the present case, by special arrangement a loan or payment of money due out of a family fund is made to a person building his own house, and the sum involved is £30 (a small part of the cost of the building) it would, in our opinion, require evidence much stronger than was tendered before the learned trial judge to justify a finding that the house is a family property.

Towards the conclusion of his judgment the trial judge said:
"the building erected by deceased on his land was worth no less than £2,500. The amount of £30 was, therefore, negligible compared with the value of the building. Applying the principle which I have already stated, even if it was meant to be a contribution in the technical sense, it could not (in these modern days) change the character of the building from individual to family property."

We do not think that the learned judge intended by these observations to change the customary law, as Dr. Danquah would have it. It is not, in our opinion, necessary to decide this one way or another, as the observations in question were in any event obiter to his decision on the facts.
Dr. Danquah cited to us a small volume of authority upon his contentions, to which it is therefore necessary, in conclusion, to refer.

In doing this we are according to Dr. Danquah a degree of consideration which he himself failed to extend to the court. First, however, we would refer to a case to which Dr. Danquah did not himself make reference, African & Colonial Co. Ltd. v. Blemir Syndicate, G. C. Hutchful and Others (Full Ct. 1923-25 p.40). In the present case there is ample evidence that Cato-Larbi's predecessor (through whose gift and devise he holds the property), and Cato-Larbi himself, have throughout held themselves out as owner in each case of the house. They have lived in it and controlled its use, and the family have not noticeably interfered, save for the issue of one warning which was ignored with impunity and without further incident. In these circumstances, according to the case cited above (in which the judgment of the Full Court was confirmed by the Privy Council), "very satisfactory evidence is required to prove that the land or house is not his sole property," (at p.44) a proposition earlier laid down in the case of Russell v. Martin (1 Ren. Rep. 193). Next, it is not immaterial to refer to Dr. Danquah's own learned work on Akan Laws and Customs which, though for a certain lively reason not authoritative, has not inconsiderable persuasive force. At pp.205-206 the learned author says:
"No person can have absolute control over property except he owns it sui juris . . . [Property] may be held by a son as a gift from his father. It may be held by one member against all others as a gift received from another member of the family or from a member of a strange family. Lastly, it may be acquired by outright purchase, or by other business means out of income earned through one's own individual efforts."

It may be asked how Dr. Danquah would seek to reconcile these observations in his book with his general argument before us, and in particular with his contention that if a lawyer, whose profession had been made possible for him by reason of support from the family, were given some property by a stranger as a token of admiration for his skill in advocacy and devotion to duty in the course of some litigation, that gift would belong, not to him but to the family to whose early support he owed his professional qualification.

In the cited passage Dr. Danquah followed the view expressed by Sarbah at p.77 of his Fanti Customary Laws, (1st. ed.) that;
"Property is designated self-acquired or private, where it is acquired by a person by means of his own personal exertions without any unremunerated help or assistance from any member of his family."
It should be made clear that it is the "exertions" that have to be assisted, and it matters not that these exertions were made in a sphere or calling, access to which had been made possible to the person by the earlier assistance of the family or some member of it.

Similarly Redwar at p.79 of his Comments on Gold Coast Ordinances:
"According to Native Law there is a presumption in favour of all land being jointly held by a Family or other Community, which presumption may, however, be rebutted by evidence that it has been acquired by an individual through his own personal exertions in [p.154] trade or otherwise, without any assistance from the Community of whom he is a member, or by gift to the individual apart from the rest of the Community ... It is also clear that he has an unfettered right to dispose of his Individual Property either during his life time or by Will.

While it is true that customary law requires that the presumption in favour of family property should be rebutted by evidence, and that the onus is upon the one who asserts sole ownership, that onus shifts once it is shown that that person has been dealing with the property as his own, or that it came to him by gift or by testamentary disposition from one who dealt with it as his own: see Russell v. Martin (1 Ren. Rep. 193).

The case of Codjoe & Others v. Kwatchey & Others (2 W.A.C.A. at p.375), which was cited both in the court below and to us, contains passages that do not support the arguments presented in support of this appeal. Evidence that a member of the family had been allowed to put up a small shed or shelter for trading during a short period on the land was claimed by the plaintiffs to establish that the land was family property. The trial judge rejected this argument, and Webber, C.J. agreed with him, citing with approval the following passage from his judgment,
"Her adoptive brother would naturally let her do a little petty trading there if she wanted and erect a stall as I have indicated. The family system would account for that. It is not by `scintillae' such as this that the ownership of land can be determined." Webber, C.J., also cited with approval this passage from Okai v. Asare (unreported.) "Self-acquired land is not turned into family land by the owner of the land being kind enough to allow some of his family to live on the land and enjoy the use of it" (ibid.)

The fact, therefore, that a nephew in the present case was allowed to reside in the house is colourless, and in our opinion ineffectual to stamp the house with the character of a family property. Also, although we agree that according to the best authority a real contribution towards the building of a family house need not be substantial in the accepted sense of that word in our view (as in that of the learned trial judge) it must be a "real contribution", and we cannot accede to the view that customary law is a stranger to the doctrine de minimis non curat lex. We have considered the other cases cited by Dr. Danquah, but we find them irrelevant to the issues decided by the learned judge, and to the facts upon which such issues were decided.
We have considered this appeal in a full awareness of the warning of Lord Haldane, in the case of Tijani v. Secretary, Southern Nigeria ([1921] 2 A.C. at p. 402) when he said:
"in interpreting the native title to land, not only in Southern Nigeria, 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 up under English law. But this tendency has to be held in check closely ...

there is no such full division between property and possession as English lawyers are familiar with."
Perhaps we may permit ourselves to say that this court is not, nor has it been since its inception, unfamiliar with this cautionary passage which was cited to us. Having given the most careful consideration to the matter we cannot (save, as we have already said, in that part of it which was obiter) find anything in the judgment of the learned trial judge which is open to any criticism, and we therefore dismiss this appeal.

DECISION
Appeal dismissed.

See also the case of AMISSAH-ABADOO v. ABADOO [1974] GLR 110-132 where it was stated that where a person with the consent of the family builds a house on a family land, he can anly acquire interest to occupy the property for his life time and cannot dispose the property. In the above case, the deceaced with the consent of the family built a house on part of their family land, upon his death, the court held that the property remains family property, eventhough the widow and the children of the deceaced still have the right to continue leaving in the house.

AMISSAH-ABADOO v. ABADOO [1974] GLR 110-132
HIGH COURT, CAPE COAST
12 NOVEMBER 1973
EDWARD WIREDU J.

The plaintiff in this action is the younger brother, customary successor and the head of the immediate family of the late lawyer Abadoo of Cape Coast and the defendant is his lawful widow. The controversy between them is about the ownership of house No. G8/2, Tantri Lane, Cape Coast, and a plot of land situate at Kotokuraba also in Cape Coast.
The declaration sought by the plaintiff in his capacity as the head of the late Abadoo's family reads as follows:

> "A declaration that house No. G8/2, Tantri Lane, Cape Coast, as well as a plot of land at Kotokuraba Road, Cape Coast, are the property of the plaintiff's family and not the private property of the late barrister D. Myles Abadoo."

The defendant for her part by her counterclaim claims a declaration:
"(a) That house No. G8/2, Tantri Lane, Cape Coast, as well as the plot at Kotokuraba Road, Cape Coast, were acquired by the individual effort and individual means of the late barrister Abadoo and as such [are] the self-acquired property of the late barrister Abadoo, his heirs and successors and not the property of the plaintiff's family.
(b) That the defendant and her children of the marriage between her and the late barrister Abadoo are entitled to remain in the said house No. G8/2, Tantri Lane, Cape Coast."
It is not in dispute that during the lifetime of the late lawyer Abadoo he lived in the disputed house exclusively with the defendant and their children. The events which seemed to have provoked the institution of the plaintiff's action are that by an instrument dated 19 December 1964 and described as the last will and testament of lawyer Abadoo, which instrument was by consent admitted in this proceeding as exhibit 1 the two disputed properties were devised as follows:

> "(a) I devise my house No. G8/2 situate at Tantri Lane, Cape Coast, which was built solely by me during the lifetime of the parents in 1929-1930, without any assistance financially or otherwise from any member of the family upon the earnest request of the parents in order to prevent the erosion of the land on the western side of Ebenezer Hill house No. G9/2 due to rainfall to my dear wife Chrissie Millie Abadoo and my three sons, namely,

Josiah Myles Abadoo, Daniel Myles Abadoo, Junior, and John David Ekum Abadoo all of Cape Coast together with all the furniture, pictures, bedsteads and things therein, to hold, possess and enjoy the same absolutely as tenants in common. Also to my said wife and her children, I devise my house No. E30/2 situate at Elmina Road, Cape Coast, for their absolute use and to hold, possess and enjoy the same as tenants in common . . .

(i) I devise my land situate at Kotokuraba Road, Cape Coast, measuring 50 feet by 100 feet long sold by nephews, the Holdbrooks, to establish a cornmill business at Amanful and re-bought by me through the late Sam Bentil, a licensed auctioneer, Cape Coast, to my second son Daniel Myles Abadoo, Junior, to erect with his own money a modern building or house thereon for his own use as soon as would be possible for him to do so."

The plaintiff's statement of claim shows that on the death of lawyer Abadoo his private apartments in the disputed house were closed by the family apparently in accordance with customary law practice. This action by the family appeared to have caused some concern to the defendant and her son Daniel who apparently are devisees of these properties under exhibit 1.

Paragraphs (10)-(13) of the plaintiff's statement of claim which set out in detail what seemed to have sparked off the present action read as follows:

"(10) On or about 31 December 1972, the defendant and her son Daniel Abadoo informed the plaintiff and other members of his family that if by 10 a.m. that morning they had not surrendered the keys of lawyer Abadoo's private apartments (which apartments according to custom were to remain closed for a year after the death of lawyer Abadoo) the plaintiff and his family would be taken to the Regional Commissioner, there to face the consequences."

(11) When this threat was ignored the defendant's son forcibly broke open the closed apartments and ransacked the rooms: Daniel Abadoo explained his conduct by saying that the house had been bequeathed to his mother and her children and that he was the sole executor of his father's will.

(12) The plaintiff's mother Sarah Abadoo bought a plot of land at Kotokuraba Road, Cape Coast, adjoining late Winful's house,for plaintiff's brother-in-law one Holdbrook then in Nigeria. After his death the land was given to plaintiff's sister Mrs. Holdbrook. After her death her children mortgaged the land to raise funds for erecting a cornmill. Later lawyer Abadoo redeemed the land on the understanding that the children would repay him. In the event lawyer Abadoo died without the children being able to refund the sum of ¢180.00 involved.

(13) This land the aforesaid Daniel Abadoo, defendant's son now claims has been bequeathed to him under the so-called will of his father: Wherefore the plaintiff claims as per his writ of summons."

These averments are however denied in the statement of defence. When the plaintiff's writ was served on the defendant, she entered an appearance under protest and later filed an application to have the plaintiff's writ set aside and his action dismissed as disclosing no reasonable cause of action against her. This application was filed the very day that the plaintiff's statement of claim was filed. The application was opposed and was later dismissed (in my earlier ruling reported in [1973] 1 G.L.R 490), principally on the ground that it was brought prematurely. The defendant however did not leave that point to rest there and by paragraphs (16) and (17) of her statement of defence summarised the same point as follows:

"(16) The defendant says that the action against her is misconceived and in law not maintainable against her but rather against the executor or the appropriate person. Hence the action ought to be dismissed."

"(17) The defendant says that the plaintiff is not entitled to any declaration either in respect of house No. G8/2, Tantri Lane or the plot on which the said house stands."

This brings me now to the most controversial aspect of the case, namely, the disputed house No. G8/2, Tantri Lane, Cape Coast. Even though the pleadings on this aspect of the dispute are very elaborate, not enough evidence was produced to enable me to settle most of the matters upon which issues were joined between the parties. The little evidence which was

produced at the trial makes me wonder where solicitors who drafted the pleadings in this case obtained their materials from. The parties to this suit who were the only witnesses to testify at the trial appear not to have much personal knowledge about the history of the disputed house. The defendant did in her evidence state that she had nothing more to say about the building than what her husband had stated in exhibit 1. Of course one can understand her stand as she had not then officially been admitted into the Abadoo family when the building was under construction. The plaintiff also did not have much to say about this and although he testified that the idea of constructing a building on the land was mooted at a family meeting, his answers to questions in cross-examination revealed that he was not personally present at that meeting and therefore did not know actually what took place. Apart from what is contained in exhibit 1 about the disputed house there is no other preferable evidence on record about how the disputed house came to be constructed. I have therefore resolved to go by the contents of exhibit 1 as the nearest approach to the true facts about the history of the disputed house. There are however two main matters about which the facts appear not to be in hot dispute between the parties. The first is about the funds and materials provided for the construction of the building. The overwhelming facts show that the funds and all materials provided for the construction of the disputed house were solely from lawyer [p.119] Abadoo. In other words the disputed house was built by lawyer Abadoo out of his own private means. Even though the plaintiff pleaded in paragraph (8) of his statement of claim that:

> "House No. G8/2, Tantri Lane, Cape Coast, was as a result built on the family land principally from funds provided by lawyer Abadoo but with contributions from other members of the family in particular from lawyer Abadoo's mother who in addition actually supervised the building in the absence of lawyer Abadoo,"

the evidence produced by him satisfies me that the nature of the contributions allegedly offered by lawyer Abadoo's mother and his sister (i.e. supervising the construction in his absence and rendering him other services such as cooking for him) were not the nature of contributions within the meaning of the phrase "substantial contribution" as enunciated in Larbi v. Cato [1959] G.L.R. 35 as to even taint the disputed house with family character. The evidence shows that lawyer Abadoo was a bachelor at the time of construction of the disputed house and that he and his other brothers and sisters were staying with their parents in house No. C9/2 just opposite the disputed house so that the nature of services rendered him by his mother and sister as stated above do not go beyond what he would ordinarily have enjoyed from them under those circumstances. I hold in my judgment therefore that house No. G8/2, Tantri Lane built by the late lawyer Abadoo out of his private resources did not become family property within the meaning of "substantial contribution" as enunciated in the Larbi case (supra) merely because of the casual supervision by his mother in his absence nor did the cooking services rendered by his sister satisfy the "substantial" requirement.

The other matter about which there did not seem to have been much controversy is the land on which the disputed house stands. The evidences shows that this land was a portion of land with a building thereon conveyed as a gift by lawyer Abadoo's father to his wife (the mother of lawyer Abadoo) and the children of their marriage. The gift was by a deed dated 28 August 1891 and was admitted by consent as exhibit A. By the said deed the donor conveyed his interest therein to his wife, children, their "heirs and assigns."

The main contention of the plaintiff as submitted by his counsel was that by the said deed the donees took the land and held it jointly as indivisible family property. The family in this sense according to learned counsel for the plaintiff was constituted by the wife (i.e. the mother of the plaintiff) and the children of her marriage with the donor and their "heirs and assigns." Counsel further submitted that the limitation as to use and the right of inheritance as enjoined on the donees by the directions of the donor as contained in exhibit A showed beyond doubt that the gift was to find its way ultimately into the matrilineal family of the Abadoos. Founding

himself on the cases of Owoo v. Owoo (1945) 11 W.A.C.A. 81, Beyeden v. Bekoe (1952) D.C. (Land) '52-'55, 38 and Ansah v. Sackey (1958) 3 W.A.L.R. 325 learned counsel contended that lawyer Abadoo had only a life interest in the house he built on the joint family property. He argued that his dealings in respect of the disputed house could not go beyond his life interest and therefore he could not alienate beyond that interest. Counsel further argued that the family on the evidence was in effective occupation of the area on which the house was built. Present at the site according to counsel was a well in use and a play ground for the family. Counsel submitted that the site was in active use by the family. He contended that the request to Abadoo to put up a building on the land was to check erosion and thereby to protect the family land. Learned counsel also referred to the case of Mensah v. Lartey [1963] 2 G.L.R.92, S.C. and submitted that since Abadoo's father had gifted the said piece of land without any limitation as to what estate each of the donees was to have in the property, such property was to be considered as their joint family property.

For the defendant it was submitted that on the proper interpretation of exhibit A the land on which the disputed house stands was conveyed to the plaintiff's mother and her children by way of gift so that the property became their absolute property which they could assign or alienate. Founding himself on the Lartey case (supra) counsel submitted that the family contemplated under exhibit A were the donees, their children and their children's descendants and not family in the accepted customary law sense as argued by counsel for the plaintiff. Counsel argued that where on the face of a document property is given to be enjoyed in perpetuity then any condition which limits that enjoyment was a mere surplusage. It was therefore contended on behalf of the defendant that the words used in exhibit A by the donor were contrary to the customary law view taken by the plaintiff's counsel. It was next submitted on behalf of the defendant that granted that the land on which the disputed house stood was held to be family land, the family's interest was limited to the land itself as distinct from the house which stood on it. For authority learned counsel cited the case of Adu v. Sarkodee Addo, Court of Appeal, 31 March 1969, unreported; digested in (1969) C.C. 59. Counsel further contended that on the authority of Amoabimaa v. Okyir [1965] G.L.R. 59, S.C. in the absence of any proved fact that the family was in occupation of the site where the late lawyer Abadoo had built, the disputed house became his self-acquired property which he could dispose of or alienate by will. Learned counsel finally argued that should the court find on the evidence that the disputed house was put up on a site which was in use by the family then notwithstanding the fact that the property became family property in which the late Abadoo had an interest limited to his life, the defendant as his widow and her children have a right of occupation under customary law.

It is clear from the submissions of learned counsel that there is no divided view on what interest the donees took under exhibit A. Both counsel agree that on the true construction of exhibit A, the donees held the gift as indivisible family property in which until disposed of by consent of the members they all have a joint interest with none of them having an alienable interest. The only area of disagreement amongst them is their respective views about who constitute the family in the sense used in exhibit A. Whilst learned counsel for the plaintiff favours a construction in favour of the matrilineal line, counsel for the defendant favours a construction in favour of the children and descendants of the donor. The construction of exhibit A (the deed of gift) has not been an easy task. The document itself has been drafted in English form and follows the strict pattern of pre-1881 conveyancing law practice. The difficulty about its construction has been brought by the introduction of native customary practice and usages into its main body and the employment of some words unknown to customary law. The donor however directed that the property was to be held as family property in the operative part of exhibit A. The relevant portion of exhibit A reads as follows:

"THIS INDENTURE made the 28th day of August one thousand eight hundred and ninety one between Daniel Myles Abadoo of Cape Coast in the Gold Coast Colony on the West Coast of Africa trader hereinafter called the donor of the one part Sarah his wife and Josina Daniel Myles Kezia Yarkoon and Joseph Amissah the children of the aforesaid donor by his said wife Sarah who with her said children are hereinafter called the donees of the other part witnesseth that the said donor as well for and in consideration of the natural love and affection which he hath and beareth unto each of the said donees as also for the better maintenance support livelihood and preferment of each of them the said donor hath given granted aliened delivered and confirmed and by these presents doth give grant alien deliver and confirm unto the said Sarah his wife and his children by the said wife to wit Josina Daniel Myles Keziah Yarkoon and Joseph Amissah and such other children which he the said donor may have by his said wife Sarah their heirs and assigns all that piece or parcel of land situated close to Commercial Road in Cape Coast aforesaid as the same is more particularly delineated and described in the plan drawn hereon together with the messuage or dwelling house thereon erected and with the rights easements and appurtenances to the said premises or any part thereof by reputation thereto belonging or therewith or heretofore held or enjoyed and all estate and interest of the said donor therein to have and hold the said piece or parcel of land hereditaments and all other the premises herein before expressed to be hereby granted and confirmed or mentioned and intended so to be with their and every of their appurtenances unto and to the use of the said donees their heirs and assigns forever in strict accordance with the native law and custom relating to the enjoyment of and the succession to family property which native law and custom shall regulate the rights of each of the donees in the hereditaments and premises hereby granted or expressed so to be."

The phrase "heirs and assigns" are words of limitation and I have no doubt that they were used in that sense in exhibit A. They are really matters of real property law with no conveyancing virtue. The addition of the word "assign" to the "heirs" was also used merely as a declaratory power of alienation in the donees which they would have had anyway without it. The significance of the words of limitation is that in pre-1881 deeds, in order to convey the fee simple (inheritable freehold estate) the use of such words were necessary: see Williams on Real Property, p. 121. What I have been able to make out of the addition of these words of limitation in exhibit A is that the deed operates to convey by way of absolute gift to the donees and their heirs as purchasers the whole interest of the donor in the property the subject of the gift. In the case of Mensah v. Lartey [1963] 2 G.L.R. 92, S.C. (referred to by learned counsel for the plaintiff) where a father by a deed of gift conveyed as family property a piece of land with building thereon by way of absolute gift to three of his eldest sons all of different mothers to be held by them in trust for themselves and their brothers and sisters, it was held (as stated in the headnote at p. 92):

"that in both patrilineal and matrilineal societies in Ghana where a man makes a gift of property to his children without any limitation as to the estate which the children are to have in the property, such property is considered as family property. The children constitute the family for the purpose of holding and enjoying the said property in perpetuity. The concept of family property imports the principles of non-divisibility of the said property except by the consent of the family, of the members of the family having joint interest in the property and of the appointment of the head of family as the `caretaker' of the property. Of family property there is, strictly speaking, no devolution on intestacy for the property remains in the family at all times. A therefore did not have any alienable interest in the property which could be inherited by the plaintiff"

Akufo-Addo J.S.C. (as he then was) in his judgment said, pp. 95-96 that:

"The family of children constituted by a gift from their father is made up of the children, their children's children and descendants irrespective of sex, for the general notion underlying the customary law in this regard is that a father by a gift to his children evinces a desire that his memory be perpetuated by his descendants. The law does not presume an intention on the

part of a father making a gift to his children that the gift should ultimately find its way into the matrilineal family of the children (that is where the children belong to a matrilineal community), for if such were the intention of man he would make a gift to his wife (the mother of the children) and not to the children."
In his book on The Law of Testate and Intestate Succession in Ghana, Ollennu at p. 179 notes: "Another instance of mixed paternal and maternal succession occurs, where a man of a maternal system who has his own farms or houses, to the knowledge of his family makes a gift of a house or farm to his wife and children for their use without making a formal gift of it to the wife exclusively . . . Such property cannot be claimed by the wife's family because it did not belong to her either by gift or by any other means of original individual acquisition."
In the present case the donee family is constituted by the mother and her children by her marriage with the donor and their heirs. They are to hold the property "forever in strict accordance with native law and custom relating to the enjoyment and of succession to family property which native law and custom shall regulate the rights of each of the donees." The question here is, is this limitation as to use as directed by the donor in accordance with the general notion underlying the customary law as stated above? I have no doubt in my mind that the limitation as to use and enjoyment of the gift as directed by the donor in exhibit A is in accord with the general notion underlying the customary law as enunciated in the Lartey case (supra). The inclusion of the mother in this case makes no difference because in matters of succession to property children are the proper inheritors of their mother: see Sarbah, Fanti Customary Laws (1897, 1st ed.) at p. 256 and the dissenting judgment of Akufo-Addo J.S.C. in Krabah v. Krakue [1963] 2 G.L.R. 122 at p. 138, S.C. And according to Ollennu in his book (supra) the property cannot be claimed by the wife's family because it did not belong to her exclusively. So that in the final analysis the property will find its way into the hands of the children. In my judgment therefore the land on which the disputed house stands is the property of the plaintiff's family constituted by his mother and the children of her marriage with the donor, their children's children and their descendants of which family the plaintiff is the head.
Even if the above construction which I accept to represent the donor's intention as expressed in exhibit A is wrong and the donor under exhibit A intended the property to be enjoyed in such a way that it found its way ultimately into the matrilineal family of the Abadoos as was contended by learned counsel for the plaintiff, a construction which I very much doubt, the one significant thing about the property is that in either way it will be held as joint indivisible family property in the enjoyment and use of which the late lawyer Abadoo was one of the beneficiaries and in the use and enjoyment of which none of the beneficiaries has an alienable interest.

This brings me to the question as to the interest which lawyer Abadoo had in the house he built on this land. In the case of Amoabimaa v. Okyir [1965] G.L.R. 59, S.C. Ollennu J.S.C. in his judgment at pp.63-64 had this to say about the interest a family member acquires in respect of family property he reduces into his occupation:
"The law as to title of a subject of a stool or member of a family to stool or family land in his occupation is that by his occupation, he acquires a determinable or usufructuary title to the portion he so occupies; that title is a burden on the absolute title of the stool or family; it vests in the subject or the member of family an exclusive right to possession; it is the most perfect estate that an individual can have in land, a freehold interest of inheritance. That title prevails against the whole world even against the stool, community or family in which the absolute title may be vested. In some respects that possessory title vis à vis the absolute estate is comparable to the possessory title of a tenant for a term of years under the common law vis à vis the reversion of the landlord which possession, while it subsists, is good against the whole world including the landlord: see North Western Railway Company v. Buckmaster ((1874) 10 Q.B. 70 at p. 76); but it is superior to the possessory title of the tenant, in that

while the title of the tenant is limited to a definite term of years or a term that is definable: see Sevenoaks, Maidstone and Tunbridge Ry. Co. v. London Chatham and Dover Ry. Co., ((1879) 11 Ch.D. 625 pp. 635-636), that of the subject or member of family is in the nature of an inheritable freehold estate which continues indefinitely so long as the subject acknowledges his loyalty to the stool or family. Therefore a hostile or an unfriendly entry by a stool upon a portion of stool land in the possession or occupation of a subject or by a family upon land in the possession or occupation of a member of the family is against all principles of customary law. Such an entry is an undue and arbitrary interference by the stool or family with the title and possession of the subject or member, it is discountenanced by customary law; in, short, it is unlawful." Later in the course of the judgment his lordship had this to say at p. 65, "a person's self-acquired property includes a portion of family land which he has reduced into his exclusive possession."

In an earlier case of Ansah v. Sackey (1958) 3 W.A.L.R. 325 it was decided by Ollennu J. (as he then was) as stated in the headnote at p. 326 that:
"the interest retained by a family member in buildings erected by him, using his own private resources, on family land otherwise unbuilt upon is an interest limited to his own life. Although the life interest itself is fully alienable (e.g., it can be given as security for a loan) it is not open to the life tenant, unless he acts with the consent and concurrence of the head and principal members of the family, to alienate any greater interest or estate. On the death of the life tenant the interest in the property vests in the family and any disposition by the life tenant purporting to have any other effect is ineffective."
The customary law position of the interest retained by a family member in buildings erected by him using his own private resources on family land appears to have been widely generalised in the Sackey case (supra) and so is the position with regard to a person's self-acquired property enunciated in the Amoabimaa case (supra). Ollennu himself acknowledges this when in his invaluable book Customary Land Law in Ghana after reviewing the various decided cases on the point (among which were the Sackey case (supra) the Owoo case (supra) and Santeng v. Darkwa (1940) 6 W.A.C.A. 52 he had this to say at p. 42:
"It is submitted, however, that the correct statement of custom is that if a member of the family is granted a portion of the general family land, i.e., a site which has not previously been granted to another individual member of the family, or a site which another individual member has not previously effectively occupied,the house which he builds on such a site, by his independent effort and his own individual means, becomes his self-acquired property,which he may alienate inter vivos or by testamentary disposition. But a building which the individual member of a family is permitted to erect on family land in use by the family, e.g., a site on which family structure of any sort exists, is property in which the individual member who builds has a life interest only; it is to be used and treated in every respect as his individual property, except that he cannot create an interest in it which may subsist after his life."
One matter of some significance about the above proposition of the law as stated by Ollennu which should not be allowed to pass without comment is the qualifying phrase "a site on which family structure of any sort exists." The above quotation, it is submitted with respect, needs some qualification in the light of what the learned author himself observed on the Santeng case (supra) as to the state of condition of the "structure." It is submitted therefore that for the structure to be taken into consideration in determining the character of the property there must be some evidence as to the nature of its state of condition, for where the structure is already ruined or has been allowed to waste it will be inequitable to conclude that its mere existence is enough to satisfy the requirement as to the "family's occupation."

The facts before me in this case however show that the family was in effective occupation of the site on which the late lawyer Abadoo built. The plaintiff's evidence which I accept shows there was in existence a well, and ground prepared for outdoor games which was in use by

members of the family and that one of the primary reasons why lawyer Abadoo was requested by his parents to put up the disputed house was to protect the land by checking the threat of erosion. Under those circumstances where the structures had to give way for the construction of the disputed house, lawyer Abadoo who put up the house on that site could not dispose of the house beyond his life. He had only a life interest in the building he put up. He did not therefore in the absence of established evidence that a gift of that site was made to him, [p.126] have any alienable interest in the building which he could dispose of by will. This finding concludes the case against the defendant in so far as the first leg of her counterclaim is concerned.

The next interesting submission by learned counsel for the defendant which deserves consideration is the submission based on the maxim quicquid plantatur solo, solo cedit which according to learned counsel should be held not to apply to the facts of this case since by exhibit 1 the donor directed the donee's interest in the property to be regulated by native law and custom. The argument of learned counsel as I understood him was that since lawyer Abadoo was not the owner of the land on which he built, but put up the building with leave and licence of the members of the donee family then on the authorities as they stand now, the non-application of the maxim in respect of lands held under customary law should avail the claim by the defendant. There is no doubt that this submission is ingenious and in fact it was one of those principles of the customary law which had engaged my mind since arguments in this case commenced but I doubt whether on the already firmly established customary law relating to the rights retained by members of family in respect of family land which they reduce into occupation, it will be safe to extend the non-application of the maxim to cover such situations without creating an unwarranted innovation into this well-established principle. The present state of the law in this regard is what is stated in the case of Adu v. Sarkodee Addo, Court of Appeal, 31 March 1969, unreported; digested in (1969) C.C. 59. This case confirmed with some variation the principle enunciated in Asseh v. Anto [1961] G.L.R. 103, S.C. the leading case on the non-applicability of the above maxim to lands held under customary law. The state of the present law on the matter is that, where the consent of the owner of the land has not been sought and given and where no plea of acquiescence avails against the owner of the land the maxim is clearly applicable: see Sarkodee Adoo's case (supra). In other words a trespasser who is warned off but persists in constructing a building on land he does not own, will have to lose the building he erects. It is significant to note that the main distinguishing features about all the cases referred to in the Anto case (supra) in which the maxim had been held not to be applicable were cases where consent or licence was given and more important, persons to whom the consent and licence were given were all strangers to the land on which they built or cultivated. It is of further significance to note that in all those cases the rationale underlying the decisions seems to stem from the inequitable situation which would be created if the land owners were permitted to claim the property on their land which was put up by strangers with their full knowledge and consent. It is submitted therefore that in order to exclude the application of the maxim in respect of land held under customary law it must be established that:

(a) the owner of the land either consented or granted leave and licence or in the alternative, he had acquiesced in the construction of the building so that it will be inequitable to permit him to claim what is on the land and which he did not build, and

(b) that the persons who erected the building or cultivated the farm must be strangers to the land on which they built or farmed.

It is submitted further that there should be no extension of the non-applicability of the maxim to cover cases like the present one where the person constructing the building is himself a member of the family owning the land. Quite apart from the fact that the customary law covering such cases is firmly well-established, it is in consonance with equity, because whilst he lives he is permitted to do whatever he likes with the building he erects without reference to the other members of the family save that he is incapable of disposing of an interest beyond

his life. In my judgment therefore on the facts of the present case the defendant cannot avail herself of the non-applicability of the maxim quicquid plantatur solo, solo cedit.
The last and perhaps the most effective and persuasive submission made on behalf of the defendant in respect of the disputed house was the submission relating to her right to occupy the disputed house with her children as the widow of lawyer Abadoo. This submission was resisted by Mr. Short who contended that only the children's right of occupation in their father's house was recognised under customary law. For authority he cited the case of Boham v. Marshall (1892) Sar.F.C.L. 193. We shall now examine the position of a husband's responsibility to provide means or support, accommodation, etc. for his wife and see where this responsibility ends in order to ascertain what the true position is under customary law.
Ollennu in his book on The Law of Testate and Intestate Succession in Ghana discusses this topic from pp. 223-229. Under the heading "Widow of the deceased," the learned author reviews exhaustively what some text-writers (notably Sarbah, Danquah, Rattray and Field) say and writes as follows at p. 225:
"So great is the importance which customary law attaches to a man's liability to maintain his wife, that his failure to maintain her is one of the very few grounds upon which a wife may obtain divorce against her husband by customary law. The liability of the husband to maintain and provide accommodation for his wife devolves upon his family or successor, a responsibility which can only determine upon death of the wife or upon the determination of the marriage in a lawful manner."
He concludes as follows at pp. 227-229:
"To conclude this part of the subject of the right of the widow to maintenance by the successor of her late husband, and particularly out of the late husband's estate, we would refer to the judgment of the Akim Abuakwa Paramount Tribunal in Bede v. Sakyiama ((1914) D.C.A.L. 201, 202.). The plaintiff in that case claimed against the defendant, successor to her late husband, allotment to her of 1\3 share of the estate of her late husband to which the defendant had succeeded. The deceased and both parties [p.128] to the suit were christians (Presbyterians). The plaintiff was an old woman and there was no question that she could re-marry and she had no intention of taking formal divorce of her late husband's family, and it was unfair and against good conscience in such a state of affairs that the successor should divorce her formally and give her a send-off. At the same time, as a christian, the defendant felt he could not keep the woman as a formal wife and be responsible for her. The Native Tribunal held that in the peculiar circumstances of the case, natural justice required that the successor should, in lieu of permanent maintenance, give to the widow a share of her late husband's estate, and fixed that share at one-third. In the course of their judgment the Tribunal said: `Considering the matter from the point of view of the Customary Law, it has been suggested by the Defendant that a widow is not entitled to succeed to a husband's property, at the same time, according to the Native Custom, the successor of the deceased husband will be bound to look after or maintain during her lifetime the widow who is very old and unlikely to marry again. The fact that the Defendant is a Christian and not allowed to keep this woman as wife justifies the Tribunal in ordering that some provisions be made for maintaining the Plaintiff.

The Tribunal therefore decides that the cocoa plantation of Bosomtwe, deceased, not excluding Nananko farm, should be divided into three the Plaintiff to have one-third portion and the Defendant two-thirds. Further, Defendant to pay £5 to the Plaintiff for having been driven away from her deceased husband's house.'
From this decision of the Tribunal we deduce that in suitable cases, the Court can, in lieu of an order for permanent maintenance for wife and children of a deceased, direct that a specific share of the estate up to about one-third, be given to the widow or children. The parties may also agree to such an allocation and their agreement will be given effect to at law. The decision

in effect also shows that the right of a widow to reside in her late husband's house is enforceable at law."
The Bede case (1914) D.C.A.L. 201 referred to by Ollennu even though decided by the Akim Abuakwa Paramount Tribunal was based on a principle of Akan customary law. It is clear from the authorities that the customary law does not only recognise the rights of the children but also of the widow to live in her deceased husband's house. I have examined also the case cited by learned counsel for the plaintiff and nowhere in that decision is the view held by counsel supported. After examining the views of some of the text-writers and some decided cases on the matter Ollennu unfortunately summed up the customary law rights of a widow of a deceased and her children as follows in his book (supra) at p. 226:
"Summing up, we would say that in both the matrilineal and patrilineal systems, the widow or widows are entitled to support from the family and to live in their deceased husband's house during widowhood. `On the death of the husband, his widows surviving and their children by him are entitled to reside in any house built by him, and the children and their issue have a life interest in such a house, subject to good behaviour."

This view according to him expresses the modern accepted customary practice at least amongst the Akan speaking tribes throughout the country. It also appears to be the view echoed by most lawyers and the courts have, on some occasions, lent some support to it. It is apparent however that the law as enunciated above appears to be confined to the self-acquired buildings of deceased persons properly so described; in other words, a house built by the deceased on his own acquired land. It does not cover cases where a house is put up by a deceased on family land under circumstances where, having regard to the then existing nature of the land, the deceased had only a life interest in the building and cases where the deceased himself had no building but stayed with his wife and children in a family house. It is also doubtful whether the phrase "subject to good behaviour" tacked on as a limitation to the right of the widow and the children to reside in the deceased's self-acquired house represents the true position of the law. Sarbah at p. 105 of his book Fanti Customary Laws (3rd ed.), stated the customary law as follows:
"When a person such as A dies, having his own acquired property, moveable and immovable, he is not succeeded by his sons, free-born or domestic, whose only right is that of a life interest in the dwelling-house built by their father, the deceased, on a land not family property. For if the house be built on family land, the children have only right of occupation during good conduct. If anyone living in the house of his father deny the right of the proper successor, or commit waste or injure the house, or encumber or sell it, he thereby forfeits his life interest. Such person must make the necessary repairs, and may quit if the successor requires it for himself as residence."(The emphasis is mine.)

In Halmond v. Daniel (1871) Sar.F.C.L. 182 at pp. 182-183 the law was stated thus:
"The custom is that if a man had a father either by country marriage or otherwise, and the father lived in the house with wife and child, and he died, all the deceased's property, except the house, goes to his family. The father's gun and sword and house go to the son, and the saying is, `The father dies and leaves his house to the son.' The family take the property, but do not turn away the child. The son lives in the house with the family of his father, supposing they had nowhere to live, and the son does not turn them away. If it is a family house, the head occupies as head yet he does not turn away the son from the house, except the son, after he has grown up, finds himself competent to build and leaves for the purpose of doing so. But he would not under any circumstances be turned out by the head of the family. The family would not be turned out for the son's accommodation; if they had nowhere else to live, they would live in the house. Where there is room enough for all (son and family), the head of the family arranges the rooms to be allotted to each. My answer of the descent of house to the son applies in case it has been built by the father; the family would be allowed to live

in it if they had nowhere else to go. If they had, they would leave the father's house to the son. Son could not sell the house except with consent of the family."

(The emphasis is mine.) It is clear from the above passages from Sarbah on whom Ollennu relied for most of his materials that the correct statement of the law of the Akans is that children at least and their mothers (i.e. the widows and their children) have a possessory life interest in their father's self-acquired buildings and that this possessory interest is only subject to the family's title to the house but takes precedence over it, so that the family cannot sell the house above their heads. So also does the customary law recognise the eldest sons' claim to the instruments of trade, swords and guns of their fathers. It appears that personal household goods including furniture go to the children: see Bentsi-Enchill on Ghana Land Law (1964 ed.) at p. 169. This view of the law is more in accord with equity than the view held that widows and children have no interest in their deceased husband's and father's estate respectively and that the ideas of the customary law as expressed in Swapim v. Ackuwa (1888) Sar.F.C.L. 191, whereby the prerogative of the family to do whatever they liked with the deceased's house to the extent of even throwing the widow and her children out in so far as the self-acquired house of the deceased is concerned have never been good customary law and that if they ever existed then those ideas belong to a different age and have no place in this second half of the twentieth century: see the case of In Krabeah v. Acquakoah (1887) Sar.F.L.R. 50. The only limitation on the widow's right to reside in the self-acquired house of her deceased husband is "during widowhood" so that if she remarries then she loses her right of occupation. It follows also that the decision in Kwakye v. Tuba [1961] G.L.R. (Pt. II) 535 that children in matrilineal societies have no interest whatever in their father's estate except that they are entitled to maintenance and "subject to good behaviour to live in their father's self-acquired property" is too much of a generalisation and needs to be qualified. Here a distinction must be made between a family house in which the father lived with his wife and children and the father's own self-acquired house in which he stayed exclusively with his wife and children as is common these days.

In the former case (i.e. where the deceased lived in a family house with his wife and children) the widow and her children on the authorities have no well-recognised interest save a right of occupation. Thus in Swapim v. Ackuwa (supra) it was held by Smith J. at pp. 192-193 that the successor:
"could ask the children to go out on any occasion for any reasonable grounds, and where the interest of the family is at stake, or their right is disputed, or even merely to secure and promote the interests of the family.

The right of the successor as stated above is the limitation on the right of the widow and her children to reside in such family house after the death of the father. This limitation is what is summed up under the phrase "subject to good behaviour." This phrase it is submitted can be tacked appropriately to only a house originally family property and not the self-acquired house of the deceased. In the latter case (i.e. where the house is designated self-acquired of the deceased) the customary law recognises the prior possessory life interest in the use and enjoyment,i.e. occupation of the children and the widow's right of occupation during widowhood. The decision in Bede v. Sakyiama (supra) shows also that the right of a widow to reside in her deceased husband's house is enforceable at law. The injustices and hardships caused to children and widows by tacking on the phrase "subject to good behaviour" as a limitation to their rights to reside in houses which their deceased fathers and husbands respectively die possessed of, irrespective of how they came by such property, have been ignored indiscriminately in the past to the detriment of the children and widows. The conduct of the family flowing from this neglect must be frowned upon as behaviour not countenanced by customary law and calls for an urgent need for a more realistic and practical re-appraisal

of this aspect of the customary law in view of the fast social changes in the country caused partly by the high rate of inter tribal marriages and partly by the development of a money economy which has provided other modes of acquiring wealth; and I am of the view that in appropriate circumstances the decision in Bede v. Sakyiama (supra) which calls for a share of the estate for widows will be given the blessing of a binding authority by the superior courts. This prior right of occupation of children and widows extends to situations like the instant case where the deceased built on family land under circumstances where having regard to the existing nature of the land his interest was limited to his life but in which house he stayed exclusively with his wife and children: see also Ankrah v. Ankrah (1957) 3 W.A.L.R.104, P.C. and Quarcoopome v. Quarcoopome [1962] 1 G.L.R. 15. These cases decide the rights of children to succeed in certain circumstances.

The possessory interest of children in respect of the deceased's self-acquired house does not however mean that they should deny the family access to the house where it is possible to accommodate those without rooms to stay in, but any undue interference against their possessory interest should be reasonably resisted. It is of some regret that some of the text-writers writing in the second half of the twentieth century failed to give any serious consideration to the law as expressed in the Halmond and Bede cases (supra). This would have gone a long way to assist in settling the confusion always created by the family in asserting their claim to the deceased's property to the extent of driving the children and widows out of the deceased's house, thereby wrongly publicising the fate of issues born out of customary marriage. In the instant case I have already held that the children of the defendant have an interest in the land conveyed by exhibit A. It follows therefore that they also have, quite apart from their customary law right of life occupation, an automatic interest in the building put up by their deceased father on that land. The defendant even though a widow of the late lawyer Abadoo by marriage under the Ordinance is a person subject to the customary law just as her husband. Her marriage with the late lawyer Abadoo was preceded by an engagement which has all the attributes of a customary marriage (i.e. consent of the parties and their parents). She is in short the widow of the deceased in the eyes of the customary law. She was the person called upon to perform the customary rites of a widow during the funeral of the late lawyer Abadoo. She is therefore entitled under the customary law to a life occupation subject to her remaining such a widow for the rest of her life.

There will therefore be judgment for the plaintiff in his capacity as the most senior member of the donees of the plot of land conveyed by exhibit A, a declaration that the disputed house is the property of the family donee as defined in this judgment. He therefore succeeds on his claim in respect of house No. G.8/2 as if he has brought his action in that capacity. Leave is therefore granted him to have his original capacity amended accordingly: see Ababio IV v. Quartey (1914) P.C. '74-'28, 40. His action in respect of the Kotokuraba land having been brought against the wrong person and the plaintiff having also shown a want of capacity to sue in respect of that plot will be dismissed. The first leg of the defendant's counterclaim for a declaration that the disputed house and the Kotokuraba land are the self-acquired properties of lawyer Abadoo in the sense claimed by her is also hereby dismissed. Judgment is entered in her favour on the second leg of her counterclaim for a declaration that she as the widow of lawyer Abadoo is entitled to occupy the said house with her children for life in terms as stated above: see Bede and Halmond cases (supra).
Judgment for the plaintiff as head of donee family entitled to house. Plaintiff's claim for redeemed land dismissed.

DECISION.
Defendant's counterclaim upheld in part.

Also, in the case of BINEY v. BINEY [1974] 1 GLR 318-336
the court also stated that one difference between a house built by a member of a family on his self-acquired land which becomes family property upon his death intestate and a house which he builds on ancestral land, in which he thus has a life interest and which becomes family property upon his death, is that in the former case the property would be affected by the provisions of theMarriage Ordinance as to succession upon intestacy if the builder were married under the provisions of the Marriage Ordinance, or his children by Ga six-cloth marriage, if the deceased were an Accra man, would have an interest in it, whilst in the latter case neither the MarriageOrdinance nor the provisions of native custom as to [rights of] Ga six-cloth children would apply

BINEY v. BINEY [1974] 1 GLR 318-336
COURT OF APPEAL, ACCRA
8 MARCH 1974
SOWAH, ANIN AND KINGSLEY-NYINAH JJ.A.

KINGSLEY-NYINAH, JA
The late Joseph Peter Oconnor Biney, who died in 1910, was the father of the plaintiff and grandfather of the defendants. By a deed of settlement dated 12 March 1901 (exhibit A), he conveyed his freehold land with building thereon measuring 100 ft. by 100 ft. situated on the Korlena, James Town, Accra (now numbered D.540/1 Bruce Road and popularly known as "Bineyville") to his two brothers and a cousin, namely, Joseph Cobblah Biney, Charles Biney and Adolphus Joseph Ashun, as life tenants; thereafter to his four children as remaindermen, namely, the plaintiff, Claudius William Biney, Lily Mensimah Biney and Hendrick Frederick Bart Biney, "their heirs, and assigns" forever.

At the date of the plaintiff's originating summons, all the donees with life interests and the remaindermen under the deed of settlement had died, with the exception of the plaintiff, who was the sole survivor of the remaindermen. It was undisputed by the parties that the settlor (J. P. O. Biney, deceased) acquired from the Sempe stool a tract of land adjoining the area of 100 ft. by 100 ft. specifically conveyed by the deed of settlement (exhibit A); that this extra land was subsequently integrated into and treated as one whole with the demised land; and that the entire area was popularly referred to as "Bineyville."

In his evidence, the plaintiff alleged that Joseph Cobblah Biney, a former head of family, partitioned "Bineyville" into two parts and granted one part to the plaintiff and the other to the plaintiff 's brother Hendrick, the father of the defendants. Thereafter Joseph Cobblah Biney permitted the plaintiff to erect buildings on the portion granted him and to make extensions to the original building known as "Bineyville."

After reviewing the relevant evidence, the learned trial judge held first, that upon the death intestate of J. P. O. Biney, the accretion to "Bineyville," (which was not conveyed by exhibit A) became family property; and secondly, that the evidence adduced by the plaintiff in support of an alleged grant to him of a portion of the said accretion to the area covered by exhibit A was unsatisfactory and unconvincing. There was no evidence of the alleged grant of this land to the plaintiff by Joseph Cobblah Biney, the then head of family, with the concurrence of the principal members of the family. Thirdly, the learned judge held that the plaintiff failed to prove that the enlarged "Bineyville" had been partitioned between himself and his brother Hendrick by Joseph Cobblah Biney. The latter was a life tenant under exhibit A; and he collected rents from "Bineyville," not as head of family but as a life tenant in his own right. The plaintiff chose to build on family land which still remains family property. By operation of customary law, the buildings put up by him on the vacant portion of "Bineyville" would become family property on his death. The plaintiff has only a life interest in these additional buildings.

Apart from the land conveyed by exhibit A (the deed of settlement), and the extra land appurtenant thereto acquired from the Sempe stool, there was a third lot of landed properties which formed the subject-matter of the plaintiff's originating summons. These were two houses, Nos. D.50/3 and D.51/3, Adedainkpo Street, Accra, which were held by the learned judge to have become family properties after the death of Lily Mensimah Biney alias Mrs. Lily Aikins, the plaintiff's sister. She had inherited two-thirds of these Adedainkpo houses on her husband's death, while the remaining one-third vested in the family of her husband. On her death, Lily's estate devolved on her mother and her two brothers, the plaintiff and Hendrick (the defendants' father). By a family arrangement, the one-third share of the Aikins' family in the two houses was bought to enable both houses to be in the ownership of the Biney family as family properties. The two brothers had successfully challenged in the Ga Native Court their mother's testamentary disposition of these two houses and recovered them from her executors on the ground that they were family properties and could not therefore be devised by their mother as her self-acquired properties. The learned judge found as a fact that the rents accruing from both Adedainkpo houses had been shared between the plaintiff and Hendrick (the defendants' father), and that since the latter's death, his share had continued to be paid to his executors.
The plaintiff's action was occasioned by an alleged deterioration in the cordial relations previously existing between the two sections of the Biney family represented by the parties herein. According to the plaintiff, the third defendant had been abusing him and calling him a thief. His sisters and brothers had also been abusing him and causing wilful damage to his window panes; and they had unreasonably turned down his invitation to talk things over and resolve their differences with him before arbitrators. The defendants had been harassing him and had made it impossible for him to manage "Bineyville" with them jointly. The plaintiff 's allegations were denied by the defendants. The learned judge found no majority support among the members of the Biney family for the plaintiff's application for the partitioning of the family estate; and, as all members of the family have under customary law a joint interest in these family properties, the learned judge declined the plaintiff's invitation to order the partitioning of the Biney estate. By way of recapitulation, he concluded his judgment with four neat propositions summarising the legal and factual position vis-a-vis (a) the plaintiff's rights under exhibit A; (b) the accretions to the area conveyed by exhibit A; (c) the Adedainkpo houses; and (d) the court's incompetence to order partition of family properties against the wishes of the principal members of the interested family.

Learned counsel for the plaintiff first referred us to the scanty evidence about the donor's acquisition of the extra land not conveyed by exhibit A from the Sempe stool; and then pointed out that up to the time of the donor's death in 1910, this extra land was vacant and had not been built upon. According to the unchallenged evidence, the plaintiff built on it; let out the premises to tenants; collected, and enjoyed the accruing rent. Having conceded that the learned judge was right in holding that there was insufficient evidence to support a formal grant of the vacant land by the then family head to the plaintiff, learned counsel nevertheless submitted that the trial judge erred in holding that the plaintiff acquired only a life interest in the buildings he erected on his late father's Sempe plot comprised in the premises at "Bineyville" but not conveyed by exhibit A. In support of his argument he relied on the cases of Amarfio v. Ayorkor (1954) 14 W.A.C.A. 554 and Santeng v. Darkwa (1940) 6 W.A.C.A. 52; and submitted that where a person constructs a building on family land, unaided by any member of his family but through his own exertions, either with or without the permission of the family, the building does not acquire the character of family property, but it becomes his self-acquired property.

Furthermore, he contended that where a person did not receive prior permission from the family before building on vacant family land, but entered, as it were, into adverse possession thereof, he acquires a better right to the land. If unchallenged for a reasonable length of time, he must be deemed to be the absolute owner of any building erected on the land by him. For this latter proposition, he again relied on Santeng v. Darkwa (supra). The gist of his argument, if I understood him correctly, was that the plaintiff, having been suffered to enter into adverse possession of vacant family land, he cannot be ousted from the house built by him on he said vacant land. The house built by him must be deemed in law to be his individual property. I am afraid I see no merit in this latter argument. At customary law, possession however long does not ripen into ownership; there is no such thing in native customary law as a prescriptive title, and the mere use and occupation for some time cannot of itself oust an original title: see per Watson J. in Agyeman v. Yamoah (1913) D. & F. '11-'16, 56; Larkai v. Amorkor (1933) 1 W.A.C.A. 323; Lartey v. Hausa [1961] G.L.R, (Pt. II) 773; Ehuran v. Atta [1960] G.L.R. 224, S.C.; Adu v. Kuma (1937) 3 W.A.C.A. 240 and the following dictum of the Privy Council in Kojo v. Dadzie (1951) P.C. Appeal No. 61 of 1941, unreported: "It is well established Native Law and Custom that rights of ownership of land are not extinguished by lapse of time." On the facts as found by the learned judge, the vacant adjoining land acquired by the plaintiff's father from the Sempe stool became family property upon his death intestate. Consequently in the absence of any grant of that property by the family to the plaintiff, their title in it could not be ousted, notwithstanding the plaintiff's vested possessory interest in the buildings he erected thereon during his lifetime.

What, then, is the correct position of our customary law with regard to a building constructed by a member of a family on family land out of his private means or through his own independent effort? Sarbah in his Fanti Customary Laws (3rd ed.), p. 61 stated:
"In the coast towns a member of a family may make separate or private acquisitions, and dispose of them as he pleases in his lifetime, provided none of his family nor any part or portion of his ancestral or family property contributed to the acquisition of such property. But any property of his that remains undisposed of at his death, descends to his successors as ancestral property."
The learned author elsewhere at p. 60 defined ancestral property to include, inter alia, "Property earned by a person with or by means of ancestral property or its accretions."
In Ansah v. Sackey (1958) 3 W.A.L.R. 325 at pp. 329—330, Ollennu J. (as he then was) held, first, that the interest retained by a family member in buildings erected by him, using his own private resources, on bare family lands, that is family land which has no family buildings on it, is an interest limited to his own life. Although the life interest is fully alienable (e.g. it can be given as security for a loan) it is not open to the life tenant, unless he acts with the consent and concurrence of the head and principal members of the family, to alienate any greater interest or estate. On the death of the life tenant the interest in the property vests in the family and any disposition by the life tenant purporting to have any other effect is ineffective. Secondly where a family member, using his own resources, builds on family land by way of addition or extension to existing family property he acquires no special rights in the buildings he erects and these are deemed to constitute family property from the date of erection: see also Tetteh v. Anang, High Court, 14 December 1957, unreported, (cited in Ollennu, Customary Land Law p. 41) per Ollennu J. (as he then was) for the following relevant dictum:
"The one difference between a house built by a member of a family on his self-acquired land which becomes family property upon his death intestate and a house which he builds on ancestral land, in which he thus has a life interest and which becomes family property upon his death, is that in the former case the property would be affected by the provisions of the Marriage Ordinance as to succession upon intestacy if the builder were married under the provisions of the Marriage Ordinance, or his children by Ga six-cloth marriage, if the deceased

were an Accra man, would have an interest in it, whilst in the latter case neither the Marriage Ordinance nor the provisions of native custom as to [rights of] Ga six-cloth children would apply."
(The emphasis is mine.) In the case of Owoo v. Owoo (1945) 11 W.A.C.A. 81, the West African Court of Appeal upheld the trial judge's finding in accordance with the evidence of an expert witness who testified about the relevant Ga customary law that the testator, a former head of the Owoo family, had only a life interest in the building which he had been permitted by the members of his family to build upon their founder's tomb and surrounding land, and which was financed from his own private resources and for his own use. It upheld his further decision that the building became family property upon his death, even though he had a life interest in it during his lifetime. His mortgages of the premises during his lifetime were consistent with that life interest. The land remained family property throughout. On this issue of customary law, both the appellate court and the learned judge held that Ga customary law tallied with the Fante customary law as expounded by Sarbah. They dissented from the opposite conclusion reached by the same appellate court in the earlier case of Santeng v. Darkwa (supra) in which Sarbah had not been referred to; and they even went to the extent of supporting the dictum of the lower court in Santeng v. Darkwa that the building site, i.e. the ruins on which the house was built are themselves family property (in respect of which the builder cannot make testamentary disposition).

In my view, the correct position of the law is as enunciated in the case of Ansah v. Sackey and Owoo v. Owoo (supra), and not in the inconsistent case of Santeng v. Darkwa, which in my respectful opinion was decided per incuriam, the relevant proposition of law in Sarbah not having been adverted to. In brief, where a family member builds on vacant family land by using his own private resources, unaided by the family, whether with or without prior permission from the family, he acquires only a life interest therein. Upon his death, his building remains family property, and is heritable by members of his immediate family. On the other hand, if such a family member secures a grant from the family of a portion of unoccupied land for his building in the proper customary manner, the house built by him on such a site, by his own effort and means, becomes his self-acquired property which he can alienate inter vivos or by testamentary disposition.

That being the true state of the law, I see no merit whatsoever in the plaintiff's application for variation of the judgment in the manner suggested. The learned judge's second proposition stated the relevant law accurately. On the authorities, the self-acquired adjoining vacant land not covered by exhibit A became family land upon the death intestate of the plaintiff's father. The plaintiff subsequently acquired only a life interest in the buildings he constructed thereon. His enjoyment of rents accruing therefrom during his lifetime is consistent and explicable on the basis of the life interest he held therein. For reasons copiously advanced in the judgment of the court below and in the first half of this judgment, the plot of land conveyed under exhibit A must be regulated in accordance with the relevant English law relating to joint tenancy with the incident of survivorship, while the devolution of interest in the extra adjacent land must follow the normal customary law. Whether the plaintiff may conceivably be regarded as a Fante man hailing from Cape Coast, or preferably as a James Town man (since on the evidence his mother came from James Town), in view of the authority of Owoo v. Owoo, the Fante customary law and the Ga customary law on this issue are identical. The plaintiff's self-acquired buildings on the said vacant family land became family property upon his death and now belong to his immediate family.
For the above reasons, I would dismiss both the appeal and cross-appeal and affirm the judgment of the court below. I would make no order as to costs.
JUDGMENT OF SOWAH J.A.
I agree.

JUDGMENT OF KINGSLEY-NYINAH J.A.
I also agree.

YOGUO AND ANOTHER v. AGYEKUM AND OTHERS [1966] GLR 482-520
SUPREME COURT
13 JUNE 1966

SARKODEE-ADOO C.J., OLLENNU AND LASSEY JJ.S.C.

OLLENNU J. S. C

The respondents (hereinafter referred to as the plaintiffs), claimed a declaration of title to a house situate at Yonso near Jamasi in Ashanti.

There is no dispute as to the identity of the subject-matter of the suit; identical descriptions of it are given by the plaintiffs in their writ of summons and by the defendants in their statement of defence and counterclaim. The plaintiffs pleaded that the house was built by their father as his self-acquired property and that their father, by a gift inter vivos made in 1955 in accordance with customary law, transferred the ownership of it to them. The defendants on the other hand pleaded that it was built by the two brothers, Kwadjo Agyekum and Kwaku Agyekum, and that the same is family property.

The issues thus joined between the parties which unmistakably appear on the pleadings and upon the evidence as stated by the trial judge at the beginning of his judgment:

"Call for the determination of three main questions, namely, first: Was the house in dispute built solely by Kwaku Agyekum or was it the joint effort of Kwadjo and Kwaku Agyekum? Secondly, was a valid customary gift of this house made to the plaintiffs? And thirdly, was the house built on family land or on land which the late Kwaku Agyekum himself acquired from the Yonso stool."

The trial judge resolved each of the three issues in favour of the plaintiffs. Against that judgment, the defendants appealed.

But more serious than all these is the misdirection of the learned judge in failing to direct himself on certain most important facts of which evidence was led by the plaintiffs as well as by the defendants, and the legal implications of such evidence. The facts in question are (a) when Kwaku Agyekum was young, he lived with and served his elder brother Kwadjo Agyekum who was then grown up and engaged in his own business as a farmer and (b) when Kwaku came of age he joined his brother Kwadjo in work, and thereafter the two brothers kept a common purse. The following are some of the pieces of evidence on this point: (i) The first plaintiff, in answer to the court, ended his evidence in the following words, "My father was a cocoa farmer all his life. He built a house in Kumasi jointly with his elder brother Kwadjo Agyekum. He was also a cocoa farmer. They were brothers of the full blood. They saved jointly and often did things together." (ii) Kwasi Krobo, the first witness for the plaintiffs, said in cross-examination, "I know that Kwaku Agyekum is the fourth child of his mother and was the third after Kwadjo. I know that before Kwaku Agyekum got married, he worked jointly with Kwadjo Agyekum." (iii) Kwaku Mosi the only witness for the defendants said in evidence-in-chief, "The two Agyekums were full brothers and always did things together so I cannot say which of them in fact built the house. I now say the house was built by Kwadjo Agyekum but he lived in the house with his brother."

Now by customary law, where a child or a ward works with his father or guardian, he does not become owner with the father or guardian of the income of their joint labour; whatever comes out of that joint effort belongs exclusively to the father or the guardian: see Bima v. Barfi, Okwabi v. Adonu, Quartey v. Martey and Adjabeng v. Kwabla. Again, under customary law, since the two brothers kept a common purse, whatever is acquired from the common purse has the character of family property, such that they could partition it during their lifetime, but upon the death of any one of them, it becomes full family property. Therefore,

upon the plaintiffs' own evidence the house in dispute would be family property unless there is evidence to prove that the two brothers shared the common purse, and that the house in dispute was erected by Kwaku out of the separate share he received from the common purse. But there is no evidence of distribution of the common purse. It follows that whether the house in dispute was seen by the public to be erected by Kwaku alone or by Kwadjo alone, it is family property until the contrary is proved. Thus the defence witness Kwaku Mosi was right when he testified that although he knew that the house in dispute was erected by Kwadjo Agyekum he could not say which of them in fact built it. The learned judge's criticism of this witness's evidence is therefore not justified. Indeed the plaintiffs too in the letter, exhibit 1, written by their solicitor to the defendants prior to the institution of the action, alleged that the adjoining house was built by Kwaku as his individual property, that is, the house which was proved conclusively to be the family house of both Kwadjo and Kwaku Agyekum. If the plaintiffs would make that mistake about the family house which was erected subsequent to 1955 when the plaintiffs were grown up and mature in age, would they not make a greater mistake about the house in dispute erected when they were only of tender years?

Having failed to direct his attention to the law on the point consequent upon possession of the common purse, the learned judge failed to appreciate the legal implication and significance of this all important piece of evidence. He consequently further erred in accepting the evidence of the plaintiffs and their witness Kwaku Krobo, which evidence amounts in law to nothing more than bare allegations which were not proved as required by law. Therefore, on the second issue also, the judgment of the trial court cannot stand.

I now pass to the last issue, namely, whether a valid gift of the house was made by Kwaku Agyekum to the plaintiffs. That issue also involves both fact and law. The learned judge's decision on this point was attacked in the first of the defendants' grounds of appeal, ground (1). Learned counsel for the defendants submitted on this point that the trial judge failed to direct himself on the essentials of a gift made under customary law; he therefore submitted that legally, no basis exists for the judgment. On the essentials of a valid gift under customary law, counsel referred the court to Kwakuwah v. Nayenna, also to Asare v. Teing.

As to the facts, counsel submitted that the learned trial judge misdirected himself on the onus of proof, and consequently erred in rejecting the version of the defendants on the grounds of inconsistencies in the evidence of the defence witnesses. He submitted that the trial judge further erred in accepting the version of the plaintiffs, that a gift was made when their evidence in that regard is contradicted by their own witness Kwasi Krobo, and the other independent witnesses who were present on the occasion when the plaintiffs alleged the gift was made. Counsel finally submitted that even if the evidence led by the plaintiffs is accepted as true, it does not amount to proof of a gift according to customary law, and that, at its best, the evidence led for the plaintiffs amounted only to expression of intention to make a gift and nothing more. In reply to these submissions made on behalf of the defendants, counsel for the plaintiffs submitted that even though it does not appear on the face of the judgment that the trial judge directed his attention specifically to the essentials of a valid gift under customary law, yet the learned judge is presumed to know the customary law, and therefore he must have made his decision with that knowledge as a background; counsel submitted further that the manner in which the drink (aseda) is alleged to have been presented, i.e. given directly by the donees to the donor without being passed through a witness, is not in conformity with customary law; he contended, however, that that alone cannot affect the validity of the gift.

A valid gift, under customary law, is an unequivocal transfer of ownership by the donor to the donee, made with the widest publicity which the circumstances of the case may permit. For

purposes of the required publicity, the gift is made in the presence of independent witnesses, some of whom should be members of the family of the donor who would have succeeded to the property if the donor had died intestate and, also, in the presence of members of the family of the donee who also would succeed to the property upon the death of the donee on intestacy. The gift is acknowledged by the donee by the presentation of drink or other articles to the donor; the drink or articles are handed to one of the witnesses — preferably a member of the donee's family, who in turn delivers it to one of the witnesses attending on behalf of the donor; libation is then poured declaring the transfer and the witnesses share a portion of the drink or other articles. Another form of publicity is exclusive possession and the exercise of overt acts of ownership by the donee after the ceremony: see Kwakuwah v. Nayenna, Asare v. Teing, Addy v. Armah and Asante v. Bogyabi. Sarbah emphasizes these principles of acts of transfer and acceptance and proof of those two acts when he says in his Fanti Customary Laws (2nd ed.) at pp. 80-81:

"Gift consists in the relinquishment of one's own right and the creation of the right of another, in lands, goods, or chattels, which creation is only completed by the acceptance of the offer of the gift by that other . . .

To constitute a valid gift, an intention of giving or passing the property in the thing given to the donee by the donor, who has power so to do, is necessary . . .

The giving and acceptance must be proved and evidenced by such delivery or conveyance as the nature of the gift admits of."

In the evidence there is no performance of the most important act or ceremony of transfer of property in the house to the plaintiffs; no publication to the living and the dead that ownership in the house had, as from that date moved from Kwaku to the plaintiffs, and no libation was poured.

Above all the manner in which the drinks are alleged to have been handed over by the second plaintiff to Kwaku is contrary to all principles of customary law. Counsel for the plaintiffs was obliged to admit this. Under customary law it is most disrespectful for a person making presentation to his elder, particularly his benefactor, to put the drinks or other article straight into the hands of the elder or benefactor. And particularly, in the case of aseda to indicate acceptance of a gift of land, the presentation of the aseda is never made direct by the donee, it is made through a representative of the family of the donee who in turn delivers it to a representative of the donor who then shows it finally to the donor. The donor may just touch it, but never actually receives it into his hands; a bottle of drink is therefore opened, libation is then poured and thereafter the drinks are served to all witnesses to the gift. On the other hand, if a father or an elder sends his child or relation to bring him some article or any other thing from somewhere, a room for example, it is usual for the child to hand it personally to the father or the other person who sent him.

Thus the evidence given by the plaintiffs of the manner in which the second plaintiff handed the drinks to Kwaku affords support to the evidence of Kwaku Mosi, the second defendants' witness, that Kwaku applied to Kwadjo and the family to permit him to make a gift of the house; for in such a case, if he had sent the second plaintiff to bring him some drinks from his room, so that in case Kwadjo and the family agreed, he might formally present the drinks to the family, it would be reasonable that the second plaintiff would hand the drinks direct to her father Kwaku, and that is the only way in which the direct delivery of the drinks to Kwaku by the second plaintiff may be reasonably explained.

It must here be emphasized that it is a misconception to think that the bottle or so of drinks which may be given by a prospective donee to a donor on an occasion when a donor expresses an intention to make a gift or says he is making a gift is the aseda which the customary law requires to substantiate acceptance of a gift made. The aseda which makes a gift perfect is a personal presentation made with a ceremony, and the ceremony usually takes place on a

fixed date subsequent to the date of the formal gift. The donor is notified of the date when the presentation of the aseda would be made, and he and his relations and friends then assemble on that day to receive the presentation in a formal way. The presentation is made by the donee through members of his family and his friends, and the donor receives the same through relations and friends. As a rule, the donee himself does not accompany the party to make this presentation on his behalf. The principle behind that procedure is that the persons who make the presentation should have confirmation from the donor in the absence of the donee, but in the presence of relation and friends both of the donor and the donee, that the gift is in fact made. In Addy v. Armah it is stated that:
"Custom lays it down that the donee does not join such a delegation, members of his family and his friends are the proper persons who must go on his behalf, though he himself should supply the articles to be presented. And where the donee is a child, and the donor happens to be one of his parents, the other parent provides the articles and leads the delegation to make the presentation to the donor parent assembled with members of his or her family."
The principle underlying this procedure is that since a gift by customary law once perfected, is irrevocable and since as Sarbah in his Fanti Customary Laws (2nd ed.) at p. 81 says:
"What is given by a person in wrath or excess of joy, or through inadvertence, or during minority or madness, or under the influence of terror, or by one intoxicated, or extremely old, or afflicted with grief or excruciating pain, or what is given in sport, is void," a donor should have opportunity at a date subsequent to making the gift to retain the gift if he has in fact made it.
If the learned trial judge had directed his mind to the essentials of a gift by customary law, and the need as Sarbah says at pp. 80-81 that "the giving and acceptance must be proved and evidenced by such delivery [i.e. act of delivery] or conveyance as the nature of the gift [in this case, land] admits of," he would most probably have realised that the uncorroborated evidence given by the plaintiffs contains nothing which proves and evidences any act of delivery or passing of property in the house from Kwaku Agyekum to the plaintiffs and that the plaintiffs failed to prove the gift they alleged.
For these reasons, I would allow the appeal.
JUDGMENT OF SARKODEE-ADOO C.J. I concur.
JUDGMENT OF LASSEY J.S.C. [Wrote a dissenting opinion which has been omitted]

ARABA TSETSEWA HEAD OF HER FAMILY FOR HERSELF AND ON BEHALF OF ALL OTHER MEMBERS OF HER FAMILY OF CAPE COAST ***Plaintiff-Appellant***

v

JOSEPH DOBSON ACQUAH AND SAMUEL GABRIEL ACQUAH AS EXECUTORS AND BENEFICIARIES UNDER THE WILL OF JOSEPH DOBSON ACQUAH (DECEASED) BOTH OF CAPE COAST ***Defendant.- Respondent***

APPEAL COURT, 24th Dec., 1941.
KINGDON, C. J., NIGERIA, PETRIDES, C. J., GOLD COAST AND BANNERMAN,. J.

In this case, the court held that where two or more members in the family put together fund and acquires a property, that property so acquired will be treated as family property. The properties in dispute in this case were acquired and developed by three brothers from the same family and also with the help of some family members.The defendant in this case argued that the properties belong to the brothers jointly and that it does not constitute family property. However,the court held that since the properties were acquired and developed by the three brothers, and also with the help of some family members, it is thus family properties and not joint properties of the three brothers.

Araba Tsetsewa brought this action on behalf of herself and all other members of her family for a declaration of title to six separate properties situate at Cape Coast. It is common ground that all the parties in this case are Fantis and although the defendants-respondents do not admit that Araba Tsetsewa is the head of her family, it is clear from the proceedings before the Provincial Commissioner's Court that she is the recognized head of her family.

The plaintiff's case is that the six properties enumerated in her writ of summons form part of the property of her family, of which the three brothers, namely, Charles Winslow Acquah, John Mensah Acquah and Joseph Dobson Acquah in turn preceded her as head. Araba Tsetsewa claims (and this is not disputed by the respondents) that her mother and the mother of Charles Winslow Acquah, John Mensah Acquah and Joseph Dobson Acquah were sisters. (Hereafter the three brothers will be referred to as Charles, John and Joseph). Charles and Joseph were literate and John was illiterate.

Charles who was the eldest of the three brothers was employed by Messrs F. & A. SwanzyLimited as Factor and afterwards a;:

Agent from 1874 and was stationed at various places in the French Ivory Coast. About the year 1888, Charles instructed one Ellis of Cape Coast to engage workmen in order to build a house for him (Charles) at Cape Coast. The house was completed and it is now known as the northern wing of Alepe House.

In 1890 Charles returned to Cape Coast on leave; he was dissatisfied with the building because it contained only three bedrooms and did not provide sufficient accommodation for himself, wife and children, and members of the family. Charles gave instructions to his brothers John and Joseph to purchase adjacent land in order that the building might be extended. Charles returned to the Ivory Coast during the same year and remitted money and shipped building materials to Cape Coast for the construction of two more wings.

From 1890 up to 1914 John and Joseph acted as the agents for Charles at Cape Coast and they supervised the building of the two wings of Alepe House. The members of the family helped towards the building of the two wings and made contributions in material. After the completion of the building several members of the family lived in Alepe House and they have continued to live there up to the present.

About the year 1900 the three brothers built another house at Cape Coast known as Acquah Hotel. This house was built with the assistance of the members of the family: they carried stones sand, swish, water, timber and other building materials.

With regard to the other four properties the plaintiff contends that they are family property in as much as they were purchased out of the profits from the joint venture of Alepe House and Acquah's Hotel. In other words Tsetsewa contends that inasmuch as all the three brothers have died she, as the head of the family, is entitled to claim those properties on behalf of herself and the other members of the family in view of the fact that they are family properties.

The case for the defendants is that all the properties mentioned in the plaintiff's writ of summons belonged to Charles, John and Joseph as joint owners and that no member of the family helped or contributed anything towards the buildings or towards the purchase of the lands. They (defendants) further contend that it was not the intention of the three brothers that the members of their family should have any interest in the properties. They however admit in paragraph 6 of their statement of defence that certain members of the family lived in Alepe House" by the leave, licence and courtesy of the three brothers ".

The substantial questions before this Court are:

(a) Are the properties family properties?

(b) Whether Joseph, as the last surviving brother, could make valid testamentary dispositions of the properties ?

(c) Whether English law or whether Fanti customary law, governs the determination of the case?

Before we deal with these questions it is necessary to state that Charles, throughout his life, showed deep interest not only in Tsetsewa the welfare of his brothers John and Joseph but also in all the other members of his family. In the various letters written by Charles from the Ivory Coast to his brothers in Cape Coast it is clear that he treated the family with kindness and generosity, and was always anxious to identify the interest of the family with the properties which he, John and Joseph acquired. Charles did all he could to make his family happy and prosperous and he made substantial contributions towards the purchase of all the properties in question.

Before the court of the Provincial Commissioner there was evidence to show that the family have definite interest in Alepe House and Acquah's Hotel, and it makes no difference that the lands on which these houses were built were jointly bought by the three brothers. It is significant that in his Will, Joseph does not dispose of any of the real properties involved in this action. All he has done is to apportion the rents accruing from the properties to various persons, including the plaintiff and other members of the family. This suggests that Joseph knew that the properties were family properties or at least that the family have some interest in them and he could not dispose of them without recognizing that interest.

At pages 79-81 of Redwar's comments on the Gold Coast Ordinances, the learned Author says:-

"According to Native Law there is a presumption in favour of all land being jointly held by a family or other community, which presumption may, however, be rebutted by evidence that it has been acquired by an individual through his own personal exertions in trade or otherwise, *without any assistance from the community of whom he is a member,* or by gift to the individual apart from the rest of the, community. Absolute and exclusive ownership of land by one individual is still comparatively rare, although individual property will probably increase as time goes on, and European notions get a firmer hold of educated natives. Joint family or stool property is still, however, the *rule,* and individual -property the *exception,* as Mr. Sarbah says in his work on 'Fanti customary law'. Nevertheless, as individual properly does in fact exist, it is desirable to consider the position of the individual owner. It is clear that although the land of a native may be individual property, he is *absolute owner* of it, and has not an *estate* in fee simple, inasmuch as no land owned by natives is held in strictness, by Tenurlt, as in England. Of course, if he be married under the provisions of the Marriage Ordinance of 1884, the change of legal status brought about by such marriage affects his positions as regards the devolution of his property upon his death, a matter which has been considered in a previous article. It is also clear that he has an unfettered right to dispose of his individual property, either during his lifetime, or by Will. The native law, however, while recognizing individual property, does not regard it with favour, and upon the individual owner's death *intestate,* it is held that the property then becomes impressed with the character of Joint Family Property, and devolves upon his heir by Native Custom as the head of the Family community. Where, however, the individual owner dies leaving a Will, the heir by native custom is bound by the dispositions of the Will, and the recipients of the testator's bounty can enforce their rights even in the Native Tribunals, the Native Law on this point being now fully established."

The defendants' main contention is that Charles, John and Joseph jointly acquired all the properties in dispute, so that the properties were all the joint properties of the three and upon the death of Charles, the properties became- the joint property of John and Joseph, and upon the death of John, the properties became solely vested in Joseph as the last surviving brother and he could dispose of them by his Will. In support of this contention the case of *Fawcett v. Odamtten,* reported at pages 339-343 of Full Court Reports, 1926-29 was cited. We have examined this report and we are of opinion that the principles enunciated in that case do not apply in the present case for these reasons. In that case, the six purchasers were not brothers, and the question whether they were bound by Fanti customary law was not mentioned. In the present case, Charles, John and Joseph were brothers and the Fanti law and custom

applicable to joint acquisition of property by more than one member of the family is undoubted, namely that such property becomes family property.
Sarbah at pages 88 and 89 of his" Fanti customary laws (2nd Edition) thus defines "Family property" and "Self-acquired property " :-

"Family property is any movable or immovable thing

" acquired-

"(i) By the joint labour of the members of a family. "One of the most common instances of this is the building of " a house by the members of a family; or

"(ii) By the contributions from two or more members of"one's family ..

"Property is designated self-acquired or private, where it "is acquired by a person by means of his own personal "exertions, without any unremunerated help or assistance from any member of his family; or without any advance or contribution from the ancestral or family possessions of his "family".

It has never, as far as we are aware, been suggested before this case that when two or more members of a family combine to acquire property, the property so acquired becomes the private joint property of the two or more and not family property. In our opinion the evidence adduced on behalf of the defendants is not sufficient to rebut the strong presumption in favour of "family property" which is the rule among Fanti-speaking people. We are of opinion that native law and custom must govern this case.

The Deputy Provincial Commissioner appears to have based his judgment solely on the English law of survivorship, and to have disregarded native law and custom. As already stated, we; take the opposite view.

In all the circumstances we hold that Alepe House, Acquah's Hotel and all the other four properties are family properties. Accordingly the plaintiff is entitled to a declaration in her favour. The appeal is allowed and the judgment of the Provincial Commissioner's Court, including the order as to costs, is set aside, and it is directed that if any sum has been paid by the appellant to the respondents in pursuance of that judgment it shall be refunded. It is ordered that the appellant be granted a declaration as prayed. The appellant is awarded costs in this Court assessed at £73 14s 9() and in the Court below to be taxed.

Also, in the case of MENSAH *v.* S.C.O.A. AND BOAHENE. (1958) 3 WACA, the court held that where two brothers jointly acquire a property, and by their conduct they decide that English Law should not govern their relationship, if they subsequently proceed to build on the property with the help of other family members, the person that built on the land will only acquire interest to occupy the property during his lifetime, and upon his death, the property will vests on the family since the property is treated as family property. And also, the brother who is still alive cannot claim that upon the death of his brother (with whom he bought the property), the ownership of the property devolves to him.

MENSAH *v.* S.C.O.A. AND BOAHENE. (1958) 3 WACA
High Court, Eastern Judicial Division, Divisional CourtOllennu J.

OLLENNU J. The plaintiff in this case claims a declaration of title to a piece or parcel of land with buildings thereon situate at Aburi and for an injunction restraining the defendants from interfering in any manner whatsoever with his ownership, possession and occupation of the land. The claim is made by the plaintiff in his capacity as head of the family of Adolf Senhard Amankwa Mensah to which the late Martin G. Donkor and Albert Afwireng Donkor belonged. In his statement of claim, the plaintiff pleaded purchase of the said land by the two brothers Martin G. Donkor and Albert Afwireng Donkor from one A. D. Schall. He alleged that the first defendant company filed notices for the sale of the said property and in spite of warnings they wrongfully entered thereon and caused it to be sold in satisfaction of a debt due to them from his uncle, the late Martin G. Donkor; and, that the second defendant was the highest bidder

at the sale and now claims ,ownership of the property. In the statement of the defence filed on behalf of the defendants the averment of the plaintiff that the property was family property purchased by the two brothers was denied, and it was therein averred on the contrary that it was individual selfacquired property of the said Martin G. Donkor.

The plaintiff led oral evidence that the property was purchased jointly by the two brothers, his uncles, the said Albert Afwireng Donkor and Martin G. Donkor, who later built upon it, and that the premises became family property upon the death of these two brothers. In support of the oral evidence the plaintiff tendered in evidence an indenture of conveyance dated April 18, 1934, executed by one Augusta Deisa Schall of Teshie in favour of the said Albert Afwireng Donkor .and Martin G. Donkor.

It has not been denied that the subject-matter of the indenture is the property now in dispute. The indenture is therefore evidence that the property in dispute is not the individual self-acquired property of Martin G. Donkor, but the joint property of Albert Afwireng Donkor and the said Martin G. Donkor. If there had been no evidence as to the erection of the building on the land in dispute and the dispute had been in respect of the bare land, it might be said, under Errglish law, that the conveyance to the two brothers created a joint tenancy with a right of survivorship such that the survivor of the two brothers, namely Martin G. Donkor, became the absolute owner on the death of his joint-owner Albert Afwireng Donkor. But the evidence as to the erection of the buildings on the land by the two brothers with the assistance of members of their family shows that the two brothers did not intend that their relationship should be governed by English law. That evidence therefore takes the case completely out of English law and makes the property one the tenure of which should be governed by native customary law. Thus the purchase of the property by the two brothers and the erection of the buildings upon it by them with the aid of other members of the family make the property family property the family being the family of their mother in which the two brothers had only a life interest.

Martin G. Donkor having only a life interest in the property could not alienate any estate or interest in it which can subsist after his death. The evidence is that Martin G. Donkor was dead at the date of the sale. All that a purchaser at the auction sale acquired was the right, title and interest of Martin G. Donkor in the property. Consequently since all his right, title and interest in the property determined upon his death the purchaser who purchased that right, title and interest of Martin G. Donkor got nothing. I am satisfied also upon the evidence that the first defendant company had sufficient warning of the family's ownership of the property before they purported to sell. But, as indicated in their letter of August 31, 1956, it appears that they were content to rely solely upon a mortgage which had been given to them by the late Martin G. Donkor without taking the trouble to investigate his title properly or to seek legal advice as to whether the right, title and interest of Martin G. Donkor if any in the property still existed at that date.
Both the sale at the instance of Messrs. S.C.O.A. and the purchase by the second defendant therefore constitute trespass and render them liable for damages. But the plaintiff had made no claim for damages; he only claims a declaration of title and an injunction. The plaintiff has fully discharged the onus which the law lays upon him. The defendants have not been able to meet the plaintiff's case. There will therefore be judgment for the plaintiff for a declaration of title and an injunction restraining the defendants from interfering with the plaintiff family's ownership, possession and occupation of the land in any manner whatsoever.

The assessor agrees with this judgment.
Judgment for the plaintiff.

However, the court also held in the case of MANUKURE AND ANOTHER v. ANIAPAM AND OTHERS [1976] 2 GLR 339-342 that were a person pledges his family property in return for a loan, if any of the family members redeems the pledge on behalf of the family, the property will thus remain family property. But if the pledgor or any of the family member fail to redeem the pledge and the pledgee goes ahead to acquire the property, then the property will no longer be family property, since it is now the personal property of the pledge. In the above case, one Kwadwo Donso pledged their family property to the plaintiff, upon his failure to redeem the pledge, the pledgee (plaintiff) went ahead to acquire the said property, and the court held that the property was no longer the family property of the pledgor.

MANUKURE AND ANOTHER v. ANIAPAM AND OTHERS [1976] 2 GLR 339-342
COURT OF APPEAL, ACCRA
18 MAY 1976

JIAGGE, SOWAH AND KINGSLEY-NYINAH JJ.A.

SOWAH, JA

The facts of this case are that on 9 July 1937, Kwadwo Danso, the father of the defendants, entered into an agreement with Solomon, Oduro, Daniel Ofosu and Kwame Manukure whereby he obtained an interest free loan of £800 and as security, he pledged his cocoa farm. It was a term of the said agreement that the net proceeds from the farm would be utilised to liquidate the debt and upon full payment the farm would be handed over to Kwadwo Danso. To this end the debtor placed his son on the farm for the purpose of accounting for the proceeds.

Of the parties to the transaction, only Kwame Manukure, the first plaintiff, is alive. Kwadwo Danso, the debtor, is dead and is succeeded by his children, the defendants herein. Solomon Oduro is also dead and his successor is the second plaintiff. Nothing appeared in these proceedings about Daniel Ofosu and nothing turns upon his absence.

Almost exactly a year after the agreement, execution was levied on a portion of the pledged property at the instance of the judgment creditor in a suit entitled Kwabena Asante v. Kwadwo Danso and it was sold at a public auction. The purchaser was Kwame Manukure, the first plaintiff, who was issued with a certificate of purchase.

On 28 August 1938 a second lot was sold in pursuance of another judgment debt at the instance of the judgment creditor in the suit between Kwabena Asante v. Kwadwo Danso. The purchaser of the second lot was one Ningo Tetteh. By a document dated 18 March 1940 Ningo Tetteh conveyed his right, title and interest in this property to Solomon Oduro. On 2 November 1938 a third lot was sold at an auction at the instance of yet another judgment creditor and was purchased by Solomon Oduro.

The plaintiffs maintained that the basis of their right to possession of the land no longer laid in the pledge but from the sale of the absolute interest of Kwadwo Danso in the land and if there was any reversion by reason of the pledge, the same was extinguished by the various auction sales and the transfer of Kwadwo Danso's title to them.

This action was sparked off by the persistent acts of trespass of the defendants who were children of Kwadwo Danso, the original owner and pledgor of the land to the plaintiffs. After nearly four decades the defendants claim that the property occupied by the plaintiffs was pledged property has that being so, they were entitled to redeem and recover it.

They maintained that the plaintiffs had occupied the property long enough and the proceeds from the farm ought to have been adequate to liquidate any debt owed by their father. They therefore called upon the plaintiffs either to go into accounts or surrender the property.

The plaintiffs after giving due warning and notice to the defendants to desist from their acts of trespass instituted action for trespass and damages. The first defendant has apparently been mentally ill for a period of over 30 years, the defence was therefore conducted by his younger brothers. It is apparent from the record that they were unaware of the transactions affecting the land when they first consulted a solicitor. They instructed him to request the plaintiffs "to clarify the terms under which the said farm was pledged" and if necessary to go into accounts and threatened to institute action for account. In their defence to the action they denied that the pledge was in pursuance of a loan of £800 given to their father but did not indicate the terms upon which the pledge was so given. They further denied that the auction sales ever took place and alleged that there was an oral agreement between their father and the plaintiffs to pay off the judgment debts and add them to the loan.

After hearing evidence, the learned High Court judge found as a fact that the auction sales were conducted and that the properties described were sold and conveyed to the purchasers. He further held that Kwadwo Danso and his son Kwadwo Aniapam, the first defendant herein, were aware of the sales at the instance of the judgment creditors. He found no fraud or irregularities in the conduct of the public auctions and in any event, if there were, Kwadwo Danso, the original owner of the land, ought to have taken proceedings timeously to set them aside. Accordingly he vindicated the claim of the plaintiffs and gave them judgment. It is from this decision that an appeal has been laid.

In this court learned counsel for the defendants has not been able to assail any of the findings of fact and appears to have accepted them. He however proceeded by legal argument to attack the judgment. He submitted that a pledgee who purchased the legal or absolute interest of the pledgor was deemed to hold the property in trust for the pledgor and that the pledgor or his successors could redeem the property at any time.

Though counsel did not refer us to any authorities, it seems obvious that counsel is drawing an analogy between this case and those cases where a member of a family either redeems pledged property from a pledgee of the family or buys family pledged property. In the latter type of cases, principles of customary law assert that unless the purchaser distinctly informs members of his family that he intends to redeem or purchase the property for his own individual and beneficial use he would be held to have redeemed the pledged property for the benefit of the family. This principle has received judicial approval in Hammond v. Randolph (1936) 5 W.A.C.A. 42, P.C.; Akyirefie v. Paramount Stool of Breman-Esiam per Nana Kwa Bom III (1951) 13 W.A.C.A. 331 and Kwainoo v. Ampong (1953) 14 W.A.C.A. 250.

But these authorities are distinguishable from the present case. Firstly, the plaintiffs are not members of the Kwadwo Danso family and are not in any way obliged to redeem the property on behalf of that family. Secondly, Ollennu in his book on Principles of Customary Land Law in Ghana equates redemption by a third party from the pledgee with assignment of the interest of the pledgee in the property. Thus the position of a purchaser from the pledgee is stated at p. 107 thus:
"The basis of this statement of the customary law is the principle already stated as the real essence of a pledge. The pledge transaction vests in the pledgee only a right to possession of the land and the enjoyment of profits thereof; it does not give him title to the land; title remains in the pledgor. Therefore that which the pledgee undertakes to surrender at any time that the loan is re-paid, is possession not title."
But the plaintiffs herein already had possession less title. It was that title they purchased at the public auction.

Applying the customary principle enunciated above, the analogy still fails; for the plaintiffs are not members of the defendants' family. The learned judge had not found fraud in the conduct of any of the public auctions and further, the interest sold was the right, title and interest of Kwadwo Danso, the father of the defendants, which at the time was his absolute title encumbered, of course, by the pledge.
I am of the view that the learned judge was right when he held that any interest the defendants' father had in the properties were effectively extinguished and that the defendants were trespassers. Accordingly the appeal fails and is dismissed.

Finally, it was also held in the case of AMISSAH-ABADOO v. DANIELS AND OTHERS 1979 GLR 509-518 that where a man builds on a family land, the property still remains family property. In this case, the deceaced built a house on part of their family land, and upon his death, his widow and children seeked to take over ownership of the said house since it was built by the deceaced (their husband and father respectively), they also argued that the property was the personal property of the deceaced since he (the deceaced) built the house with his money. The court held that since the land on which the house was built was a family land, and that the land was given to the deceaced by the family to construct a house so as to protect the land, the property therefore remain family property and so the deceaced had only the right to occupy the property for his life time. Secondly, that the issue on whether the children of the deceaced can continue leaving in the property, subject to good behaviour, does not arise since the property in question is a family property and not the personal property of their late father.

AMISSAH-ABADOO v. DANIELS AND OTHERS 1979 GLR 509-518
HIGH COURT, CAPE COAST
12 JANUARY 1979
OSEI-HWERE J.

By the endorsement on his writ the plaintiff's claim against the defendants is for, "possession of house No. G. 8/2, Tantri Lane, Cape Coast, property of the plaintiff and his family which the defendants have taken possession of against the interest of the plaintiff." The statement of claim subsequently filed by the plaintiff ran:
"(1) By a judgment dated 12 November 1973, house No. G 8/2, Tantri Lane, was adjudged the property of the Abadoo family of which the plaintiff is the present head.
(2) The said house consists of three floors with an annexe in which the widow of the late lawyer Abadoo carried on her occupation as a seamstress.
(3) An action instituted by the plaintiff to enforce his right to apportion accommodation in the house as against the widow and members of the plaintiff's family needing accommodation abated with the death of the widow.
(4) The plaintiff had reason to believe that after the final funeral rites of the widow the fourth defendant would surrender the keys of the house to the plaintiff who would then have allocated accommodation to the fourth defendant if he intended to remain in the house instead of living in the house given to his late mother by his late father, who knew the position of the house in dispute.
(5) Instead, the fourth defendant is packing the house with members of his mother's family including the first, second, and third defendants who have no right to live therein.
(6) On the day when a thanksgiving service was held for his late mother, the fourth defendant outrageously and in a frantic manner expelled the plaintiff's niece from the house and threatened to assault her if she did not leave.
(7) On the same day, the defendants behaved in a riotous manner in the house to the annoyance of neighbours; they have also expressed an avowed aim of destroying the house,

which in any case is in need of interior as well as exterior repairs, urgently rates are outstanding.
(8) There are members of the plaintiff's family needing accommodation; the fourth defendant cannot maintain the house. Wherefore plaintiff claims as per his summons."
The defendants in their turn filed the following defence:
"(1) Save that the fourth defendant admits that in November 1973 judgment was given in respect of the said property, he says that the interpretation put on it by the plaintiff is wide off the mark.
(2) The fourth defendant denies that he is packing the house with members of his family. He says further that there is no law which forbids a nephew to invite his aunt to live with him.
(3) The fourth defendant denies that he has behaved in riotous manner. All that he did was to exercise his right as a child of his father. The allegation therefore must be proved.
(4) The defendants say that they have been harassed by the plaintiff beyond endurance. The harassment contributed to the untimely death of the widow of lawyer Abadoo, the mother of the fourth defendant.
(5) That for several years the plaintiff's family have occupied their family house which has many rooms. They have rented several of them. In spite of that they want to prevent the fourth defendant from peaceably enjoying the house built by his father without any help from the plaintiff's family.
(6) The defendants say that the plaintiff is not entitled to the relief claimed."
By consent of counsel for both sides the third issue settled for trial was down as a preliminary point of law for argument. That issue calls for determination "whether the interpretation put on the judgment is erroneous as claimed by the defendants." The judgment on which the plaintiff relies to found his claim is that of Edward Wiredu J. in the case of Amissah-Abadoo v. Abadoo reported in [1974] 1 G.L.R. 110. In that case the plaintiff, as the customary successor and the head of the immediate family of the late lawyer Abadoo, sued the lawful widow of the said lawyer for a declaration that house No. G. 8/2, Tantri Lane, Cape Coast, is the property of his family. The defendant, Mrs. Abadoo, also counterclaimed for a declaration that the said house was acquired by the individual effort and means of her late husband and as such it is his self-acquired property and that of his heirs and successors and not the property of the plaintiff's family. She further asked for a declaration that she and the children born between her and her late husband were entitled to remain in the said house. The plaintiff brought that action because by the will of the late lawyer Abadoo he had purported to devise this house to his wife and his three sons together to hold, possess and enjoy the same as tanants in common. It was found as a fact at the trial that the plot of land on which house No. G.8/2 had been erected was a portion of a larger plot of land with a building thereon which had earlier been conveyed by a deed of gift by lawyer Abadoo's father to his wife (that is the mother of lawyer Abadoo), his children by her and their "heirs and assigns" with a direction in the deed that the property was to be enjoyed by the donees as family property in accordance with "native law and custom." In his judgment the learned judge held, among others, that (a) the deed of gift conveyed to the donees and their heirs as purchasers the whole interest of the donor in the property and that, consequently, the land on which house No. G. 8/2 is situate is the joint property of the donee family constituted by the plaintiff's mother, the children of her marriage with the donor, their children's children and their descendants and that it is, therefore, not the property of the plaintiff's matrilineal family; (b) house No. G. 8/2 is the self-acquired property of the late lawyer Abadoo. However, since the family (in the sense explained above) is in effective occupation of the land on which the house was built, lawyer Abadoo had only a life interest in the house with no alienable interest which he could dispose of by will; (c) the defendant and her children have a possessory life interest in the self-acquired property of their husband and father respectively. This possessory life interest is only subject to the title of the deceased's family but takes precedence over it; and

(d) where the deceased lived in a family house with his wife and children, the widow and the children had no interest save a right of occupation "subject to good behaviour."

It must be conceded that the plaintiff's action is mainly directed against the fourth defendant John Ekem Abadoo, one of the sons of the late lawyer Abadoo by his wife Mrs. Chrissie Millie Abadoo and one of the named beneficiaries under his will. The first, second and third defendants are but nominal defendants. The interpretation given by the plaintiff's counsel to the judgment of Edward Wiredu J. is that its main prop was the assertion that the disputed house is the self-acquired property of lawyer Abadoo which he had erected on family land and that the house therefore became family property which vested on the head of family on the death of lawyer Abadoo.

According to him, although the trial judge conceded that the widow and her children had the right to reside in the house yet he sought to doubt the validity of the customary rule that this right of occupation was subject to their good behaviour. Counsel referred to Amponsah v. Kwatia, a decision of the Court of Appeal reported in [1976] 2 G.L.R. 189, which confirms this customary rule. At any rate, counsel further argued, certain of the conclusions reached by the trial judge were made "inconclusive" by his own doubts on those conclusions. The plaintiff's counsel finally invited the court, in line with the decision of Edward Wiredu J., to order that the fourth defendant deliver the house, to the plaintiff who would then show him where to reside in the house and then the plaintiff would also allocate rooms to such members of the family who would need accommodation.

The defendants, counsel in turn argued that insofar as the plaintiff's writ asked for possession of the house simpliciter on the score that it is his family property he is estopped from asserting that claim against the fourth defendant as the judgment of Edward Wiredu J. allowed the second leg of the counterclaim by giving the defendant and her children an unqualified and possessory life interest in the house. According to him once that counterclaim has not been challenged on appeal it is immaterial whether or not that judgment on the counterclaim is wrong. Counsel further pointed out that the fourth defendant (as well as his mother) was adjudged to have a beneficial interest in the plot itself and that this, coupled with his life interest in the house, should throw the plaintiff out of court.

He again maintained that as the judgment gave possession of the whole house to them and without the qualification that their possession was subject to any good behaviour the plaintiff cannot be heard to say that he must be given possession to make any allocations of the rooms to the fourth defendant and needy members of his family. Counsel then tried to distinguish the judgment in Amponsah v. Kwatia and argued that what Sowah J.A. said, that the children of a deceased could live in his self-acquired house subject to good behaviour, was, at any rate, an obiter dicta. According to counsel the declaration that the fourth defendant has a possessory life interest in the house carried with it certain rights which, short of disposing of it, could extend to letting out the rooms. Counsel finally attacked the capacity of the plaintiff to sue.

It is axiomatic that a judicial decision, otherwise final, will remain so and bind the parties until it has been reviewed by the court pronouncing it or set aside by a competent appellate tribunal. It is in this light that the judgment of Edward Wiredu J. must be approached, interpreted and applied. I should have thought that the concluding part of the judgment was unambiguous in stating what claims had been allowed the parties when it said at p. 132:

"There will therefore be judgment for the plaintiff in his capacity as the most senior member of the donees of the plot of land conveyed by exhibit A, a declaration that the disputed house is the property of the family donee as defined in this judgment. He therefore succeeds on his claim in respect of house No. G. 8/2 as if he has brought his action in that capacity ... The first leg of the defendant's counterclaim for a declaration that the disputed house... [is] the self-acquired [property] of lawyer Abadoo in the sense claimed by her is also hereby dismissed. Judgment is entered in her favour on the second leg of her counterclaim for a

declaration that she as the widow of lawyer Abadoo is entitled to occupy the said house with her children for life in terms as stated above . . ."
The application of the decision, however, is bound to cause some disenchantment because the learned judge went out in full style to garnish the customary law concept of the respective rights of a widow and children to the self-acquired house of the husband and father in line with contemporary Ghanaian thought. It is generally accepted that customary law rests on "national" conviction and owes its validity to the fact that, having sprung from the conviction and life of a people, it has asserted itself by voluntary observance in virtue of an inward necessity. It is for this reason that a particular rule of customary law can properly be understood by an appreciation of the social milieu in which it has developed. The endeavour of Edward Wiredu J. to make precise the form of this branch of the customary law and its rationale are, to my mind, in the right direction. For instance, whilst acknowledging that the children's right to stay in the family house is "subject to good behaviour," he was at pains to explain that the phrase can only be tacked on to the children's right to occupy the house where the house was originally family property and not the self-acquired house of their deceased father. In other words, if the father by his own individual effort erected a house in which he stayed exclusively with his wife and children, the children's right to occupy the house for their lifetime after the father's death will, according to him, not be subject to their good behaviour.

The above amplification of the customary law, as noted before, was the subject of criticism by counsel for the plaintiff who was of the view that it is opposed to the Court of Appeal decision in Amponsah v. Kwatia. Truly the doctrine of stare decisis prohibits a lower court from impugning the decision of a higher court (see Sogbaka v. Tamakloe [1973] 1 G.L.R. 25), but the only binding part of a judgment (from wherever it proceeds) is its ratio decidendi: see Bank of Ghana v. Labone Weavers Enterprises Ltd. [1971] 1 G.L.R. 251, C.A. In Amponsahs' case Sowah J. A. who delivered the judgment of the court said at p. 190, "The house in dispute was not the self-acquired property of their father; if it were, they would be entitled to reside therein subject to good behaviour." Amponsah's case was, of course, not concerned with the right of children to live in the self-acquired house of their deceased father but was concerned with the nature of their interest, if any, in the family house in which they had lived with their deceased father. That judgment must, therefore, be read in the light of the facts of the case in which it was delivered, for as Lord Halsbury said in Quinn v. Leathem [1901] A.C. 495 at p. 506, H.L.:
"every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be exposition of the case in which such expressions are to be found."

One of the reasons why it is not everything said by a judge in his judgment that constitutes a precedent is that among the propositions of law he enunciates, only those he appears to consider necessary for his decision are said to form part of the ratio decidendi: see Bank of Ghana v. Labone Weavers Enterprises Ltd. (supra). But such other propositions of law which are, not so considered necessary for the judgment (and without which the judgment would have the same result) are regarded as mere judicial opinions or obiter dicta which are not binding but at best, of persuasive effect.

The clear ratio of the Court of Appeal's decision in Amponsah v. Kwatia as regards the interest of the children in the house is that under Akan customary law children who live in the family house of their deceased father do so at the pleasure of the father's family and are therefore mere licensees. The opinion expressed that children are entitled to reside in the self-acquired house of their deceased father subject to good behaviour is, accordingly, an obiter dictum

which could not bind Edward Wiredu J. If even he was bound by that proposition of law the plaintiff will not be entitled to raise his voice of dissent in this forum.

It is clear from the judgment that the fourth defendant's right to occupy his deceased father's house for the duration of his lifetime will, therefore, not be conditioned upon good behaviour because the learned judge found that the house was the self-acquired property of the late lawyer Abadoo which he built on land belonging to the family. Apart from holding that the widow of lawyer Abadoo was entitled to occupy the said house with her children for life, the learned judge also recognised as noted before, that the children (of whom the fourth defendant is one) have a beneficial interest in the land on which the house stands because they should be reckoned among the donees of the gift made by the late lawyer Abadoo's father. This construction of the deed of gift which sought to constitute the donee family as the plaintiff's mother and the children of her marriage with the donor, their children's children and their descendants (and thus bring the fourth defendant within its ambit) was specifically challenged by the plaintiff's counsel on the score that the trial judge was not certain of his construction when he said at p. 123:

> "Even if the above construction which I accept to represent the donor's intention as expressed in exhibit A is wrong and the donor under exhibit A intended the property to be enjoyed in such a way that it found its way ultimately into the matrilineal family of the Abadoos as was contended by learned counsel for the plaintiff, a construction which I very much doubt, the one significant thing about the property is that in either way it will be held as joint indivisible family property in the enjoyment and use of which the late lawyer Abadoo was one of the beneficiaries and in the use and enjoyment of which none of the beneficiaries has an alienable interest."

The orthodox judicial theory is that if a judge gives two reasons for his decision, both are binding. The practice of making judicial observations obiter is also well established. In this connection, as observed by Devlin J. Behrens v. Bertram Mills Circus Ltd. [1957] 2 Q. B. 1 at p. 24:

"A judge may often give additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is a matter which the judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course has been adopted from the language used and not by consulting his own preference."

From the above quotation it becomes plain that the trial judge was not convinced of the cogency of the construction put on the deed of gift by [p.517] counsel. Whatever proposition of law he expounds as flowing from that interpretation must, therefore, be considered as an obiter.

Now the vexing question calling for determination is whether the judgment decreed that those specific children of lawyer Abadoo are entitled to occupy the whole house for the duration of their lives or that they are entitled to occupy only that portion of the house the head of family will allocate to them. In allowing the second leg of her counterclaim the trial judge declared that the defendant was entitled to occupy the house (simpliciter) with her children for life in terms he had stated before and referred to the cases of Bede and Halmond for those terms.

Bede v. Sekyiama (1914) D.C.A.L. 201 pertains to the interest of the widow in her husband's landed estate, and that will be of no pressing interest to us here. Halmond v. Daniel (1871) Sar.F.C.L. 182 which is on a different plane deals with the interest of children in their deceased father's self-acquired house. It is in the customary law expounded in this latter case at pp.

182-183 that the trial judge anchored the children's possessory life interest in the house. The customary law quoted in extenso by the trial judge at pp. 129-130 is as follows:
"The custom is that if a man had a father either by country marriage or otherwise, and the father lived in the house with wife and child, and he died, all the deceased's property, except the house, goes to his family. The father's gun and sword and house go to the son, and the saying is, 'The father dies and leaves his house to the son.' The family take the property, but do not turn away the child. The son lives in the house with the family of his father, supposing they had nowhere to live, and the son does not turn them away.

If it is a family house, the head occupies as head yet he does not turn away the son from the house, except the son, after he has grown up, finds himself competent to build and leaves for the purpose of doing so. But he would not under any circumstances be turned out by the head of the family. The family would not be turned out for the son's accommodation; if they had nowhere else to live, they would live in the house. Where there is room enough for all (son and family), the head of the family arranges the rooms to be allotted to each. My answer of the descent of house to the son applies in case it has been built by the father; the family would be allowed to live in it if they had nowhere else to go. If they had, they would leave the father's house to the son. Son could not sell the house except with consent of the family."

The emphasis is the judge's own.) In fine, the customary law herein expounded is that the self-acquired house in which the deceased father had lived with his wife and children descends on the children who cannot sell the house except with the consent of the family. This is what the learned judge recognised at p. 130 that the children have a possessory life interest in such self-acquired house and that "this possessory interest is only subject to the family's title to the house but takes precedence over it, so that the family cannot sell the house above their heads."
From the exposition of the customary law in Halmond's case the children will, as a rule, be entitled to their possessory life interest in the whole house except that where the members of the family have nowhere to live (and there was room to accommodate them) they would be permitted to live in the house with the children. If they already have their accommodation then the members of the family should leave the house to the children. Edward Wiredu J. at p. 131 thus aptly describes this privilege to the family:
"The possessory interest of children in respect of the deceased's self-acquired house does not however mean that they should deny the family access to the house where it is possible to accommodate those without rooms to stay in, but any undue interference against their possessory interest should be reasonably resisted."
The learned judge further lamented the failure of some text-writers of our generation to give any serious consideration to the law as expressed in the Halmond and Bede cases and which, in his opinion, would have gone a long way to minimise the plight of widows and their children from the rapacious demands of the husband's family. This possessory life interest reserved in the children, and which Edward Wiredu J. upholds will, in my view, generally make the children their own masters in the house and discountenance the notion that the head of family (or the successor for that matter) has the right to take possession and instal himself the grand patriarch of the house and watchful of the conduct of the children even where they are sui juris.
And, indeed, any attempt to implant members of the family in a father's self acquired house to the diminution of the comfortable life-style to which the children have been accustomed must be considered an "undue interference against their possessory interest" which they will be entitled to resist. It is also a matter to be pleaded and proved that members of the family have nowhere to lay their heads before the children will be ordered to permit their accommodation in the house. To ask in this writ for possession of house No. G. 8/2, Tantri Lane, Cape Coast, is a right so fundamental and so far removed from asking for a right to

accommodate indigent members of family. Insofar as the plaintiff claims merely for possession of that house, I hold that the decision in Amissah-Abadoo v. Abadoo (which vests title in the defined family but a possessory life interest in the fourth defendant and his other full-blood brothers) estops him. I accordingly dismiss the plaintiff's claim with ¢200 costs. DECISION. Action dismissed. Judgment for the defendants with costs.

ALIENATION

The guiding principle to alienate family property was affirmed by the court in the case of YAWOGA *v.* YAWOGA AND ATUTONU [1959] GLR 67 where it held that for the head of the family to validly alienate family property, he must do so with the consent of the principal members of the family. In the instant case, the plaintiff (who was the son of the first defendant) brought an action to set aside the sale of family property done by the first defendant (who was the head of the family). The plaintiff argued that the other principal member did not consent to the sale. Upon trial, it was esterblished that all the principal members consented to the sale, hence the court held that the sale was valid since it was done by the head of the family, with the consent of the principal members.

The principle in the above case was also supported by the case of ALLOTEY *v.* ABRAHAMS TAMAKLOE *v.* ABRAHAMS (1957) 3 WALR 280 where the court held that for the alienation of a stool property to be valid, such a sale must be done by the head of the stoolwith the consent of some principal members of the stool. In this case, the head of a stool with the consent of some principal members of the stool sold some stool properties to the plaintiff, the court held that the sale was valid.

Also,the case of ATTAH v. AIDOO AND OTHERS [1968] GLR 362 -372 also supported the principle stated in the above cases.

However, in the case of ENNIN v. PRAH [1959] GLR 44-48, the court held that if 'A' have self acquired properties, upon his death (intestate)the properties will devolve to his immediate matrilineal family as a family property and not to the general family to which he belong. So in such an event, the proper head of family to validly alienate the family property will be that of the deceaced matrilineal family with the consent of the principal members therein and not the head of the wider family.

Furthermore, It was also stated in the case of NUNEKPEKU AND OTHERS v. AMETEPE [1961] GLR 301-305 that where a member of the family alienates part of the family land without the consent of other family members, and the family members now wishes to take from him the part of the family land allocated to him, the right way to do this is for the family members to call a family meeting whereby the head and principal members of the family will decide whether or not to eject him from the family land. The members are not to resort to court to eject such a person without having a family meeting first to that effect. In the instant case, the plaintiffs (some members of the family) brought an action to eject the defendant from the part of the family land which he occupied, and their reason for doing so was that he sold part of the family land without the consent of the other family members. The plaintiffs succeeded at first instance. But upon appeal, the court of appeal held that the plaintiffs would have had a family meeting to that effect before instituting such an action, and consequently entered judgment for the appellant, and dismiss the claim of the plaintiffs.

Also, in the case of MAHAMA HAUSA AND OTHERS v. BAAKO HAUSA AND ANOTHER [1972] 2 GLR 469-487, the court held that when a person who is not authourised to alienate family property goes ahead to do so, the family, if apply to the court on time can have the sale set aside. In the instant case, the first defendant claim that the property in dispute was given to him as a gift by the deceaced (who died without a child). The plaintiffs during the trial, esterblished that no such gift was made to the defendant by the deceaced (so the properties are to vests on the family since the deceaced left no issue). Mean why, the first defendant had already sold the said property to the second defendant. The court held that since no gift was made to the first defendant, the property became family property. And also that because the first defendant was not in a position to sell family property and that the family members applied to the court on time to set aside the sale, the sale was therefore set aside and the property returned to the plaintiffs as family property.

However, it was held in the case of AKAKPO V. AFAFA [1952] D.C. (LAND) 52, 55, 116 that where the head of the family is unavoidably absent, and there is a good reason for family members to sell the family property, the sale will be valid so long as all the other family members consent to it. In the above case, the head of the family travelled to Liberia and stayed there for about 12 years. Mean why the family house was deteriorating, so the other family members sold part of the family property, and then used the proceed to renovate the family house. Upon his (the head of the family) return from Liberia, he tried to regain possession of the property sold to the plaintiff. The court held that the puppose for selling the property was for the interest of the entire family and also that the sale was with the consent of the family, hence the sale was valid.

However, it was held in the case of ADJEI *v.* APPIAGYEI. [1958] 3WALR 401 that wher the head of the family sell family property without the consent of the principal members, the sale will be voidable and could be set aside, but for thie to happen, the members must apply to the cout on timeously.

The issue of applying to the court timeously for the court to set aside the sale of a family land by someone who does not have the capacity to do so was also affirmed in the case of MANKO AND ORS Vrs Bonsu [1936] 3 WACA 625. In this case, the family property was sold by a member of the family who lack the capacity to do so, it took the family several years to challenge the sale and the court held that the application was not brought timeously, hence, the sale was upheld.

Read the case of KWAN v. NYIENI & ANOR. [1959] GLR 67-74

In addition to this , the court also held in the case of DOTWAAH AND ANOTHER v. AFRIYIE [1965] GLR 257-269 that the 'head of the family or successor is an indispensable person in the alienation of family land; and alienation of family property made by the head of the family or a successor purporting to be with the consent and concurrence of the principal members of the family is voidable at the instance of the family if they act timeously; but a conveyance made by any other member without the indispensable person, the head of the family or the successor as the case may be, is void ab initio and confers no interest or title in the land on the purchaser or mortgagee'. The mortgage in this case was granted by the first defendant, and the second defendant took it in spite of opposition by the plaintiff the successor; that being so, the court held that the transaction is void and of no effect.

Also, in the case of FOSU v. KRAMO [1965] GLR 629-640, the court held that where the head of the family have not been appointed or that he is unavoidably absent, the duties of the head of that family will be perfomed by the eldest male member of that family, pending when the head of the family will be appointed or when he return from where he went to. The court also added that a family can validly allow a memebre of that family to obtain personal loan using the family property as security for the loan. In the instant case, the plaintiff purchased the farm in dispute from a public auction conducted under a power of sale in a mortgage deed. The defendant then entered in to the said properting, claiming it is their family property and that the so called mortgage transacting was void since the mortgagor entered into the mortgaga transaction in his personal capacity and not on behalf of the family and also that it was done without the consent of the family. The court held that the sale was valid because some members of the family signed the mortgage instrument, signifying their consent to the transaction and hence with the consent of the family, a member can use the family property as security for personal loan.

NUNEKPEKU AND OTHERS v. AMETEPE [1961] GLR 301-305
IN THE HIGH COURT, HO
6TH JUNE, 1961

PREMPEH, J.

This is an appeal from the judgment of the South Anlo Local Court "A" given in favour of the plaintiffs-respondents herein.

"The land commonly known and called Bawe land situate and being between Woe and Tegbi towns is admittedly the property of Agbeve family of Anloga and Woe – which is under the control and supervision of the plaintiffs as head and principal members of the said Agbeve family.

"The defendant who is not a member of the said Agbeve family has been wrongly and unlawfully granted a portion of the said Bawe land (previously cultivated by the late Abusah) by Kwashie Bohlibo Akpalu a junior member of the Agbeve family without the knowledge, consent and authority of the plaintiff and/or the family as a whole wherefore the plaintiffs' claim against the defendant is for an order of ejection of the defendant from the land wrongly occupied by him at Bawe and bounded on the East by Bawe Tribal land, West by the land of farm cultivated by Tsigui Akpalu: North by the farm wrongly entered upon by Tetor Abotsi Aho and on the South by the farm wrongly entered upon by Denu Kese.

A further order upon the defendant, his agents, servants and labourers to vacate any other portion of Agbeve family land known and called Bawe land, Aborme land and Aveglo land wrongly and unlawfully occupied and/or cultivated by him.

In the second paragraph of the particulars of claim, the respondents claimed that the appellant was not a member of the Agbeve family, but in giving evidence for and on behalf of the other respondents, the second plaintiff-respondent admitted that the defendant was a member of the Agbeve family on the maternal side, and it is not insignificant to observe that the second plaintiff himself admitted that he was a member of the said Agbeve family on the maternal side.

It having been established that the appellant is a member of the Agbeve family, whether it be of the wider or immediate family, it is my view that he is entitled to occupy any available part of the Agbeve family land, and that once he has occupied that portion, he has a limited right to it, and cannot be ejected therefrom at the will of the individual member of the family.

It has been contended on behalf of the respondents that the appellant was a licensee of the respondents, but I am unable to accede to that argument since as a member of the family he has limited rights to the family land.

It is my view that even if the appellant had joined some other members of the family in alienating a portion of the family land rightly or wrongly, the remedy open to the respondents, if they had a right to sue at all, was to bring an action for the recovery of the land from the vendee.
In my opinion, the alternative remedy open to the respondents was to have called a meeting of the whole family, and if the entire family or the principal members thereof had resolved that he should be ejected from or dispossessed of the portion of family land he himself occupied, and if he still remained on the land, then and in that case he could be termed a trespasser, and the family per the respondents could then properly bring an action in a native court to enforce the decision of the family and obtain an order of ejectment or for possession. See Abontendomhene Kweku Akenten v. Kwame Dapaah.

In that case, the respondent had been made the customary successor of one Kweku Pong deceased, a member of the family to which both the appellant and the respondent belonged, and the cocoa farm left by the deceased had been entrusted to the respondent as caretaker thereof for the family, and to utilise the proceeds of the said cocoa farm for the benefit of the family. The respondent failed to utilise the proceeds of the farm to repair the family house, as he had to do, and had also refused to render accounts, and the appellant brought an action in the native court for the recovery of possession from him of the said cocoa farm.
It was held by the Land Court, supporting the judgment of the Asantehene's Appeal Court "A", that the family could only bring the action for recovery of possession of the farm after the family had properly met and customarily removed the respondent from his position as successor and caretaker, the point being that after having been removed, the respondent would be a trespasser if he remained in occupation of the farm.

In my opinion the principle applies with much more force in this case. In this case, the respondents just sued in the native court to dispossess the appellant of the portion of Agbeve family land occupied by his ancestors and now occupied by him, on the ground that he had joined some other members of family to alienate another portion of family land, and since the procedure which I have indicated in the case above referred to was not followed, I do hold that the respondents' action against the appellant was not maintainable.
Further, and in any case, it is my view that if there was a peculiar custom applicable to the respondents' family or to the area in which the property is situated, whereby the action could be maintainable without such customary observance, such peculiar custom should have been proved by evidence. See Tetteh v. Doku. This the respondents failed to do and the trial court also failed to direct itself that such custom should have been proved.
One other reason for the institution of the action against the appellant, as is evidenced in paragraph 2 of the particulars of claim, was that he had been in occupation of a portion of family land previously occupied and cultivated by Abusah. In my view that was a right of action open to Abusah himself, if in fact he had a family right which had been disturbed by the appellant, and I hold therefore that the respondents were not in those circumstances competent to bring this action against the appellant on that ground.
For these reasons I will allow this appeal, and I do set aside the judgment of the native court. Accordingly I do order that the plaintiffs-respondents' claim against the defendant-appellant be dismissed, and I enter judgment for the defendant-appellant with costs which I assess at 70 guineas, inclusive of counsel's brief fee. The appellant will have his taxed costs in the court below. Appeal dismissed.

MAHAMA HAUSA AND OTHERS v. BAAKO HAUSA AND ANOTHER [1972] 2 GLR 469-487
IN THE COURT OF APPEAL
31 JULY 1972

APALOO AND BENTSI-ENCHILL JJ.S.C. AND KINGSLEY-NYINAH J.A.

Customary law—Land—Gift inter vivos—Acceptance—Mode of acceptance—Alleged presentation to donor of some token of acknowledgement in presence of witnesses—Oral gift of house made by deceased to defendant in presence of plaintiffs—Denial of gift by plaintiffs—No evidence of giving of aseda—Whether valid oral gift inter vivos made.

Practice and procedure—Pleadings—Amendment—Application for leave to amend original pleadings granted—Another application for leave to amend pleadings by substituting original plea to bring pleadings in line with evidence adduced not granted—Court's refusal based on the fact that the amendment would change the whole tenor of the matter—Whether amendment should have been allowed—Supreme [High] Court (Civil Procedure) Rules, 1954 (L.N. 140A), Order 28, r. 1.

Practice and procedure—Pleadings—Amendment—Leave to amend pleadings granted—Amendment effectuated by court in the terms sought—Amendment filed out of time—Whether such amendments null and void or a defect which can be cured by the court at any time—Supreme [High] Court (Civil Procedure) Rules, 1954 (L.N. 140A), Order 28, rr. 7 and 12.

Deeds and documents—English form—Illiterate parties—Document written in English—Contents of documents contrary to what signatories understood it to be—Whether contents of document can be enforced against signatories.

Customary law—Family property—Alienation of—Family property entrusted to the defendant as caretaker—House sold by first defendant to the second defendant as a bona fide purchaser for value without notice of any defects—Prompt action taken by family to have sale set aside—Whether the action to have the sale set aside should have been commenced by whole family or head of family only.

Conflict of laws—Intestate succession—Immovable property—Deceased of Hausa origin and resident in Ghana all his lifetime—Acquisition of Ghanaian domicile of choice—Devolution of property on death intestate—Law applicable.

Customary law—Samansiw—Essential requirements—Gift made by nuncupative will—No proof of acceptance or giving of aseda—No members of deceased's family present at the making of gift—Whether the presence of some family members and the giving of aseda in the form of drinks essential requirements in the creation of an oral customary will.

HEADNOTES

On the death of S. who left no issue, the plaintiffs, his paternal brothers and sisters alleged they were entitled on intestacy to succeed to his self-acquired property. They purported to appoint M. caretaker of a house left by S. in Navrongo by a document (exhibit 2) written in English which however recited the terms of a nuncupative will and witnessed the implementation of a gift of the said house made thereunder to M. All the parties to the document were illiterate in English. M. sold the house to K. and the plaintiffs brought an action **[p.470]** against M. and K. claiming a declaration of title to the house and a declaration that any purported sale of it by M. was null and void. M. contested the action and counterclaimed for a declaration that the sale was valid. He contended that S. had made a gift of the house to him before he died; that the plaintiffs in the presence of witnesses had witnessed the making of the gift and that they were estopped by exhibit 2 from denying that the property had passed to him. The plaintiffs denied all these allegations.

M. pleaded first a gift by oral will, later amended this to an oral gift inter vivos and at the close of evidence sought to amend his pleadings back to a gift by oral will. This was refused by the trial judge on the ground that it would change the whole tenor of the case. Other amendments by both sides were effectuated by the court in the terms sought but were not filed within the time laid down in the amending orders. Judgment was given for the plaintiffs, dismissing the defendants' counterclaim. The defendants appealed. Among the issues to be determined by the Court of Appeal were: (1) whether the alleged oral gift was ever made by the deceased and if so whether it was an oral gift inter vivos or an oral will; (2) whether the judge should have allowed the defendants to amend their pleadings and also whether other amendments

filed out of time should have been accepted; (3) whether the family as a whole could bring an action to recover the property or it should have been brought by the head of family only and (4) whether the property of the deceased should devolve by Hausa custom or that of Kassena-Nankani.
Held, dismissing the appeal:
(1) the acceptance of a gift inter vivos, especially of land must be made by the presentation to the donor of some token of acknowledgement and gratitude in the presence of witnesses. There was no evidence of such acceptance, and such evidence as there was could only support a claim for a gift by oral will.
(2) Where an amendment is being sought in order to bring the pleadings in line with the evidence adduced, it is a guiding principle of cardinal importance that generally speaking, all such amendments ought to be made and Order 28, r. 1 in fact provides mandatorily that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." The real issue between the parties in the present case was the question whether or not S. had made such a disposition of the said property to M. as would vest the latter with title to sell the property. M. had pleaded and led evidence regarding a certain transaction at the sick bed of S. and in the presence of witnesses. Whether this evidence proved the transaction to be an oral gift inter vivos or a nuncupative will would be essentially a conclusion of law from the evidence already adduced. The amendment sought to be made in the pleadings was thus to enable the defence to argue that the transaction so evidenced amounted to a nuncupative will as originally pleaded and not an oral gift inter vivos as later amended. In the circumstances the amendment should have been allowed. Dictum of Bowen L.J. in Cropper v. Smith (1884) 26 Ch.D. 700 at pp. 710-711, C.A. applied.
(3) If a court in granting an application for amendment confines itself to granting leave to amend, the failure to file the amendments within the time limited must result in their becoming ipso facto void as laid down in Order 28, r. 7. But this failure to file the amendments within the time limited is not irremediable. Order 28, r. 7 expressly leaves room for the court to grant an extension of time. The amendments in this case were however **[p.471]** effectuated by the court in the terms sought and Order 28, r. 12 mandatorily requires the court or a judge to make "all necessary amendments" for the purpose of determining the real issues raised and further that any defects or errors in any proceedings may be amended by the court "at any time." Ayiwah v. Badu [1963] 1 G.L.R. 86, S.C. explained.
(4) There is no presumption that an illiterate Ghanaian who does not understand English and cannot read or write has appreciated the meaning and effect of an English legal instrument because he is alleged to have set his mark to it by way of a thumbprint. Since the plaintiffs were illiterate in English and the contents of the document (exhibit 2) did not correspond with what they had understood themselves to be setting their thumbprints to, the contents of the document could not be used as an estoppel or as a basis to enforce a claim against them. Kwamin v. Kufuor (1914) P.C '74—'28, 28 followed.
(5) Even if the second defendant was a bona fide purchaser from the first defendant the law permits sales of family property to be avoided in situations where prompt action is taken by the family concerned or its representatives to prove that the sale had been made without the consent of the principal members of the family. And in this case there was no evidence that the plaintiffs had slept on their rights. Agbloe v. Sappor (1947) 12 W.A.C.A. 187; Nelson v. Nelson (1951) 13 W.A.C.A. 248; Owiredu v. Moshie (1952) 14 W.A.C.A. 11; Bayaidee v. Mensah (1878) Sar.F.C.L. 171; Insilea v. Simons (1899) Sar.F.L.R. 105 and Manko v. Bonso (1936) 3 W.A.C.A. 62 cited.
(6) The many decisions of the courts which state that when a man dies intestate his property becomes family property can be understood to mean at least this: that title to such property vests automatically in the class of entitled persons commonly called the family, though the group of persons covered by the term obviously differs according to whether one is dealing

with a patrilineal or matrilineal community. If this class of persons is identified, as was the case in this action, then it obviously is entitled to institute an action for a declaration of its title to the property where this is disputed. A head of family or successor is patently only a representative or agent of the class of entitled persons. Where the class is numerous, convenience, custom, tradition and court practice dictate that a head of family or successor should normally act on behalf of the class of entitled persons. But this requirement is necessarily subject to important exceptions. And one obvious exception is where all or nearly all the members of the class of entitled persons present themselves before the court as plaintiffs claiming a declaration of the title of all the members to the property. This is all the more obvious when, as in the present case, the defendants admit and even plead that the two eldest members of the deceased owner's family are among the plaintiffs. Mahmudu v. Zenuah (1934) 2 W.A.C.A. 172; Koram v. Dokyi (1941) 7 W.A.C.A. 78 and Kwan v. Nyieni [1959] G.L.R. 67, C.A. cited.

(7) The evidence adduced showed that S. was born in Yariba, Ghana, lived all his life in Ghana and settled and worked at Navrongo where he acquired the house in dispute. He had a Ghanaian domicile and had become a member of the Kassena-Nankani community among whom he had settled and died. The Kassena-Nankani customary law rules of succession therefore applied to this case.

[p.472]

obiter. Per Bentsi-Enchill J.S.C. The evidentiary requirements deemed necessary for the valid exercise of a right to make a samansiw can be made so rigorous as to render that right nugatory. A voluntary oral declaration in the presence of two responsible and disinterested witnesses should suffice and there should be no need for aseda.

Per Apaloo J.S.C. The rendering of thanks with thank-offering or presents is recognised by customary law, but any evidentiary requirement that a samansiw should be accepted by the giving of drinks should be disapproved. It is also not necessary that the witnesses should include a heritable member of the donor's family. Summey v. Yohuno [1960] G.L.R. 68 disapproved.

CASES REFERRED TO

(1) Irons v. Smallpiece (1819) 2 B. & Ald. 551; 106 E.R. 467.
(2) Cochrane v. Moore (1890) 25 Q.B.D. 57; 59 L.J.Q.B. 377; 63 L.T . 153; 54 J.P . 804; 38 W.R. 588; 6 T.L.R. 296, C.A.
(3) Cropper v. Smith (1884) 26 Ch.D. 700; 53 L.J.Ch. 891; 51 L.T. 729; 33 W.R. 60, C.A.
(4) Ayiwah v. Badu [1963] 1 G.L.R. 86, S.C.
(5) Summey v. Yohuno [1960] G.L.R. 68; Oll.C.L.L. 233; affirmed [1962]1 G.L.R. 160, S.C.
(6) Kwamin v. Kufuor (1914) P.C. '74—'28, 28.
(7) Akele v. Cofie [1961]1 G.L.R. 334.
(8) Agbloe v. Sappor (1947) 12 W.A.C.A. 187.
(9) Nelson v. Nelson (1951) 13 W.A.C.A. 248.
(10) Owiredu v. Moshie (1952) 14 W.A.C.A.11.
(11) Bayaidee v. Mensah (1878) Sar. F.L.R. 171
(12) Insilea v. Simons (1899) Sar F.L.R. 105.
(13) Manko v. Bonso (1936) 3 W.A.C.A. 62.
(14) Mahmudu v. Zenuah (1934) 2 W.A.C.A. 172.
(15) Koran v. Dokyi (1941) 7 W.A.C.A. 78.
(16) Kwan v. Nyieni [1959] G.L.R. 67, C.A.

NATURE OF PROCEEDINGS

APPEAL from a judgment of Koranteng-Addow J. granting the respondents' claim for a declaration of title to a property and a declaration that any purported sale of it by the first defendant is null and void. The facts are fully set out in the judgment of Bentsi-Enchill J.S.C.

COUNSEL

U. V. Campbell for the appellants.

K. Dei Anang for the respondent.
JUDGMENT OF BENTSI-ENCHILL J.S.C.
The subject-matter of these proceedings is a parcel of land with buildings on it, known as house No. C.32 Navrongo. It was once owned by one Salifu Tailor, a Hausa man whose parents originally came from Kano in Northern Nigeria. Salifu Tailor had died some three years prior to the action without leaving any issue. The dispute arose when the first defendant, one Mahama Hausa, a cousin of Salifu Tailor, purported to sell Salifu's said property to the second defendant, one Alhaji Seidu Kantosi, a stranger to the family.
[p.473]
The plaintiffs, who are acknowledged by the defendant to be paternal brothers and sisters of the deceased Salifu Tailor, challenged the first defendant's right to alienate the said property and brought the action herein claiming a declaration of title to the property and a declaration that any purported sale of it by the first defendant is null and void.
This claim was hotly contested on three principal grounds, and backed up with a counterclaim for a declaration affirming the validity of the sale and for other reliefs. While admitting that the plaintiffs are the brothers and sisters of the deceased Salifu Tailor, that the first and second plaintiffs are the eldest members of the deceased's family and that the deceased had left no issue after him surviving, the first defendant contended that the deceased had made a gift of the said property to him before he died. As to whether this was a gift by oral will, or a straightforward oral gift inter vivos, the defence wavered somewhat between the one and the other, first pleading a gift by oral will, later amending this to an oral gift, and later seeking leave, which was refused, to amend again back to the original plea of a testamentary gift. But I do not think that much can reasonably be made concerning this vacillation between the two kinds of gift. For whether it was an oral gift or a gift by oral will would be a conclusion of law from the first defendant's contention and evidence that it occurred in the presence of witnesses including the first and second plaintiffs who, he said, were the eldest members of the deceased's family. And, if validly made, as he contended, then either type of gift would have operated to prevent the property from passing by way of intestate succession, and would have vested him with title to dispose of the property as he pleased.

The defence contended secondly that the plaintiffs had in the presence of witnesses admitted the making of the said gift by Salifu Tailor to the first defendant and that the plaintiffs were therefore estopped by their admissions from alleging otherwise and contesting the sale. It was contended further that the second defendant was a bona fide purchaser for value without notice of any defect in the first defendant's title, a title which the plaintiffs must be held to have admitted to be valid. Thirdly the defence denied the right of the plaintiffs to bring this action even if the said property became family property upon the death of Salifu Tailor contending, in effect, that the plaintiffs neither became entitled to nor succeeded to the estate of Salifu Tailor.
These three points of dispute were all resolved in favour of the plaintiffs by Koranteng-Addow J. in the court below, in a judgment dismissing the defendants' counterclaim and declaring: (a) that the property in dispute "is the family property of Salifu Tailor (deceased) in which the plaintiffs and their other brothers and sisters are the principal members" and (b) that "the purported sale of the property by the first defendant is null and void." From this decision the defendants have appealed to this court on several grounds.

On the issue as to whether or not Salifu Tailor gifted the said house to the first defendant, Mr. Campbell urged as a ground of appeal **[p.474]** the contention that "the learned judge erred in law and on the facts in dismissing the counterclaim of the defendants and in holding as against the second defendant that the first defendant had no title in the property to pass"; further that:

"the learned trial judge erred in law and on the facts in failing to hold as against the plaintiffs and in favour of the second defendant that the aforesaid plaintiffs are estopped by their own admission in exhibit 2 from denying that the property passed to the first defendant entitling the latter to dispose of the same."

Now since the property in dispute is admitted on all hands to have been the self-acquired property of Salifu Tailor deceased, it is evident that unless it is shown that Salifu Tailor either divested himself of the said property inter vivos, e.g. by gift, or disposed of it by his will, his said property must pass to the persons entitled to succeed him upon his death intestate. A clear onus therefore lay on the defendants to prove such a disposition by Salifu Tailor in favour of the first defendant in order to succeed on their counterclaim for "a declaration that the sale of house No. C.32 Navrongo by the first defendant to the second defendant is valid and lawful." For such a sale by the first defendant would be "valid and lawful" only if he had title to it, as he claimed, by virtue of an oral gift inter vivos from Salifu Tailor or by virtue of the latter's oral will.
The first defendant clearly failed to prove a gift inter vivos; and I think the learned trial judge was right in rejecting his claim in this regard. His evidence, for what it was worth, could only support a claim for a gift by oral will. It was as follows:
"About 1963 Salifu contracted a disease and he died. When he was sick and before he died, he sent for me. I went and saw him at the hospital at Navrongo. I met the first and second plaintiffs at his bedside. There he told me that if he were to die his house should go to Mahama. Nobody should do anything about it. He also sent for a certain man called Alhassan."
He did not call Alhassan to give evidence in support. And the plaintiffs denied this evidence.
So far as oral gifts inter vivos go, our courts have for a long time insisted, rightly in my view, on a requirement for acceptance patently lacking in this evidence of the first defendant. This is the requirement that the acceptance of a gift, especially of land, must be made by the presentation to the donor of some token of acknowledgement and gratitude in the presence of witnesses. This requirement serves many purposes, and solves many problems relating to gifts. In the first place, a proffered gift which the donee does not accept is thereby prevented from becoming a gift. Secondly, where no gift was intended by a putative donor, a purported acceptance in the presence of witnesses affords **[p.475]** an opportunity for express denial of a donative intent. Thirdly, the requirement of acceptance in the presence of witnesses ensures publicity and makes the gift not only impossible or difficult to deny afterwards, but operates as a double check preventing the donor from making a gift of what is not his own, namely, family property, and preventing fraud. As a device which solves the problem of proving donative intent, it neatly obviates some of the uncertainties surrounding the issue of delivery in Anglo-American law : compare Irons v. Smallpiece (1819) 2 B. & Ald. 551; Cochrane v. Moore (1890) 25 Q.B.D. 57.t-1819)

Needless to say it is because the evidence led did not support the plea of an oral gift that counsel for the defendants in the court below, sought, at the close of the evidence, to amend his pleading from one of an oral gift inter vivos, to one of a gift by oral will as originally pleaded. He sought leave to make this amendment in order, as he expressly stated, to bring his pleadings in line with the evidence adduced. This application was refused by the learned trial judge. The reason he gave is that "this proposed amendment would change the whole tenor of the case as it goes to the root of the matter." With respect to him, I think that the amendment should have been allowed and for the limited purpose expressly stated by the defence counsel, namely, to bring his pleadings in line with the evidence adduced. It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made and Order 28, r. 1 of the Supreme [High] Court (Civil Procedure) Rules, 1954 (L.N.140A), in fact provides mandatorily that "all such

amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." The words of Bowen L.J. in Cropper v. Smith (1884) 26 Ch.D. 700 at pp. 710-711, C.A. are apposite in this regard:

> "[I]t is a well established principle that the object of the Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights . . . I know of no error or mistake which, if not fraudulent or intended to over-reach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."

The real issue between the parties in this part of the case was the question whether or not Salifu Tailor had made such a disposition of the said property to the first defendant. The defendants had pleaded **[p.476]** and led evidence regarding a certain transaction at the sick bed of Salifu Tailor, and in the presence of witnesses. Whether this evidence proved the transaction to be an oral gift inter vivos or a nuncupative will would be essentially a conclusion of law from the evidence already adduced. The amendment sought to be made in the pleading was thus to enable the defence to argue that the transaction so evidenced amounted to a nuncupative will as originally pleaded, and not an oral gift inter vivos as later amended. This amendment should have been allowed.

It has seemed to me necessary to comment at length on this question of practice regarding amendments because the state of the pleadings in this case at the conclusion of the trial and prior to the addresses was distinctly confusing. There had been other amendments ordered by the court at the request of each of the parties on different previous occasions. On most of these occasions the court's order did not only effectuate the amendment prayed for; but also ordered the filing (usually) within seven days of the amended pleading. But in many cases the amended pleading was filed long after the prescribed period. Thus, for example on 15 February 1967 pursuant to an unopposed application by the defendants for leave to amend the statement of defence by adding a counterclaim thereto in terms specified in the supporting affidavit, Annan J., as he then was, granted the application in the following terms:

"By court:

Motion granted. It is ordered that the statement of defence filed by the defendants on 17 August 1966 be amended in terms of the application. Further ordered that the amended statement of defence be filed within seven days from today, and the reply be amended within fourteen days from the service of the amended defence ..."

The amended statement of defence, however, was not filed till nearly three months later, i.e. on 6 May 1967. And no defence to the counterclaim therein contained was ever filed. Some two years later, i.e. 3 March 1969, the plaintiffs filed an application to amend their writ of summons by adding after the plaintiffs' names in the title the following statement "Suit on behalf of themselves and all other persons entitled to the estate of Salifu Tailor deceased," and by adding similar words to the claim on the endorsement, and to paragraph 1 of the statement of claim. They also sought to amend paragraph 4 of the statement of claim by adding Kassena-Nankani custom as an alternative to the Moslem custom which they had pleaded as the custom by which they claimed to have become entitled to Salifu's property.

This application was not heard till the very day of the trial some ten months later, i.e. on 21 January 1970 when the plaintiffs' counsel drew the courts attention to it. Koranteng-Addow J. then made the following order: "Let the writ and the statement of claim be amended in terms of the amendment filed and let the plaintiffs file a writ and **[p.477]** statement of claim incorporating the amendments within seven days." It was on this occasion, i.e. just before the

trial began, that the defendants' counsel then applied to have the word "will" replaced by the word "gift" in his pleadings. This was not objected to by the plaintiffs' counsel who then asked leave to make consequential amendments in the reply, substituting the word "gift" for the word "will," among other things. Pursuant to these applications the court ordered as follows: "Let the amendments sought in both cases be granted. Let the solicitors file amended pleadings incorporating all these amendments." The trial then followed on immediately. The amended statement of defence was filed three days later 24 January 1970, while the trial was proceeding. The amended writ and statement of claim and reply were filed on 3 February 1970 immediately after the conclusion of the trial. A fortnight later, i.e. 17 February 1970, the court heard counsel's addresses.

The question is whether these amendments were a nullity merely because counsel had failed to file the amended pleadings within the times laid down in the amending orders. Quite clearly if the court orders had confined themselves to granting leave to amend then failure to file the amendments within the time limited must result in their becoming ipso facto void as laid down in Order 28, r. 7. But this failure to file the amendment within the time limited is not irremediable as was contended by counsel for the defendants in the court below citing Ayiwah v. Badu [1963] 1 G.L.R. 86, S.C. and concurred in by the plaintiffs' counsel who argued similarly concerning the amended statement of defence. Order 28, r. 7 expressly leaves room for the court to grant an extension of time. And the amended pleadings already on the file could have been regularised in this way, assuming that the sought-for amendments had not in fact been made by the court and were therefore dependent on the filing of the amended pleadings in time. As can be seen from the terms of the orders actually made, however, the amendments were in each case effectuated by the court in the terms sought. The decision in Ayiwah v. Badu (supra) excepted amendments made by the court ex proprio motu. It remains only to add that amendments actually effectuated by the court pursuant to an application are also necessarily excepted. And it is to be noted that Order 28, r.12 mandatorily requires the court or judge, to make "all necessary amendments ... for the purpose of determining the real question or issue raised by or depending on the proceedings." For this purpose that rule provides that "The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings,..." (The emphasis is mine).
Therefore, there was patent error on the part of counsel in the court below in urging the rejection of each other's amended pleadings and proceeding on the notion that failure to file the amended pleadings within the time limited "cannot," as Mr. Luguterah counsel for the defendants in the court below put it, "be repaired."
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The learned trial judge made no explicit ruling on counsel's submissions regarding the amended pleadings filed out of time; but he must be taken to have rejected the contention that they had become void since he treats the plaintiffs as suing in a representative capacity and also expressly deals with the defendants' counterclaim, which he must otherwise have ignored. In my view he was right to do so.
It is to be observed, further, that no real harm was done by the learned trial judge's rejection of the defendants' application to amend their pleading on this issue of a gift inter vivos to one of gift by nuncupative will. Defence counsel in the court below felt free to submit that "even if a gift cannot be established on the evidence, the court should hold that there was a nuncupative will," and he contended further that the plaintiffs' subsequent conduct, particularly in making exhibit 2; proves that a will was made; and he cited in his support the judgment of Ollennu J., as he then was, in Summey v. Yohuno [1960] G.L.R. 68. These submissions of defence counsel, it is true, were held by the learned trial judge to be unacceptable because "that contradicts his case, is outside his pleadings." But the learned

trial judge nevertheless did consider these submissions, and he decided in regard to them that "no case for a devise by will in favour of the first defendant has been made out."

Was he right in so holding? The only direct evidence given by the first defendant regarding this nuncupative will has been reproduced above in the section of this judgment dealing with the defence contention that there had been an inter vivos gift of the property. It will be recalled that although the first defendant says that one independent witness Alhassan was present together with the first and second plaintiffs at the making of this gift by nuncupative will, he did not call Alhassan to testify in the face of the plaintiffs' denials in that regard.

For corroboration of his solitary evidence concerning this gift by oral will, the first defendant rather relied on the document exhibit 2. This document, the truth of whose contents was disputed by the plaintiffs, was tendered and initially accepted by the court as a document given to the first defendant by the first plaintiff. The court shortly after some evidence had been given about it, decided to reject it on the ground that "it is not admissible not complying with Order 37, r. 60." I think, with respect, that it was admissible, and agree with Mr. Campbell's submission in this regard. However nothing important turns on this purported rejection, because the learned trial judge allowed further evidence to be given in regard to the said exhibit and to be cross-examined upon. What is more, he dealt with it in his judgment as a document very much in evidence. Exhibit 2 is a document in English admittedly thumbprinted by the first and second plaintiffs. It reads as follows:

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"House Claim

I, Baako the eldest of all the family hereby declare that before the death of Salifu Tailor, the deceased, he Salifu told me that after his death the house should be handed over to the youngest of all the brothers, thus Alhaji Mahama; despite the fact that he is the junior.

We the undersigned elder brothers of Alhaji Mahama have therefore on this day handed the house over to him."

On the face of it, this document appears to recite the alleged nuncupative will and to witness the implementation of the gift of the house made thereunder. The problem, however, is that all the parties to it were illiterate in English, and there is nothing in it to show that its contents corresponded with what the signatories or thumprinters understood themselves to be signing or thumbprinting. And the plaintiffs disputed the contents of this document explaining that they had only made a paper authorising the first defendant to be a caretaker of the house for them.

We are thus thrown back to an evaluation of the conflicting oral evidence in regard to it. For, as was pointed out by the Privy Council in Kwamin v. Kufuor (1914) P.C. '74—'28, 28, there can be no presumption that an illiterate Ghanaian who does not understand English and cannot read or write has appreciated the meaning and effect of an English legal instrument because he is alleged to have set his mark to it by way of signature.

The learned trial judge accepted the plaintiffs' evidence on this issue in the following terms :

"I do therefore accept Ali's explanation namely, that it does not accurately contain the instructions he and Baako gave and that by the documents they were only allowing the first defendant to be a caretaker of the house for all the beneficiaries. This view is reinforced by the instant reaction of Ali when he heard of the intention on the part of the first defendant to sell the house. He objected without hesitation and sent the defendant's second witness with a message to him that he should desist. As the second witness for the defendant deposed, Ali said that if the first defendant sold the house they would find no accommodation when they visited Navrongo. This, surely, is not the mentality of a person who knew that the house was the property of the first defendant and that it had been given to him absolutely by Salifu before he died."

In thus accepting the plaintiffs' evidence the learned trial judge impliedly rejected the evidence of the defendants and their witness the Malam Isumaila. That he was justified in accepting the evidence of the plaintiff Ali Hausa and rejecting the defence evidence in this regard was convincingly demonstrated by Mr. Dei Anang, counsel for the plaintiffs-respondents. Ali was patently a witness of truth whose evidence and conduct were entirely consistent with the contention that the first **[p.480]** defendant had only been made a caretaker of the disputed property by the plaintiffs. By contrast the defendants made a poor showing, and their witness, the Malam, revealed both inconsistent conduct and surprising nonchalance in the testimony he gave. In the result the first defendant's contention that Salifu Tailor made a gift of the house to him by oral will fails. I am satisfied that the learned trial judge had ample justification for resolving the conflict of evidence on this issue in the way he did.

It remains to observe that on the authority of the High Court judgment in Summey v. Yohuno [1960] G.L.R. 68 on which his counsel relied on the court below, the first defendant would still have failed to make out a case for a valid gift by oral will even if the evidence he led about the gift being made in the presence of senior members of the testator's family had been believed. For that evidence lacked proof of acceptance or aseda, an element which Ollennu J. (as he then was) laid down at p. 71 in that case as one of the "essential requirements of a valid customary will," namely that "there must be acceptance, by or on behalf of the beneficiaries, indicated by the giving and receiving of 'drinks'. . ."

Speaking for myself, I should have had no difficulty in upholding the validity of the gift by will if there had been credible evidence proving that it had been witnessed by two responsible and disinterested persons. Important though it is to insist on strict evidentiary requirements for the nuncupative will, I cannot help thinking, with all due respect to him that Ollennu J. went too far in the requirements he laid down in Summey v. Yohuno (supra). In so doing he virtually equated the requirements of the nuncupative will with those of the ordinary gift inter vivos. No authority was cited in support of the statement of those requirements, and the learned judge reiterated these requirements in Akele v. Cofie [1961] G.L.R. 334. What is more, although the appellate opinions of Azu Crabbe and van Lare JJ.S.C. in Summey v. Yohuno [1962] 1 G.L.R. 160, S.C. affirmed the decision of Ollennu J. on a different ground turning upon other issues, their silence might be taken as implying agreement with the requirements of a samansiw laid down in the High Court judgment.

What then are the persuasive grounds for suggesting that the requirements laid down by Ollennu J., as he then was, in Summey v. Yohuno [1960] G.L.R. 68 should not be insisted upon? In the first place, although Sarbah is very emphatic about the aseda when he deals with ordinary gifts inter vivos he makes no such stipulation concerning the samansiw (contrast Sarbah Fanti Customary Laws (2nd ed.), pp. 80-82 on gifts with pp. 95-100 on testamentary dispositions). Secondly, and even more significant as positive evidence suggesting less rigorous evidentiary requirements, is the State of Akim Abuakwa (Declaration of Native Customary Law) Proclamation, 1943. This provided concerning the samansiw in section 2 of its schedule as follows:

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"the disposition of property by samansiw is valid as it is made voluntarily and orally in the presence of two responsible and disinterested witnesses, by a person of sound mind in expectation of death from illness however caused."

The absence of any requirement of a thank-offering or aseda and of any requirement that any member of the family should be among the witnesses is a striking feature of this declaration which represents valid Akim Abuakwa law.

No less suggestive and significant regarding the requirement of the presence of members of the family as witnesses to gifts of self-acquired property was the proposal for the variation of Asante custom adopted by the Asanteman Council in 1942 as follows:
"When a person makes a gift of his own personal or self-acquired property to his children or to any other person in the presence of accredited witnesses, whether the relatives of the donor approve of it or not, it becomes valid."
See Busia, The Position of the Chief in the Modern Political System of Ashanti, p. 127. Admittedly this resolution did not, in contrast to the Akim Abuakwa Proclamation quoted above, become a proclamation under the procedure laid down in section 4 of the Native Law and Custom (Ashanti Confederacy Council) Ordinance, Cap. 102 (1951 Rev.). But it represents a significant comment on Rattray's statements regarding the samansiw in his Ashanti, pp. 238-239, where he emphasizes both the aseda and the presence of members of the family as requirements. And it is high-level evidence of a change in custom, such as the courts cannot ignore.
For as long as our legislature abstains from regulating this area of our traditional law, it is evident that the burden lies on the courts to regulate it as best they can; and the requirements laid down by Ollennu J. (as he then was) in Summey v. Yohuno (supra) represent an enterprising attempt in this direction. But there is always a danger, which must be guarded against, of throwing away the baby (some legal right) with the bath water (of formal requirements). The evidentiary requirements deemed necessary for the valid exercise of this right of making a samansiw can be made so rigorous as to render nugatory the acknowledged right to dispose of self-acquired property by samansiw. For the circumstances of oral will-making are often complicated by illness and other difficulties of access. To avoid this danger it becomes imperative for the courts to seek guidance from indications of the kind illustrated above coming from such bodies as the Asanteman Council, the Okyeman Council, etc. No less suggestive as a guide for determining appropriate evidentiary requirements, are the fact that our own Wills Act, 1971 (Act 360), copied from England, stipulates a minimum of two witnesses, and that an oral or written declaration made by an adult person of sound mind in the presence of two witnesses effectuates a valid disposition of property under Islamic law. Our ready acceptance of the **[p.482]** validity of deeds of gift and wills in English form that show no compliance with traditional requirements is, surely, an argument for re-examining those traditional requirements.

From this necessary but somewhat lengthy excursus into our law of oral wills, I now turn to another strand of Mr. Campbell's appellate argument on behalf of the defendants. This is the contention that:
"the learned trial judge erred in law and on the facts in failing to hold as against the plaintiffs and in favour of the second defendant that the aforesaid plaintiffs are estopped by their own admission in exhibit 2 from denying that the property passed to the first defendant entitling the latter to dispose of the same."
This contention, however, has been substantially disposed of by the learned trial judge's holding, which I have affirmed, that exhibit 2 is not what it purports to be. For that holding negatives any contention that the plaintiffs have admitted that the property was gifted to the first defendant by Salifu Tailor. Mr. Campbell therefore argued further that exhibit 2 is a document which on the face of it clothed the first defendant with apparent authority to dispose of the property as he pleased; that, if in reliance upon this representation the second defendant after due inquiry purchased the property, the plaintiffs must be adjudged estopped by their conduct from denying the first defendant's authority, and the second defendant must be adjudged to be a bona fide purchaser for value without notice of any defects in or equities attaching to the first defendant's title.

To begin with, as Mr. Dei Anang pointed out, the type of estoppel argued is not the type that was pleaded. In any case the bona fides of the second defendant was disputed and his evidence of admissions by the second plaintiff rejected. More important still, even if he had been a bona fide purchaser from the first defendant, our law permits sales of family property to be avoided in situations where prompt action is taken by the family concerned or its representatives to prove that the sale had been made without the consent of the principal members of the family. See, e.g. Agbloe v. Sappor (1947) 12 W.A.C.A. 187; Nelson v. Nelson (1951) 13 W.A.C.A. 248; Owiredu v. Moshie (1952) 14 W.A.C.A. 11. See also Bayaidee v. Mensah (1878) Sar.F.C.L. 171; Insilea v. Simons (1899) Sar.F.L.R. 105 and Manko v. Bonso (1936) 3 W.A.C.A. 62. And this is not a case in which the plaintiffs have slept on their rights.
This then brings us to the defendants' remaining grounds of appeal by which the plaintiffs' right to bring the action is challenged. Those grounds were formulated as follows:
"Ground 2 (a)
The learned trial judge erred in law and on the evidence in failing to dismiss the plaintiffs-respondents' claim since they failed to prove that they were successors to Salifu Tailor, deceased, and entitled to institute action against the defendants.

[p.483]
Ground 2 (b)
The learned trial judge misdirected himself in law in finding that the plaintiffs were entitled to succeed in accordance with Hausa custom and also the custom of the Kassena-Nankani people and further that the defendants admitted the right and title of the plaintiffs to succeed on the intestacy of Salifu Tailor since there was no evidence on record to support these findings."
On the issue of locus standi it is indeed true that the claim, as originally made, does not show the plaintiffs as claiming in any representative capacity. But the writ and statement of claim were amended by the court on the first day of the trial pursuant to an application by the plaintiffs' counsel to which the defendants' counsel expressed himself as not objecting. And the amendment thus ordered stated that the plaintiffs were claiming "for themselves and for all other persons entitled to the estate of Salifu Tailor deceased."
Quite apart from this however, as Mr. Dei Anang pointed out, nothing could be clearer from the proceedings that the quality in which the plaintiffs sued. Averments in the statement of claim that the plaintiffs are brothers and sisters of the deceased Salifu Tailor, and that the deceased died without leaving any issue were explicitly admitted in the statement of defence, which even pleaded further that the first plaintiff is the eldest member of Salifu Tailor's family. There was uncontradicted evidence that the plaintiffs are brothers and sisters of the deceased by the same father. There was even elicited from the second plaintiff in cross-examination the assertion, which was not denied or disproved by the defence, that there were no other persons apart from the plaintiffs who were entitled to the enjoyment of Salilfu's properties, although it appears from the plaintiff's subsequent attempt to join one Amina Hausa as plaintiff that there was at least one other sister. In this connection it is to be noted that the learned trial judge was careful to confine himself to a declaration that the said house "is the family property of the deceased in which the plaintiffs and their other brothers and sisters are principal members."

The plaintiffs further averred that "in the events which have happened and by Hausa and Moslem custom and or Kassena-Nankani custom" they "as brothers and sisters became entitled to and did succeed to the estate of Salifu Tailor." This was indeed denied in the statement of defence, and the onus therefore remained on the plaintiffs to prove this averment. But this is an onus which was discharged by the admissions on the pleadings and the evidence referred to above which was accepted.

The basis for the contention that the plaintiffs had no locus standi, no right to bring this action, lurks in the old notion that only a head of family can bring an action in respect of family property. It was effectively disposed of in cases like Mahmudu v. Zenuah (1934) 2 W.A.C.A. 172; Koran v. Dokyi (1941) 7 W.A.C.A. 78 and Kwan v. Nyieni [1959] G.L.R. 67, C.A. Mr. Campbell, it is true, did not go quite **[p.484]** as far as this. He confined himself to the contention that the plaintiffs failed to prove that they were successors to Salifu Tailor and as such entitled to institute action against the defendants. This contention, however, is effectively negatived by the admissions in the pleadings and the evidence, which disclose that the plaintiffs all but constitute the entire class of persons entitled to Salifu's property upon his death intestate. Add to this the fact that the essence of their action was patently to preserve the family character of the property and to prevent it from falling into the hands of a stranger to the family, it then becomes plain that this ground of appeal cannot be sustained.

The many decisions of our courts which state that when a man dies intestate his property becomes family property can be understood to mean at least this, that title to such property vests automatically in the class of entitled persons commonly called the family, though the group of persons covered by this term obviously varies according to whether we are dealing with a patrilineal or matrilineal community. If this class of persons is identified, as is the case in this action, then it obviously is "entitled" to institute an action for a declaration of its title to the property where this is disputed. A head of family or successor is patently only a representative or agent of the class of entitled persons. Where the class is numerous, convenience, custom, tradition and court practice dictate that a head of family or successor should normally act on behalf of the class of entitled persons. But this requirement, as the authorities show, is necessarily subject to important exceptions. And one obvious exception is where all or nearly all the members of the class of entitled persons present themselves before the court as plaintiffs claiming a declaration of the title of all the members to the property. This is all the more obvious when, as in the present case, the defendants admit and even plead that the two eldest members of the deceased owner's family are among the plaintiffs.

We are thus left with the remaining contention on behalf of the defendants that the learned trial judge misdirected himself in finding that the plaintiffs were entitled to succeed in accordance with Hausa custom and also the custom of the Kassena-Nankani people. This, however is a contention that was not backed up with any showing that Hausa custom or Kassena-Nankani custom provides otherwise than as declared by the learned trial judge, when he said that "succession of the Hausas the lex domicile [sic] of Salifu is patrilineal and that of the Kassena-Nankani the lex situs of the property follows the same pattern," or that any other system of law was applicable.

It is not necessary for me, in this regard, to address myself at any length to the arguments of both appellate counsel in relation to the inapplicability of Mohammedan law to this estate in view of section 10 of the marriage of Mohammedans Ordinance, Cap. 129 (1951 Rev.). For the claim is based not on the applicability of Mohammedan law but of Hausa and Moslem custom and or Kassena-Nankani custom, and **[p.485]** the learned trial judge's finding is as to the relevant customary law to be applied. What is more, the authorities cited by counsel, namely, Ollennu on Testate and Intestate Succession in Ghana and Bentsi-Enchill on Ghana Land Law are in substantial agreement on the point that section 10 of the said Ordinance has the effect of retaining the application of customary law to the estate of a Mohammedan whose marriage was not registered under the provisions of that Ordinance. Customary law, it must be remembered, is not static and where the applicable customary law has been deeply modified by Mohammedan law or is identical with it in its rules regarding a particular issue, there is, in my view, nothing in the Marriage of Mohammedans Ordinance prohibiting the application of such customary or modified customary law.

The real question is whether any fault can be found with the learned trial judge's holding that "succession of the Hausas the lex domicile [sic] of Salifu is patrilineal and that of the Kassena-Nankani the lex situs of the property follows the same pattern." That holding was, in my view open to question in so far as it implied that Salifu had a domicile in Hausaland. For the evidence shows that even Salifu's father, who originally came from Kano, had settled in Yariba near Mamprusi, and could have been held to have acquired a Ghanaian domicile. Salifu himself who was born at Yariba, Ghana, lived all his life in Ghana and settled and worked at Navrongo where he acquired the house in dispute. A holding that he had a Ghanaian domicile and had become a member of the Kassena-Nankani community among whom he settled and died in Navrongo would therefore have been the more reasonable conclusion, leading to the application of the Kassena-Nankani customary law rules of succession of this case.

As to the Kassena-Nankani law of succession, the learned trial judge's holding that it is patrilineal would seem to be well supported by the available literature. See, e.g. Manoukian; The Tribes of the Northern Territories of the Gold Coast Section 50 of the Courts Act, 1971 (Act 372), reproduces the provisions originally enacted in the Courts Act, 1960 (C.A. 9), and re-enacted in the Courts Decree, 1966 (N.L.C.D. 84), which make any question as to the existence or content of a rule of customary law a question of law for the court. That section tells the court what to do if it "entertains any doubt as to the existence or content of a rule of customary law relevant in any proceedings." In this case the court had no doubt as to the applicable customary law rule. What it did not do, but should have done was to disclose the source of its authority for declaring the applicable rule. For this is an element in the basic obligation of the courts to give reasoned judgments.
It is nevertheless evident that the court derived assistance from the evidence led by the parties. The facts that Salifu died without issue, that the plaintiffs were his surviving paternal brothers and sisters and the **[p.486]** persons entitled to succeed upon his death intestate in these circumstances were admitted for the most part on the pleadings and conclusively in the evidence, the real point of dispute being whether or not there was a gift of the house by Salifu which prevented any intestacy from arising in regard to it, and thus disentitling the plaintiffs from succeeding to it. With the resolution of this factual dispute against the defendants, an intestacy was established in regard to the property, and the plaintiffs, being admittedly the family of the deceased, became entitled to the declaration they sought.

In conclusion then, and for the reasons indicated above, I would dismiss this interesting appeal which was ably argued by counsel for both parties.

JUDGMENT OF APALOO J.S.C.
I also agree that this appeal fails for the reasons given in the full and interesting judgment of my brother Bentsi-Enchill. I should have contented myself only with expressing my concurrence with his conclusion but thought on reflection, that there is one aspect of the judgment with which I should identify myself positively rather than formally.
The first defendant sought to prove a valid gift both inter vivos and by oral customary will. I agree that on the facts, he failed to prove either. But had he succeeded in showing that in addition to Alhassan, one other person was present and witnessed the oral transfer of title to this property, the High Court decision of Summey v. Yohuno [1960] G.L.R. 68 would have stood as an obstacle against the court pronouncing for the gift. Ollennu J. who was the author of Summey v. Yohuno (supra) did not profess to be following any authority when he laid down what he called the essential requirements of a valid customary will. That learned and resourceful judge was only stating what, in his best judgment, an intending donor mortis causa and a would-be beneficiary should do to obtain the sanction of the court to that particular mode of transferring property. I think the purely evidentiary requirement of

witnesses is desirable and if they are independent and disinterested, that should suffice. Following the guideline provided by the Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), two such witnesses should be adequate. I suspect strongly that the declarations of custom made both by the Akim Abuakwa State Council and the Asanteman Council were inspired by this particular provision of the Wills Act.

Ollennu J. thinks that one heritable member of the intestate's family must be a witness to this disposition. Perhaps the reason underlying this requirement is that if the person has a spes successionis to the deceased, his testimony that the latter on his death-bed gave the property away might facilitate its credibility. But such a requirement may well be embarrassing to the deceased, especially if he were minded of disinheriting his intestate successors. The learned judge himself did **[p.487]** not give the theoretical or policy justification for such a requirement. Whatever it is, it seems to me too much a fetter on a persons right to dispose of his property as he wishes. Ollennu J. also thinks that such a gift must be accepted by the donees or on their behalf "by the giving and receiving of drinks." There can be little doubt that in laying down this requirement, the learned judge drew inspiration from Sarbah who thought and wrote that a gift inter vivos to be effective, must be accepted by the donee. Sarbah gave four methods by which acceptance should be made. One of such methods is "rendering thanks with thank-offering or presents…" Sarbah did not consider that the giving of drinks was established custom or usage. True, as a national habit, we take to the consumption of liquor on the slightest provocation but I do not think it desirable that we should write this into our jurisprudence even if it were established that an oral will should be formally accepted. But the researches of my brother Bentsi-Enchill show that unlike gifts inter vivos, customary law does not require formal acceptance as a condition of validity of a samansiw.
I cannot think of any strong reasons of public policy which constrain us to hold that a man's testamentary wishes about his own effects clearly expressed to two independent and disinterested persons should be set at nought only because none of the persons to whom the wishes are expressed happens to be a heritable member of his family or the ritual of giving drinks is omitted. As our law develops and acquires some degree of sophistication, we should make a conscious effort to shear it of some of its trappings which enhance its form but not its social objective.

Notwithstanding his undoubted authority in these matters, I cannot find it in my heart to agree that the formulations of Ollennu J. in Summey v. Yohuno (supra) truly reflect the customary law relating to samansiw. In so far as he lays it down that the witnesses to the gift must necessarily include a heritable member of the donor's family and that there should be acceptance of this gift by the giving of drinks, that decision should be disapproved.

I also think that this appeal was argued with great ability by counsel on both sides, but as I said before, I concur not only with the conclusion of my brother Bentsi-Enchill, but in the reasons which led him to that conclusion and like him, would dismiss this appeal.

JUDGMENT OF KINGSLEY NYINAH J.A.
I agree.
DECISION
Appeal dismissed.
S. O.

January 7, 1958.

YAWOGA *v.* YAWOGA AND ATUTONU [1959] GLR 67.
High Court, Eastern Judicial Division, Land Court
Ollennu J

OLLENNU J.

The plaintiff is a son of the first defendant, and the claim is for an order declaring null and void a sale of a farm which the first defendant has made to the second defendant, and for recovery of possession of the farm so sold. It is common ground between the parties that the farm in dispute was the 'self-acquired property of one Yawoga, the father of the first defendant, and grandfather of the plaintiff, and was therefore family property.

Succession in the tribe to which the plaintiff and the first defendant belong is patrilineal. And it is admitted that upon the death of the said Yawoga, his family, who became entitled to the property, consisted of his children and their descendants. The plaintiff admits that the first defendant is the head of the said family, and that the only other child of Yawoga is one Afua Yawoga. Now, according to native custom, rank among members of a family is determined by the relative proximity of a member to the founder of the family or the remotest ancestor that is remembered in the family. Therefore children of a deceased person rank first with equal status as the principal members of the family. Next in rank are their children. Upon the death of anyone of the deceased person's children that child's own children step into his or her shoes and the head among those grandchildren takes position among the uncles and aunts as a principal member of the family to fill the gap thus created. A child, however, can, during the lifetime of his parent, be accorded the rights of a principal member of the family, depending upon his services to or achievements in the family.
The evidence in this case shows that the only principal members of the Yawoga family at the date of the sale of the farm were the first defendant-the head of the family-and his sister Afua Yawoga.

Although by native custom the head of the family is the proper person to sue or be sued in respect of family property yet, where the head of the family fails or neglects to sue or take appropriate steps to save family property, any member of the family is entitled to take action to save the family property. A sale of family property by the head purporting to be with the concurrence of the principal members of the family is voidable, not void, if not in fact made with such concurrence, and it can be set aside at the instance of the family if members of the family act timeously.

The plaintiff, upon the evidence on the record, is not a principal member of the Yawoga family, his father being still alive. He is entitled, however, to reclaim, for the family, property of the family which has been wrongly alienated. To succeed in .this he must prove that the alienation was without the consent and concurrence of the people who constitute the principal members of the family. In short he should prove that the sale of the farm to the second defendant was made without the knowledge and consent of Afua Yawoga. Under cross-examination the plaintiff himself said: "If you had informed Afua Yawoga before you sold this farm I would be satisfied that you had consulted and informed a member of the family."

The plaintiff's knowledge that, the farm was the self-acquired property of his grandfather Yawoga, and that his father, the first defendant, sold it some years ago, was obtained by means of information given him by his said father. He admitted that the first defendant told him that he gave £2 out of the proceeds of the farm to Afua Yawoga. Moreover, Afua Yawoga herself gave evidence for the defence and proved that she gave her consent before the first defendant sold the farm to the second defendant. Thus not only did the plaintiff fail to establish that the sale was without the necessary consent and concurrence, but the first defendant, upon whom there was no onus, placed the matter beyond doubt by establishing

that the necessary consent and concurrence were obtained before the sale was made. It is abundantly clear therefore that the trial Native Court was wrong in entering judgment for the plaintiff. Consequently the Native Appeal Court was also wrong in upholding that judgment.

For these reasons the appeal is allowed, the judgments of the Native Appeal Court and of the Native Court "B" are each set aside. The plaintiff's claim is dismissed and judgment entered for the defendants.
Appeal allowed.
S. G. D.

AKAKPO V. AFAFA [1952] D.C. (LAND) 52, 55, 116
LANDS DIVISION, ACCRA

3rd September, 1952

JACKSON, AG.C.J.

1. FELLICIA ADJOWA AKAKPO

2. VICTOR K. AKAKPO ALL OF KETA PLAINTIFFS-RESPONDENTS

Vrs.

1. AGNES AFAFA

2. JOHN DOE OF KETA DEFENDANT

DEFENDANT-APPELLANT

Family property—Alienation—Anlo customary law—Consent of children of deceased person who acquired property—Child absent from country—Whether sale valid without his consent when the money is needed to preserve a family house.

The property in dispute had belonged to J. D. Williams. It was agreed that on his death his children held it as family property, according to Anlo customary law. The second defendant, one of the children, was allegedly appointed "head" to the property. Later he went to Liberia for about 12 years. While he was away the first defendant, another of the children, with the consent of the family, sold the property to the plaintiffs in order to raise money to repair a house left by the deceased. The money was duly used to repair the house, which had been in danger of falling. On his return the second defendant went onto the land, and the plaintiffs then instituted this action for damages for trespass and an injunction.

[p.117]

Held: while in strict law the consent of all the children was necessary for a valid sale, customary law was reasonable, and the sale in this case ought to be upheld.

Appeal dismissed.

Case cited:

Yerenchi v. Akuffo (1905) Renn. 366.

N. A. Ollennu for the plaintiffs-respondents.
Second defendant-appellant in person.

Judgment: This is an appeal from a decision given by the Native Appeal Court of the Anlo State given on the 25th February, 1952, which dismissed an appeal made by the defendant John Doe from a judgment delivered by the Native Court of Keta on the 7th May, 1951.

The plaintiff-respondents, F. A. and V. K. Akakpo, claimed damages for trespass to land and an injunction.

Their case rested upon a purchase of this land made by them from the defendant Agnes Afafa.

It was common ground that the land was inhabited by the children of the late John Doe Williams upon his decease, and that they held it as family property in accordance with the dictates of the Anlo customary law.

The facts are as follows. Agnes Afafa (first defendant) was the eldest female child of the late John Doc Williams. The second defendant-appellant is one of the nine children of the late Williams and claimed to have been appointed the "Head" to the late John Doe properties. He left home and went to Liberia some 12-14 years before this action was instituted. He returned home as he had information that a part of his family's land had been sold to the plaintiffs by his sister Agnes Afafa. On his return, finding that the respondents had started building operation on this land, he instituted this action on the ground that the sale was invalid by reason that his consent had not been obtained and this was the sole ground of appeal argued before me by learned counsel.

I am satisfied that the Native Appeal Court directed themselves correctly as to the issues which the court of first instance had to determine and they enumerate them as follows:

> "1. Did the family at home (Keta) and Lome approve of the sale of this portion, the subject matter of dispute.
>
> 2. Was this portion sold really to make repairs to the falling house of John Doe Williams, deceased, which was in danger of falling?
>
> 3. Was the money used for the purpose for which the land was approved by the family for sale?"

The Native Court found that these questions had all been answered in the affirmative.

There was evidence that when John Doe left this country and went to Liberia he entrusted the properties to Gabriel K. Woolams and the trial court misdirected themselves when they said he had admitted that he had' not entrusted **[p.118]** the property to anyone upon his departure. There was no evidence as to who was this man Woolams and he was not called to give evidence and the fact that he had been so appointed was denied by Agnes Afafa.

Not one other child of the nine gave evidence, and there was ample evidence before the court that these children living at home had knowledge of the sale and of the purposes of that sale. That silence is indicative of their consent and this view the Native Court appears to have held.

The Native Court quite clearly were of opinion that the defendant Agnes Afafa had acted in a reasonable manner in effecting a sale in order to protect other family property; quite clearly the appellant, living in Liberia and after more than a 12 years absence from his home, would not be in a position, with his lack of knowledge of what was happening at home, to say whether the circumstances attending to sale were reasonable or not. Whilst in strict law the consent of all of the children is requisite before such a sale is valid, "Native custom generally consists in the performance of the reasonable in its special circumstances of the case" per Griffiths, C.J. in *Yerenchi* v. *Akuffo*[1] and in the circumstances shown in this case both the Native Court of first instance and that of Appeal were of opinion that the sale was justified and that the plaintiffs- respondents had acquired a good title as against the defendant John Doe.

The Native Court of Keta then found that the plaintiffs-respondents were the owners of the land by purchase and gave judgment with ten guineas costs.

They disallowed the claim for damages for reasons which are not exposed but against which decision no appeal was made by the plaintiffs-respondents.

The Native Court then went into other matters which they had not been asked to determine and ordered John Doe to return £55 (the purchase price of the land), to the plaintiffs and then to go into account. These orders must clearly be regarded solely as obiter, and are wholly outside of the issues before the Native Court and which were.

(1) Have the plaintiffs-respondents a good possessory title?

(2) Has that possession been disturbed?

(3) If it has what damages have been suffered?

No question of a re-opening of the sale was ever asked for by the respondents and these matters I do order shall be deleted from the record in the Native Court of Keta as I consider the justice of the case requires (Section 50 of Ordinance No. 22 of 1944).

The appeal is dismissed with costs which I assess at ten guineas (including seven guineas counsel's costs).

Appeal dismissed.

KWAN v. NYIENI & ANOR. [1959] GLR 67-74
IN THE COURT OF APPEAL
26TH FEBRUARY, 1959.

VAN LARE AG. C.J., GRANVILLE SHARP J.A., AND OLLENNU J.

VAN LARE, AG. C.J.

The appeal is from a judgment of Benson J. in the Land Court, Kumasi, in a suit which had been instituted in Kumasi West District Court "B", Goaso, and which was transferred to the said Land Court. by

[1] (1905) Rena. 366.

The facts of the case are as follows: Kojo Kwan and Osei Kojo were members of the same family, whose head was the said Osei Kojo. Sometime between the years 1953 and 1954 the members of this family purported to remove Osei Kojo from the headship, on the ground that he was squandering the family property. Osei Kojo caused an arbitration to be held on the matter of his removal, and the arbitrators decided that his removal was not in order. Notwithstanding this decision the family, still not satisfied, appointed Kojo Kwan as another head.

The family's real property consisted of six cocoa farms. In April, 1953, the said Osei Kojo (then still head of the family), together with one female member of the family, mortgaged four of the six farms to Kwesi Nyieni. This fact came to the knowledge of Kojo Kwan's family in January, 1954, upon Nyieni's advertising the said four farms for sale in exercise of a power of sale under the mortgage.

Thereupon Kojo Kwan, purporting to act as head of the family, instituted an action in the Kumasi West District Court "B," Goaso, against Osei Kojo and Nyieni, claiming:

(a) a declaration that the said four farms were property of his family;

(b) a declaration that the mortgage of the said farms by Osei Kojo was without the knowledge and consent of the family;

(c) an order for recovery of possession of the said farms; and

(d) an order for interim injunction.

In a judgment delivered in that suit the Court made the following findings of fact:

(a) that the award of the arbitrators with respect to the headship of the family was binding on the family, and therefore Osei Kojo was still the head of the family; and, further, that the appointment of Kojo Kwan as head of the family was not in order;

(b) that the farms in dispute were family property; and

(c) that the mortgage thereof was without the knowledge of the principal members of the family.

The Court, however, entered judgment for Nyieni for the recovery of the sum of £900 for which the farms were mortgaged to him. It was also ordered that

(a) the said £900 due to Nyieni should be paid by Yaw Donkor, the family's caretaker of the farms, and that such payment should be made by him out of proceeds of the farms for the 1953/54 cocoa season, the balance to be paid during the 1954/55 cocoa season; and

(b) the farms in dispute should not be sold.

From this decision Kojo Kwan appealed to the Asantehene's Court "A2," specifically against the order for the payment of the £900 to Nyieni out of the family property. His appeal was dismissed. In expressing their opinion on the case, the members of the Asantehene's "A2" Court said, in effect, that if they had been trying the case at first instance they might on one point have come to a conclusion different from that to which the trial-Court came, namely, they might have come to the conclusion that the mortgage by Osei Kojo and another to Nyieni was with the knowledge of the family. However, they merely dismissed Kwan's appeal without in any way varying or modifying the findings of fact made by the trial-Court. Nyieni did not appeal against those findings of fact.

Notwithstanding the decision of the Kumasi West District Court "B" and the result of the appeal, Nyieni sold the farms in dispute to Kwaku Duah on the 6th March, 1954. , because, as he alleged, the debt of £900 had not been paid as ordered by the trial-Court. To challenge this sale Kwan instituted proceedings (which were transferred to the Land Court, Kumasi) against Nyieni and Duah, claiming:

(a) a declaration that the farms were still the property of his family;

(b) an order to set aside the sale of the farms, and

(c) the value of 700 loads of cocoa collected from the said farms during the 1953/55 cocoa seasons, and, in the alternative, damages for trespass.

Kwan's action was dismissed by Benson J. mainly on the grounds:

(1) that Kwan was not head of the family, nor a person authorised by the family to sue;

(2) that the mortgage by Osei Kojo to Nyieni was valid in spite of the finding by the West District Court "B" that the mortgaged property was family property, and their finding that the mortgage was without the knowledge and consent of the family;
(3) that the finding of the Kumasi West District Court "B" that the property was a family property was conditional upon the family's paying Osei Kojo's debt of £900, and failure to pay such debt made the property an individual property of Osei Kojo, and liable to be sold under the mortgage.
Kwan appealed to the Court of Appeal (Civ. App. No. 52/58). That Court allowed the appeal. Final leave to appeal to the Privy Council was given on the 9th May, 1959.

We are unable to agree, however, with any of the reasons advanced in the judgment of the learned Judge. Counsel for the respondents, supporting the judgment, submitted that the declaration of native custom (that the appellant, not being the head of the family, is not competent to sue in respect of family property) is a correct statement of the custom. He argued that the only exception to that well established custom is in the case of interpleader suits where, under the Rules of Court, any member of the family who claims to be in possession, active or constructive, of family property which has been attached in execution of a decree of the Court, can resort to the Courts for the removal of the attachment.
Firstly, however, the Kumasi West District Court "B", who are presumed to know the native custom, made the declaration prayed for by the appellant in the former suit, although it found in very clear terms that the appellant was not the head of the family. The inference is that, though not the head of the family, the appellant as a member of the family is entitled, in the special circumstances of the case, to sue on behalf of the family. As already pointed out, that judgment of the trial District Court "B" was not varied by the superior native court, which is a higher authority on the native customary law than the District Court "B". In this connection we wish to repeat the opinion we expressed in the judgment delivered on 2nd February, 1959 in Civil Appeal No.47/58 (Anane v. Mensah) as follows:
"Native customary law is peculiarly within the knowledge of the native courts, and the opinion of a superior native court on native custom must be preferred to the opinion of an inferior native court, unless it is either contrary to a decision of the Supreme of the Privy Council on the point or 'is repugnant to natural justice, equity and good conscience' (sec. 87, cap. 4)."
Again, in their judgment the District Court "B" found that it was after the arbitration award (setting aside the deposition of Osei Kojo from the headship) that the family met, and appointed the appellant as an additional head. Thus, although the appellant's appointment was declared ineffective at the arbitration, the findings of the Court in that former case show that he went to Court upon the authority of the principal members of the family.

In the case of Mahmudu v. Zenuah (2 W.A.C.A. 172), family property was attached for sale in execution of a decree obtained against the head of the family in his personal capacity. A member of the family other than the head interpleaded, and lost. Aiken J., sitting on appeal from a judgment of the Police Magistrate (now District Magistrate) who was the Court of first instance, referred the following point of law to the West African Court of Appeal for their opinion:
"Is the rule of native customary law to the effect that only the head of family can sue on its behalf not contrary to justice, equity and good conscience in a case like this, and therefore not applicable thereto?"
Graham Paul J., as he then was, delivering judgment in the West African Court of Appeal, stated:
"It is to my mind clear that such a native customary law is 'repugnant to justice, equity or good conscience,' and that it is, therefore, under section 19 of the Supreme Court Ordinance, not a rule of native customary law which the Supreme Court have the right to observe and enforce the observance of."

(Section 19 of the Supreme Court Ordinance is now section 87 (1) of the Courts Ordinance). Graham Paul J. concluded by saying that that did not mean that the general principle of native custom that only the head of the family could sue to recover family land was no longer the native custom. With these views Kingdon C.J. (Nigeria), and Yates Ag. C.J. (Gold Coast), concurred.

There is also the case of Koran v. Dokyi & ors. (7 W.A.C.A. 78). In that case, family property was sold in execution of a decree against one Danso, a member of the Ekuona Family of Akyem Abuakwa, in respect of his personal debt. The plaintiff therein, one of the principal members of Ekuona Family, but not the head, sued the judgment-creditor, the auctioneer and the purchasers in the then Tribunal of the Paramount Chief of Akyem Abuakwa, and claimed precisely the same reliefs as the appellant claims in this suit. The Tribunal after making findings of fact similar to those found by the Kumasi West District Court "B" referred to, declared that "the properties claimed are the properties of the Ekuona Family, and were not liable to be sold for the debt due from Danso personally." They also held that according to native custom the plaintiff was empowered to bring the action. They concluded with an order in these words: "That the plaintiff, for herself and on behalf of her family, do recover the said properties, for and on behalf of herself and the said Ekuona Family, without any further liability on the part of the defendants."

That judgment was upheld on appeal by the then Court of the Provincial Commissioner, who among other things stated that he accepted the custom as laid down by the Tribunal, and said "It seems to me that no one is better qualified to define Akyem Abuakwa native custom than the Omanhene and his Councillors."

Upon further appeal to the West African Court of Appeal, the sole ground argued was that although "family property had been wrongly sold under a writ of Fi.Fa. issued in execution of a judgment against an individual member of the family for his own personal debt, and the purchasers have entered into possession and occupation of the family property, no member of the family except the head of the family may take action in Court against the purchasers to claim a declaration that the property in question is family property and not liable to be sold for the debt in question, and for recovery of possession for and on behalf of the family." The West African Court of Appeal agreed with the observations made by the Court of the Provincial Commissioner as to the native custom, and dismissed the appeal.

The conclusions we have come to, upon careful consideration of the judgments in the two cases to which we have referred, and other judicial decisions on the native custom in this regard, are as follows:

(1) as a general rule the head of a family, as representative of the family, is the proper person to institute suits for the recovery of family land;

(2) to this general rule there are exceptions in certain special circumstances, such as:

(i) where the family property is in danger of being lost to the family, and it is shown that the head (either out of personal interest, or otherwise) will not make a move to save or preserve it; or

(ii) where, owing to a division in the family, the head and some of the principal members will not take any step; or

(iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.

In any such special circumstances, the Court will entertain an action by any member of the family, either upon proof that he has been authorised by other members of the family to sue, or upon proof of necessity, provided that the Court is satisfied that the action is instituted in order to preserve the family character of the property.

Applying these principles to this case, we are of the opinion that the learned Judge of the Land Court misdirected himself on the native customary law in holding that the appellant was not competent to sue on behalf of the family. It was manifestly clear that the action was

instituted solely to preserve the family character of the property; further, there was evidence on record that the appellant, though not head, was authorised by the family to institute the action. We would go further, and say that the learned Judge erred in challenging the competency of the appellant to bring the action, when the native courts (which are the repositories of native custom) had not challenged the appellant's right to do so, even though they found him not to be the head.

December 10, 1957
ALLOTEY *v.* ABRAHAMS TAMAKLOE *v.* ABRAHAMS (1957) 3 WALR 280
High Court, Eastern Judicial Division, Land Court
Ollennu J.

OLLENNU J.

The plaintiff in the first of these two consolidated suits claims a declaration of his title to an area of land specifically described in his writ of summons; he also claims damages for trespass to the land and an injunction. He relies for his title upon a deed of conveyance dated April 30, 1946, executed in his favour by Nii Tetteh Kpeshie II, Mantse of Sempe, acting with the consent and concurrence of his principal headmen, Asafoatsemei, elders, linguists and councillors. The deed is registered as No. 550/1946 in the Deeds Registry of Ghana. He pleaded that the defendant had entered upon the land, wrongfully claiming it as his property. The defence, as contained in an amended statement of defence filed on behalf of the defendant to this first suit is:

(1) a denial that the Sempe Mantse and his elders sold land to the plaintiff which includes the land in dispute,

(2) that any purported sale of Sempe Stool land by the Sempe Mantse to the plaintiff was without the knowledge and consent of the principal elders of the stool including the defendant, who claims to be Stool Father of Sempe, and is therefore null and void,

(3) that by reason of a judgment of the Ga Native Court" B " delivered on September 11, 1948, restraining the Sempe Mantse from alienating Sempe Stool land without the consent of certain persons, the document relied upon by the plaintiff is null and void and of no effect, and

(4) a denial of the allegation that the defendant has entered upon the said land or claims ownership of it.

The claims made by the plaintiff in the second suit are exactly the same as those made by the plaintiff in the first case, but in respect of another piece of land, which land is also specifically described in his writ of summons. The plaintiff in the second case depends for his title upon two deeds of conveyance dated October 16, 1946, and November 29, 1946, respectively, registered as Nos. 803/1946 and 932/1946 in the Deeds Registry of Ghana.

The defence to the second suit is exactly the same as in the first suit.

According to native custom it is only the occupant of the stool or the head of the family who is entitled, with the consent and concurrence of the principal elders of the stool or family, to alienate stool or family land. There can be no valid disposal of stool or family land without the participation of the occupant of the stool or the head of the family; but there can be a valid alienation of stool or family land if the alienation was made by the occupant of the stool or the head of the family with the consent and concurrence of some, but not necessarily all, of the principal elders of the stool or family. The occupant of the stool or the head of the family is an indispensable figure in dealing with stool or family land.

Therefore the law is that a deed of conveyance of stool or family land executed by the occupant of the stool or the head of the family and a linguist and / or other principal elders of the stool or family, purporting to be with the necessary consent, is valid until it is proved that such consent and concurrence were not in fact obtained. In other words, such a conveyance is voidable, not void, and can only be set aside at the instance of a stool or family

if the principal members of the stool or family act timeously. See the case of *Quarm* v. *Yankah and Another.*
On the other hand, a deed of conveyance of stool or family land which on the face of it is executed only by the principal elders of the stool or family, no matter how large their numbers, is prima facie void *ab initio,* since on the face of it the indispensable person-the occupant of the stool or the head of the 'family-is not a party to it. See the case of *Agblo and Others* v. *Sappor*. In such a case, however, it is open to the principal elders to prove .that the occupant of the stool or the head of the family consented and concurred in the transaction and had authorised the deed to be executed in the form in which it appears.
Judgments for the plaintiffs.
S. G. D.

ENNIN v. PRAH [1959] GLR 44-48
IN THE HIGH COURT (LANDS DIVISION), CAPE COAST
31ST JANUARY, 1959

ADUMUA-BOSSMAN J.

Kofi Nkum owned, inter alia, three cocoa-farms as his self-acquired property. He died, and (as all concerned admitted) the farms became family property. A nephew, Kwaku Akuma, was appointed successor to Kofi Nkum, and this successor sold the farms to Kwaku Prah in 1941, 1942 and 1944. The documents evidencing the sales bore the signatures of various nephews and nieces of the deceased, and the deceased's brother also had full knowledge of the sales and of the documents.
One of Kofi Nkum's nephews, Isaac Ennin, was away in the United Kingdom on a scholarship for higher studies when the properties were sold as he said, without his knowledge. In 1957 Ennin instituted proceedings against the purchaser Prah in the Agona Native Court "B" of Nsaba. His main contention was that Kofi Nkum's immediate family was itself only one of four branches of a larger Twidan family. Each branch had its head, and there was an over-all Head and Elders of the whole Twidan family. The sales had been without the knowledge and consent of the over-all Head and Elders, and were therefore bad. Isaac Ennin accordingly claimed a declaration that the sales of the farms were null and void, and should be set aside, and recovery of possession ordered to him.
The trial-Court accepted that contention, and gave judgment for Isaac Ennin, saying in their judgment:
The unsuccessful purchaser (Prah) appealed to the Land Court (Cape Coast). Land Appeal No. 56/1958.
It is clear that the trial-Court proceeded upon a complete misconception as to the identity of the family to which the properties belonged, and which could deal with them.
The late Kofi Nkum's properties could not devolve upon, and become vested in, the wider Twidan family of which he was a member in his life time. They devolved upon, and became vested in, his immediate family group. This consisted of all who were descended matrilineally from the same womb as himself-his surviving brothers (if any), his surviving sisters (if any), and the surviving children of his sisters, dead or alive (see the dictum of Deane C. J. in Larkai v. Amorkor & ors. (1 W.A.C.A. 323 at 330); and that of Strother- Stewart J. in Santeng per Ohimen v. Darkwa & anor. (6 W.A.C.A. 52 at 53)). In the proper and true conception of the native customary law of inheritance and/or succession, it is Kofi Nkum's family (consisting of the matrilineal descendants of his mother, or, in the absence of any such, the matrilineal descendants of his mother's mother) who are entitled to the beneficial use and enjoyment of the self-acquired properties left by him. It is they, therefore, who are entitled to control the disposition of such properties, not the Head and principal elders of the wider Twidan family of which all the parties are members.
Does the evidence establish that the disposition of the properties to the defendant was by the immediate family group? The answer is clearly in the affirmative. The sale is admitted to be by their Head, the successor Kwaku Nkuma, in whom the title was vested. In Santeng per

Ohimen v. Darkwa Strother-Stewart J. refers to Sarbah's Fanti Customary Law (2nd Ed.) p. 83, as follows:—"The owner of self-acquired property can in his life-time deal with it as he pleases. . . As soon as he dies, his successor is entitled to all the property he died possessed of . . . subject to the usual rules of inheritance." The learned Judge goes on to point out, "He has many duties to perform. He has to pay the debts of the person to whom he succeeds, and to collect all assets. He would also be responsible for holding such of the property of the person to whom he succeeds as family property, if such was its nature."

I turn to the question of the concurrence of members of the family in the sale. From the evidence available, it appears sufficiently clear that the transactions had the concurrence necessary or requisite according to native customary law. It appears that the general sale and purchase of the properties were discussed and agreed to at one time, though the actual transaction in respect of each piece of land (involving inspection, demarcation, payment of price, and execution of documents) was effected separately, and at different times.

The documents evidencing the three separate sales were put in as Exhibits 'A' & 'A1' for the 1st sale in 1941, Exhibits 'A2' & 'A3' for the 2nd sale in 1942, and Exhibits 'A4' & 'A5' for the sale in 1944. On the face of them these documents bear the signatures (by marks) of persons who, according to the evidence, are brothers or sisters or cousins of Kwaku Akuma, and therefore the nephews and nieces of the deceased. The evidence further establishes that one J.W. Tsibu (uncle both of the respondent and of Kwaku Akuma the successor, and therefore presumably brother to the deceased) had full knowledge of the sales, and signed some of the transfer documents. Tsibu (if a brother), together with the nephews and nieces, would be the persons who, in the contemplation of native customary law, properly constituted the family of the late Kofi Nkum, and who are beneficially entitled to his self-acquired property. The oral and documentary evidence sufficiently establishes that they concurred in the sales, which were, therefore, perfectly valid, even though one of them (the respondent) did not know of the sales, and did not concur, because he was away in the United Kingdom. A member of a family who goes abroad does not, and cannot, expect family life to come to a stand-still whilst he is away. The rest of the family carry on without him, until he comes back to take his full share in the life of the family.

The Head and principal members of the wider Twidan family had no interest whatever in the properties left by the deceased Kofi Nkum. Their concurrence was not in anyway necessary to alienation by the successor and/or Head of the deceased's immediate family group, tracing from his mother. The judgment of the trial-Court was based on the views

(1) that the family entitled to the properties was the wider Twidan family group;

(2) that under no circumstances could a family property be disposed of by Kwaku Akuma, the admitted successor, and

(3) that the sale without the knowledge and concurrence of the overall Head (Kwesi Abbew) and the principal elders of the wider Twidan family, was invalid.

That judgment was palpably wrong, as contrary to established native customary law.

Tamakloe & 2 ors. v. Attipoe & 3 ors. (unreported; W.A.C.A., 22nd June, 1953; Civil Appeal No. 38/52) was a case under Anlo customary law, in which those beneficially interested in, or entitled [p.48] to, the estate of the deceased person are accepted to be his children. Some of these claimed accounts from the Heads of the wider family in respect of their control of the property of the deceased for some time before transferring it to one of the children who was appointed successor. The heads appealed against an order to account. Coussey J. said:—

"I can see no difference in principle in their liability to account both by English Law and by the Customary Law, once it is appreciated that the 1st and 2nd Defendants have no beneficial interest in the estate of the deceased, and that their true function as the Heads of the larger family is advisory and protective, i.e. to watch the interests of the children, and if necessary to convene meetings in matters affecting the deceased's estate. This is reflected in the fact that the successor is receiving the rents of the other properties of the deceased."

But there is another aspect in which the judgment of the trial-Court offends against native customary law, as modified by the application of equitable rules administered by the Supreme Court. It is now well established law that a claim to set aside the sale of family property on the ground that it was without the consents required by customary law, must be made "timeously," and "under circumstances in which, upon the rescinding of the bargain, the purchaser can be fully restored to the position in which he stood before the sale." This rule was enunciated by the Full Court in Bayaidie v. Mensah (Sar. F.C.L. 150), and has since been applied in several later cases, notably Manko & ors. v. Bonso & ors. (3 W.A.C.A. 62). It is clear that a claim made in 1957 to set aside sales made in 1941, 1942 and 1944 can hardly be said to be a "timeous claim." It would clearly be inequitable, and contrary to the rule in Bayaidie v. Mensah, to entertain and allow such a claim.

DECISION

For the foregoing reasons, I am satisfied that the appeal must be allowed. It is allowed accordingly, and the judgment of the trial-Court is set aside. In place thereof judgment is entered for the defendant, with costs of the appeal.

ATTAH v. AIDOO AND OTHERS [1968] GLR 362 -372
HIGH COURT, CAPE COAST
4 APRIL 1968

ARCHER J.

The plaintiff, as customary successor of his late uncle Kobina Gurah, on behalf of himself and the family of the late Gurah, claims a declaration of title to and recovery of six farms, described in the statement of claim, from the four defendants, which said properties were unlawfully pledged by the first defendant Kobina Aidoo to the third defendant Alagbade and the fourth defendant Anaman, and later were unlawfully sold at the instance of the third defendant by the second defendant Minnow as auctioneer to the fourth defendant.

The plaintiff seeks also an order setting aside the said sale. He also claims £G10,000 damages for trespass and an account of the defendants' occupation of the said cocoa farms and for mesne profits.

The plaintiff's story is that his late uncle Gurah obtained land at Kwanyaku and Dunkwa and cultivated the land into cocoa farms. On his death, Gurah was succeeded by the first defendant, Kobina Aidoo as customary successor who took over the properties of Gurah. During Kobina Aidoo's administration of the properties, he pledged these farms, without the knowledge and consent or approval of the family, to the fourth defendant and the third defendant. Subsequently, the third defendant Alagbade obtained judgment against Kobina Aidoo in respect of the pledge-debt and seized all the farms (except one) in dispute under a writ of fi. fa. and the farms were sold by the second defendant Minnow, an auctioneer, to the fourth defendant Anaman, by private treaty and not by public auction as required by law. The plaintiff's case is therefore that as the pledges were made without the knowledge and consent of the head of family and the principal elders, the pledges were of no legal effect according to customary law. Moreover as the sale of the farms was not advertised and the sale did not take place by public auction, the sale should be set aside.

The next point I wish to deal with is to find out whether or not these properties belonged to Kobina Gurah alone so as to transform them into family property on his death. The plaintiff maintained that it was Gurah himself who obtained the land and cultivated the farms. The first defendant also maintained that he came to the land after he had been appointed customary successor and that he was not a joint grantee. The third and fourth defendants, that is, Alagbade and Anaman on the other hand took the view that Kobina Gurah and his two brothers Kwesi Gyan and Kobina Aidoo, the first defendant, took the grant jointly and

cultivated the farms and therefore on the deaths of the two brothers, Kobina Aidoo, the first defendant, continued to be in possession of the farms as a joint owner with a life interest and therefore the properties could not be strictly classified as family properties. Alagbade stated that he settled in the area about 1914 and he used to go round the surrounding villages to buy cocoa and he knew that the three brothers worked together on the land although their village was known as Gurah's village. Yaw Gyasi the third defence witness, the mankrado of Kwanyaku, stated that the land was granted originally to the three brothers and that he was present when the land was measured and granted because as a member of the grantor-family his presence was desirable. Nevertheless, Yaw Gyasi the mankrado was not the person who granted the land. It was his predecessor who made the grant. There is evidence from exhibits H1-H3 that all receipts for the rent paid to the stool were issued in the name of Kobina Gurah in 1935 by Yaw Kurantsi II, the then mankrado of Kwanyaku. The first defendant also revealed in his evidence that as a young boy he stayed with his own father. When Kobina Gurah died, and the first defendant was appointed successor, the necessary customary rites were performed before Yaw Gyasi the third defence witness as landowner and in his own evidence, he recognized the first defendant as the new tenant. What puzzles me is why did Yaw Gyasi recognise the first defendant as the new tenant when he knew that the first defendant was already before the death of Kobina Gurah a joint tenant. I have considered the evidence very carefully and I am convinced that, as the village was known as Gurah's village, as the receipts were issued in Gurah's name, and as there is no evidence that the three brothers cultivated separate portions to the land, it is safe to hold that the land was originally granted to Kobina Gurah. I therefore find that the farms in dispute belonged to Kobina Gurah and on his death, they became family property [p.365] under the management and control of the first defendant as customary successor.
The third point I wish to tackle is whether the pledges to Anaman and Alagbade were lawful and valid according to customary law. Ollennu's book on Principles of Customary Land Law in Ghana at p. 122 states, "The pledge of land has many things in common with the sale and gift of land. Like those other two forms of alienation, pledge must be given wide publicity." Then at pp. 127-128 the following principle is stated:
"By customary law, no valid alienation of a stool or family land can be made except by the occupant of the stool, acting with the consent and concurrence of the principal members of the family.

The one indispensable person in the alienation of stool or skin land is the occupant of the stool or of the skin, and the one indispensable person in the alienation of family land is the head of the family. But the occupant of the stool or skin alone, or the head of the family alone, is incapable of making a valid alienation of stool or family land. Any conveyance made by the occupant of the stool alone, or by the head of family alone, is null and void ab initio, and any alienation made by the principal elders alone without the occupant of the stool or the head of the family is likewise null and void ab initio.
An alienation of stool or family land which on the face of it purports to have been made by the occupant of the stool or the head of the family acting with the consent and concurrence of the principal elders, and with that consent and concurrence evidenced by at least one principal member of the family (e.g., a holder of traditional office like a linguist) is not void, but it is voidable; that is to say, it is valid until it is declared void by a court of competent jurisdiction, at the suit of the family."

That above are the principles which govern the alienation of family land and the necessary consents which must be obtained. Mr. Gordon R. Woodman, in an exhaustive article on "Developments in pledges of land in Ghanaian customary law" in [1967] J.A.L. 8 at pp. 9-10 states:

"There is no direct authority on the consents necessary for a valid pledge of an interest held by the customary-law corporate persons the stool and the family. Since however a pledge involves incurring a debt and the possible future loss of the interest, it would seem reasonable for the same consents to be necessary for a pledge as for the incurring of a debt without security, or the outright alienation of an interest in land."

As the action of customary pledge is akin to a mortgage in certain essential aspects, I wish to rely on what Granville Sharp J.A. said in Adjei v. Appiagyei (1958) 3 W.A.L.R. 401 at p. 404, C.A.:

"A sale of land by the head of family without the assent or concurrence of the rest of the family is not void. It is voidable at the instance of the family, but the court will not avoid the sale if not satisfied that the family has acted timeously and with due diligence and that the party affected by the avoidance of the sale can be restored to the position in which he stood before the sale took place: Manko v. Bonsu ((1956) 3 W.A.C.A. 62). This applies as much in the case of a mortgagee as in the case of a sale if cancellation is sought."

Then Granville Sharp J.A. continued at the same page as follows:

"It seems to me that in the circumstances of the present case, and in the state of the pleadings, the plaintiff was under the duty to prove (a) that he was the proper person to represent the family . . . in a suit relating to the family property; (b) that the members of family were wholly ignorant of the transaction . . . (c) that the family had not by any conduct subsequent to the date mentioned acquiesced in the transaction; (d) that they had acted timeously and with due diligence; and (e) that the defendant could, on a declaration of the court avoiding the transaction, be put in the same situation that his predecessor occupied before the mortgage was entered into by him."

In the present case before me, I intend to abide by the above five principles or requirements. But in doing so, I wish to remind myself that in such a suit the onus is upon the family to prove that in fact no consent of the principal elders was obtained: see Quarm v. Yankah II (1930) 1 W.A.C.A. 80.

I have considered the evidence very carefully and I have noted that although Asher the defendant's first witness who prepared exhibit 4D1 is related to the fourth defendant, I find that it was Yaw Gyasi the defendant's third witness and the first defendant who called him to prepare that document. On the strength of the evidence of the fourth defendant supported by the evidence of Bikorang the defendant's second witness and Yaw Gyasi the defendant's third witness, I find that Kobina Kartah the family linguist was present when exhibit 2 was executed

However it seems to me that, in Ghana, rules of court enable the immovable properties of a judgment debtor to be attached including his equity of redemption. I have not been able to find any decided authority which disables a pledgee from purchasing the pledged property under a writ of fi. fa. In the absence of such prohibition, it follows that the fourth defendant was at liberty to purchase the pledged farms which were already in his possession. As he bought only the equity of redemption vested in the first defendant, the fourth defendant stepped into the shoes of the first defendant. The only absurd result is that the fourth defendant has to redeem the pledged farms from himself. The title of the first defendant is therefore extinguished by the sale and his right to redeem has been transferred to the fourth defendant. It seems therefore that the first defendant has lost his equity of redemption notwithstanding the maxim in customary law that once a pledge always a pledge. The pledge debt is also transferred and the fourth defendant cannot claim it from the first defendant. The only aspect of this case which has exercised my mind is that each of the two certificates of purchase—exhibits 4D2 and 4D3 states that the purchaser has bought the right, title or interest of Kobina Aidoo the first defendant. I have already held these farms were family properties and that the first defendant was the customary successor of these farms. He therefore had a right to deal with these farms with the consent of the principal members of the family. There is also evidence that these debts were incurred by the first defendant to

meet funeral expenses of members of the family. There is also evidence that some members of the family were present on the two occasions when the first defendant approached Anaman for the loans. These members of the family allowed the first defendant to represent himself to Anaman and the other witnesses as a person who had capacity to deal with these farms. I therefore hold that as these debts including that due to Alagbade were incurred on behalf of the family with their knowledge the properties of the family could properly be attached and the family members are already estopped from saying that only the right or interest of the first defendant was sold.

Kobina Kartah, the family linguist, Kwesi Kwakye, the present head of family, Kofi Arku struck me as persons who pretended that they did not know of the first defendant's activities with Anaman. They want this court to believe that from 1950 to 1960 they took no interest in these farms and were completely ignorant of the sales which took place in 1950 and 1952 when in the words of Kobina Kartah, his own father had farms near the farms in dispute. My conviction on a reasonable balance of probabilities is that although the [p.372] first defendant became customary successor on the death of Kobina Gurah, the principal members of the family assisted him to dissipate these properties and allowed him to deal with these properties as if they were his own properties. For a period of eleven years, that is, from 1950 until 1961 they did not assert any rights in a court of law challenging these pledges or these sales in execution. My feeling is that they knew what was happening and they did not bother because the first defendant had incurred these debts on behalf of the family. Yaw Gyasi, the defendant's third witness stated in evidence in chief that when Anaman complained that notices of sale had been posted on the pledged farms, he saw both the first defendant and Kobina Kartah and asked why the farms had been pledged and the first defendant confirmed the attachment. Kobina Kartah is the family linguist and he must have been aware of the attachment of these family properties by Alagbade but he did nothing.
I therefore hold that as there is evidence that the plaintiff's family have lost these properties and valid certificates of purchase have been issued, the plaintiff has failed to prove his claim and his claim for a declaration of title is hereby rejected. The first defendant committed no trespass when he pledged the farms to Anaman. As to the two executions, he had no hand in them and did not commit trespass. There is no evidence that the second and third defendants have committed any trespass. The fourth defendant was legally entitled to possession of farms Nos. 2, 4 and 5 and became legally entitled also to farms Nos. 1 and 3 after the sale of the said farms to him. The fourth defendant therefore committed no trespass. As the plaintiff's family knowingly divested themselves of these properties through the first defendant's activities, the plaintiff is not entitled to an account.
I have tried in vain to find any just grounds on which to rely to set aside the sales but it seems to me that the farms were in the possession of the fourth defendant twelve to thirteen years before the plaintiff's writ was issued. There is no doubt that it is a long period within which one would expect the fourth defendant to husband these farms at great expense. It is now too late for the plaintiff and his family to complain.
For the above reasons the plaintiff's claim is dismissed. In view of the first defendant's deception of Anaman, I order that he should not be entitled to any costs. The second, third and fourth defendants are awarded their costs assessed at N¢200.00.
Action dismissed.

May 1, 1958
ADJEI *v.* APPIAGYEI. [1958] 3WALR 401
Court of Appeal
Korsah C.J., Granville Sharp J.A., Ollennu J.

The plaintiff, who purported to represent the family of one Kofi Attim deceased, sought the cancellation of a deed by which lands belonging to the family had been mortgaged. The

plaintiff's complaint was that the mortgage had been procured by fraud and that the consent and concurrence of the family had not been obtained to the transaction. The defendant-the fifth defendant in the action as it was commenced-was the successor to the original mortgagee. The deed in question, which was dated June 29, 1951, was between one Kofi Kumah (the original first defendant) in the capacity of successor by custom to Kofi Attim as mortgagor and one Kwabena Brogya (the predecessor in title of the present defendant) as mortgagee. It was also executed by one Yaw Kunadu (the original second defendant) as "head of the family of the said Attim" and by two other persons (the original third and fourth defendants) as members of the family, their signatures being on the face of the document, to evidence the consent of the family to the transaction. It was admitted by the plaintiff that, at the time of the mortgage, Kofi Kumah was the duly appointed successor to Kofi Attim and thus was the proper person to enter into a transaction affecting Kofi Attim's property. He claimed, however, that Yaw Kunadu was not the head of the family; that one of the other signatories was not even a member of the family; and, that Kofi Kumah had acted without the knowledge of the family. The fraud was thus alleged to have been by Kuma, Kunadu, and the other evidentiary signatories, none of whom had entered a defence. There was no suggestion of fraud on the part of the mortgagee or his successor, the present defendant. He, by his defence, asserted that his predecessor had made all proper searches before entering into the deed and that when he did so it was in good faith and without knowledge of any fraud. There was also evidence that on May 29, 1951 (that is, prior to the execution of the deed), the Asantehene had given consent in writing to the mortgage transaction and that in this writing Kumah was described as the assignor. The defence then put the plaintiff to proof of his status.

A sale of land by the head of a family without the assent or concurrence of the rest of the family is not void. It is voidable at the instance of the family, but the court will not avoid the sale if not satisfied that the family has acted timeously and with due diligence and that the party affected by the avoidance of the sale can be restored to the position in which he stood before the sale took place: *Manko* v. *Bonso*. This applies as much in the case of a mortgagee as in the case of a sale if cancellation is sought.

Upon another aspect of the matter; fraud when alleged must be pleaded with the particularity of an indictment and must be affirmatively proved.

It seems to me that in the circumstances of the present case, and in the state of the pleadings, the plaintiff was under the duty to prove (a) that he was the proper person to represent the family of the late Kofi Attim in a suit relating to the family property; (b) that the members of the family were wholly ignorant of the transaction entered into by Kofi Kumah as admitted head of the family on June 29, 1951; (c) that the family had not by any conduct subsequent to the date mentioned acquiesced in the transaction; (d) that they had acted timeously and with due diligence; and (e) that the defendant could, on a declaration of the court avoiding the transaction, be put in the same situation that his predecessor occupied before the mortgage was entered into by him.

The learned judge held that "on the evidence (oral and documentary) I am satisfied that the plaintiff is entitled to the reliefs sought as appears in the writ of summons and the statement of claim." He then decreed that the deed of mortgage be cancelled and that the purported sale thereunder be set aside as null and void.

With the greatest respect I am unable to see any justification for this decision. In my view the plaintiff wholly failed at every stage to produce proof of the matters that were essential to the success of the claim, and, even in the absence of any evidence on behalf of the fifth defendant, who has now appealed to us, no case whatever was made out for him to answer.

I would therefore allow this appeal, set aside the judgment of the, Divisional Court and enter judgment for the fifth defendant with costs.

Appeal allowed.

MANKO AND ORS Vrs Bonsu [1936] 3 WACA 625
Accra, 9th May, 1936.
Cor. KINGDON, PETRIDES and WEBBER, C.JJ.

KWESI MANKO AND ORS. ***Plaintiffs-Appellants.***
1st Appeal ***v***
CONSOLIDATED **BONSO AND OTHERS** ***Defendants-Respondents.***
.
AND
KWESI MANKO AND ORS. ***Plaintiffs-Appellants.***
2nd Appeal ***v.***
ABA KOKODEY AND ANOR ***Defendants-Respondents***

PETRIDES, CJ, GOLD COAST.

This is an appeal and a cross-appeal from a judgment of the Acting Deputy Commissioner, Central Province, given by him after he had retried two separate actions originally tried by the Tribunal of the Paramount Chief of Gomoa Assin.

In the action against Bonso and others the plaintiffs' claim was for"ejectment, or ownership or possession" of a piece of land with a two-storey house which the plaintiff alleged was the property of the late Kojo Botsio's family, which said ownership of the said property was confirmed by a judgment of the Supreme Court, Accra, dated the 8th October, 1885, in the case of *Coffie Patsie v. Boatoe and two others* and for £100 damages.

The Deputy Commissioner found that the land on which the two-storey house was built belonged to Botsio and his family. Although the land was family property, Botsio (described as Cudjoe Buatoe in the Deed) purported to sell it with the house thereon to Cudjoe Buatoe Bentil as evidenced by a Deed dated the 30th December, 1885. The Deputy Commissioner found that this sale was valid, and that even if the family had not given prior consent, they subsequently acquiesced in the sale by allowing Bentil and his successors in title to occupy the house rent free from the year 1885 until the present time without protest.

Appellants' Counsel contended at length that this Deed was a forgery, but entirely failed to satisfy us that such was the case.

He then contended that the alleged sale of 1885 by Botsio to Bentil was absolutely void as Botsio could not sell the land as it was family property, and that the Deputy Commissioner was wrong in holding that the family had acquiesced in the sale by allowing Bentil and his successors in title to occupy the house rent free from the year 1885 until the present time without protest. He contended that the family could not have acquiesced in the sale as they knew nothing about it at the time and never saw the Deed of sale. He pointed out that as Bentil had married Botsio's niece he was entitled to live in the house. We think that this contention is right, and that in consequence the fact that Bentil and those who inherited from him paid no rent is no evidence that the family acquiesced in the sale of the property to Bentil.

In 1914 the house was sold by Essie Gyan, who inherited indirectly from Bentil, to H. E. Thompson as evidenced by Exhibit D. When Thompson died Okwesi succeeded to the property and sold it to Kwa Baubin, who died and was succeeded by Kofi Acquah, who placed the defendants in possession as caretakers.

It appears from the evidence that from 1914 up to date the upper storey of the house was occupied by persons like Thompson who had no right to be there unless there had been a sale in 1885. The presence of these people from 1914 to date is only intelligible upon the footing of title as in the ordinary course of events strangers do not live in other people's houses. On the other hand until 1933 the ground floor was occupied by the plaintiff's family.

In the case of *Quassie Bayaidie v. Kwamina Mensah* (F.C.L. 150) the Full Court had to consider what was the effect of a sale by family land by occupant of a stool. That Court in the course of its judgment stated:-

.. Now although it may be, and we believe it is, the law that the concurrence of the members of the family ought to be given in order to constitute an unimpeachable sale of family land, the sale is not in itself void, but is capable of being opened up at the instance of the family, provided they avail themselves of their right timeously and under circumstances in which, upon the rescinding of the bargain, the purchaser can be fully restored to the position in which he stood before the sale."

If this judgment is sound, and the contrary is not suggested by appellants' Counsel, then it appears clear that the sale of 1885 was not void, but merely voidable and the plaintiffs having taken no steps to set it aside have no title to the land in dispute.

The burden of proof in an action such as this for ejectment, possession and a declaration of title clearly lies on the plaintiff, and as it has been shown that Kofi Acquah has a title to the land, even though it may be a defeasible one, his caretakers cannot be ejected or a title granted to the plaintiffs in respect of this land while Kofi Acquah's title subsists.
The plaintiffs' appeal must therefore be dismissed.
As to the cross-appeal, we think that the Deputy Commissioner's decision was right and we dismiss that appeal.

DOTWAAH AND ANOTHER v. AFRIYIE [1965] GLR 257-269
SUPREME COURT
12 APRIL 1965

MILLS-ODOI, OLLENNU AND BRUCE-LYLE JJ.S.C.

JUDGMENT OF OLLENNU J.S.C.

This is an appeal from a judgment of Apaloo J., as he then was, delivered in the High Court, Kumasi. The first appellant, the first defendant in the court below, had mortgaged the cocoa farm, the subject-matter of the suit, to the second appellant, the second defendant in the court below, and the claim of the respondent, the plaintiff in the suit, is for:
(a) a declaration that the farm in dispute is family property,
(b) a declaration that the mortgage of the farm is void and of no effect,
(c) an order for recovery of possession, and
(d) an order upon the second defendant to account for the proceeds of the farm from the date of his entry into possession of the farm to the date of judgment.
The parties are agreed that the farm in dispute was the self-acquired property of one Kwaku Addo who died in or about 1947 intestate and is, therefore, by customary law the property of his family, which is a matrilineal family, Kwaku Addo being an Akan. It is also agreed that there are no descendants of Kwaku Addo's maternal grandmother living; by custom, therefore, the immediate family for purposes of succession in such a case would be all descendants in the direct female line of the next known ancestress of Kwaku Addo, and the wider family would be all descendants in the direct female line of the remotest known ancestress of Kwaku Addo.
It is also not in dispute that the plaintiff and those she represents were not consulted in the granting of the mortgage by the first defendant to the second defendant; and also that when the negotiations for the mortgage came to her knowledge, the plaintiff vehemently protested against it and warned the second defendant against concluding the transaction, but he treated her warning with contempt.

Upon these undisputed facts, the legal position would be as follows:
(i) if the plaintiff and those on behalf of whom she sued are proved to be the only persons who constitute the immediate family of Kwaku Addo, the mortgage is void ab initio.

(ii) if the plaintiff and those on behalf of whom she sued, together with the first defendant and others who concurred in the mortgage are shown to form the immediate family, but that the plaintiff is the successor to Addo in accordance with customary law, then the mortgage without her, the successor's (plaintiff's) consent, is again void ab initio, and
(iii) if the plaintiff and those on behalf of whom, she sued, together with the first defendant and those who joined with him to grant the mortgage are shown to be the principal members of Addo's immediate family, but that the first defendant is the successor to Addo, then the mortgage so granted is voidable only, and may be set aside at the instance of the plaintiff and the others if they act timeously.

The late Addo, the plaintiff, the first defendant and the majority of the witnesses for the parties all belong to one clan, the Agona clan; the clan has three main wings, these are at Amoako, Tetrem, and Boaman; these towns or villages are within a short distance of each other. There are sections of the clan in other places. The clan has a male stool and a female stool at Amoako; it has a stool also at Boaman, and the occupant thereof is the head of the clan at Boaman. The plaintiff is the present occupant of the Agona female stool at Amoako; she succeeded one Pramang a sister of the whole-blood of the deceased Kwaku Addo. Her first witness is the occupant of the male stool at Amoako, and her second witness is the Nifahene of Amoako, and is also the occupant of the clan stool at Tetrem and the head of the Tetrem wing of the clan.
Another matter not in dispute is that the first defendant is of the Boaman branch of the clan, and came to live with Addo at Amoako some time ago after Addo had, upon an appeal from his, the first defendant's family, paid some debts which he had incurred.
The plaintiff pleaded that Addo was succeeded by his (Addo's) sister Pramang, and that she, the plaintiff, succeeded Addo upon Pramang's death; she pleaded further that she and those on whose behalf she sued constitute the immediate family of Addo, without whose consent and concurrence, no valid transaction with Addo's property can be effected. The first defendant denied that the plaintiff and those whom she represents are members of Addo's family. He pleaded also that he is the successor to Addo, duly appointed by the family.
Before us it was submitted for the defendants that the trial judge erred in entertaining the claim of the plaintiff because the plaintiff had not sued either as head of the family or as successor to Addo; that by customary law only the head of the family can sue in respect of family property, that the plaintiff is not proved to be the head of the family, and that the case does not come within the exception laid down in Kwan v. Nyieni.

It is true that the plaintiff did not describe herself in the title of the suit as successor to Addo, but she made it quite plain in her statement of claim as well as in her evidence that she was litigating the family's title to the farm in her right as the successor to Addo. By customary law, as soon as a successor is appointed to a deceased member of a family the self-acquired property left by the deceased vests in the successor for and on behalf of the family, therefore the responsibility to litigate the family's title to such property passed from the head of the family to the successor. The plea of the plaintiff that she is the present successor to Addo is a disclosure that she has a locus standi, the proof of which lies upon her, and the court is bound upon that plea to entertain the suit to enable the plaintiff to establish that status if she could.

Counsel however submitted that members of one clan may belong to different family groups for purposes of succession to property as distinguished from succession to a stool, and may therefore not be connected in blood and affinity as to be entitled to be told the tradition of the one family or the other. That raises the important question: what is a clan? Rattray in his Ashanti Law and Constitution, p. 63, defines a clan as follows:

" 'A clan is an exogamous division of a tribe, all the clansmen or members of which are held to be related to one another and bound together by the common tie of clanship.' This tie in Ashanti is, for all ordinary purposes, belief in a common descent from some ancestress; reaching back still further, it was belief in a common descent from an ancestress who was descended from some animal."
And at pp. 69-70 the learned author said:
"The main characteristics of the clan system in Ashanti appear, then to be:
(1) All persons bearing a common clan name, resident however widely apart, are held to be related by blood. In consequence, they are considered to stand to each other in a prohibited degree of relationship with regard to marriage, and to be bound together by a sentimental tie of brotherhood.
(2) The heads of the various household groups exercise complete control only over these members of their clan who are directly related by a blood-tie that is practically, not theoretically capable of demonstration, as being traceable to a common female ancestress who founded that particular family group; in other words, their authority extends only to the nearer kinsmen.
(3) Clan descent alone confers the right
(a) to inherit property;
(b) to perform the sacra for ancestral spirits;
(c) to succeed to certain offices;
(d) to be buried in a particular cemetery;
(e) to unite in the performance of certain funeral rites.
(4) The clan tie cannot be lost or broken save by expulsion from the clan.
(5) By a legal fiction, clan relationship might sometimes be acquired otherwise than by birth."
What this means is that all members of an Akan clan are regarded as descended in the direct female line from a common very remote ancestress, e.g. Asonafo, i.e. members of the Asona clan are blood descendants from the very remote ancestress Aso, Ekonafo are blood descendants from Eko and Agonafo blood descendants from the very remote ancestress Ago.

Now an Akan family, for the purpose of ownership of property called the Abusua, are all persons lineally descended in the direct female line from a common known ancestress: see Amarfio v. Ayorkor. Thus Rattray says in Ashanti, p. 35 that "The Ashanti word for clan is abusua, and this word is synonymous with mogya (blood). There is a well-known proverb which runs Abusua bako mogya bako, 'one clan one blood.' Sarbah maintains the same principle that the abusua or ebusua and the clan signify the same group. The clan or abusua has many concentric families variously called the immediate or the nearest, the remote or extended family reckoning from any particular individual member of the clan.

Now the general principle of succession under customary law is that a person's self-acquired property vests in his family, i.e. the whole family, the abusua, upon his death intestate; but the right to immediate enjoyment of the beneficial interest in it is limited to the members of the immediate family. For the appointment of a successor to a deceased member of the abusua, persons nearest in relationship to the deceased, i.e. members of his immediate family come in for first consideration and take priority over members of the more remote group or family; but where there are no persons in the family circles closest or nearest in blood relationship to the deceased, any suitable person from the outer or wider circle, the extended family, has a right to be considered.

Now the immediate family of an Akan person, male or female, consists of his or her mother, the mother's brothers and sisters, the children of female descendants of his mother; in short, a person's immediate maternal family consists of the descendants of his or her maternal grandmother in the direct female line; the next family nearest to him will be the descendant's

of the maternal great-grand-mother in the direct female line, so that if the descendants of the grandmother are extinct, the immediate family will be the descendants of the great-grand-aunts, the next will be the descendants of the great-great-grandmother and so on until the widest possible circle of relations is encompassed, which often means the clan. Hence it is that to the Akans the idea of complete failure of the matrilineal family for purposes of succession is inconceivable, for if no member of the abusua can be found in any particular town, a near clansman may be traced to the next town, district or state as the case may be.

The law regulating dealings with family property is well-settled, and is as follows: The head of the family or the successor is an indispensable person in the alienation of family land; and alienation of family property made by the head of the family or a successor purporting to be with the consent and concurrence of the principal members of the family is voidable at the instance of the family if they act timeously; but a conveyance made by any other member without the indispensable person, the head of the family or the successor as the case may be, is void ab initio and confers no interest or title in the land on the purchaser or mortgagee. The mortgage in this case was granted by the first defendant, and the second defendant took it in spite of opposition by the plaintiff the successor; that being so, the transaction is void and of no effect. The learned judge is therefore right in so declaring it.

FOSU v. KRAMO [1965] GLR 629-640
HIGH COURT, SUNYANI
11 NOVEMBER 1965
HAYFORD-BENJAMIN J.

The plaintiff by his writ of summons dated 29 July 1964 claims as against the defendant a declaration of title to one cocoa farm lying and being at a place commonly called Adwoano on Dwumo stool land and bounded on all sides by the properties of Kwame Dapaah, Akua Krah, Kofi Peprah and the Adwoa stream. He also claims an order for perpetual injunction and damages for trespass. There is no dispute as to the identity of the farm.

The plaintiff's case as appearing on his pleadings is shortly, that on 8 July 1964, he purchased the farm the subject-matter in dispute, at a public auction conducted at Dwumo. This sale was effected under a power of sale contained in a mortgage deed executed between two brothers and a sister of the defendant as mortgagors and one Kwasi Kwakye, a licensed moneylender as mortgagee. The mother of the defendant signed the deed as a witness. After the purchase, the plaintiff says he entered into possession of the said farm, but the defendant and other men committed trespass on the farm on 28 and 29 July 1964 by forcibly entering the said farm and plucking and carrying away ripe cocoa pods.

The defendant denies the allegation of trespass and contends that the farm was cultivated by one Kwame Poku deceased, his elder brother as his self-acquired property. After the death of this Kwame Poku the farm became, in accordance with custom, family property. He, the defendant, was elected the customary successor of Kwame Poku and also became head of the immediate family originating of course from the mother of Poku and the defendant, Yaa Fremaa. The defendant denies that any of his relatives have ever obtained a loan from Kwasi Kwakye, and contends that there could therefore be no mortgage deed executed in respect of the farm. He further contends that in any event, the farm being family property, individual members of the family have no right to dispose of it or offer it as security without the consent and concurrence of the other members of the family. He however admits that his elder brother Kofi Attim obtained a loan of £G1,000 on the security of this farm from one Barnie who is now deceased, and who has been succeeded customarily by one Kojo Kyei. Of this loan, £G268 6s. 8d. was paid by Attim leaving a balance of £G731 13s. 4d. for which Kojo Kyei obtained a default judgment in the High Court in Sunyani. Kyei purported to go into execution by

attaching the said farm under a writ of fi. fa. The defendant promptly filed an interpleader summons No. 17/64, and at the hearing Kyei through his solicitor admitted the claim by the defendant and the farm was accordingly released from attachment. He contended therefore that the plaintiff is estopped from disputing his title. He bases his plea of estoppel on two further grounds, namely:
(a) That the plaintiff and Kwasi Kwakye (whom he has sued on his counterclaim) are claiming through Kojo Kyei (successor of the late Kwame Barnie) who has already admitted in the interpleader suit the defendant's title to the farm.

(b) That Kwasi Kwakye has admitted at diverse places and in a statement to the police that he has never given any money to the said Attim the mortgagor-debtor.
The defendant further contends that the actual sale was fraudulent because the plaintiff and Kwasi Kwakye are in effect attempting to claim payment of the alleged loan twice over from Attim. He also alleges that the conduct of the auction sale was irregular. The sale he finally states is wrongful since the farm belongs to the family and not to Kofi Attim personally. He therefore counterclaims against the plaintiff and Kwasi Kwakye for:
(a) nullification and setting aside of the purported sale of the disputed cocoa farm;
(b) declaration of title to the said farm; and
(c) general damages.
Before dealing with the issues that arise for determination, I think it will be appropriate at this stage to dispose of the controversy as to who is the head of the family. In the particular circumstances of this case, I do not think it is material who is the head of the defendant's family. The defendant admittedly was away from Dwumo at all material times relevant to this case. According to him, he deputed Attim to look after this farm during his absence. The law is clear and settled that where there is no duly appointed head of a family, or where the duly appointed head is absent, the right to represent the family, to take charge of the family property and generally to exercise the powers of the head of the family is exercisable by the eldest male member of the family. As Ollennu J. (as he then was) said in the case of Mills v. Addy:
"By native custom, absence of a duly elected head of the family, whatever the cause of that absence, is not permitted to prejudice the interest of the family. Therefore in the absence of a duly appointed head, the eldest male member of the family, and failing him, the eldest female member, acts as head of the family and takes charge of family property. See Sarbah, Fanti Customary Law (1896), p. 38."
The farm in dispute being admittedly the self-acquired property of Kwame Poku devolved on his death onto his immediate family. Bentsi-Enchill in his book Ghana Land Law, after reviewing the authorities states at p. 41:
"We conclude then that the better view is the first one which holds that upon the death intestate of a person, both the legal title to and the beneficial enjoyment of his property devolve upon his immediate family. What is the immediate family of a man in a matrilineage? This is the group made up of persons whom Sarbah called 'Real' and 'Proper' successors. That is to say, a man's mother, uterine brothers and sisters, and the issue of such sisters. This is the group which inherits the intestate's property, the title thereto, as well as the right to possession and enjoyment of it."
As Sarbah states in Fanti Customary Laws (2nd ed.), pp. 101-102:
"The owner of self-acquired real property dying intestate, is not succeeded by his sons, they being outside the line of inheritance, but by his mother and her issue according to seniority . . .
There are . . . four kinds of successors, viz. Real, Proper, Ordinary, and Extraordinary.
The Real successor of a person is his mother.

We call those persons Proper successors who are the uterine brothers and sisters of the deceased, and the issue of such sisters; but never can the pedigree be traced out in the line of the male to."
"[E]very woman" says Ollennu J., as he then was, in Mills v. Addy "becomes the originator of a family."
The family which in law is entitled to the cocoa farm left by Kwame Poku is the family originating from his mother Yaa Fremaa. The most senior male member of this family is Attim and the most senior female member is of course Yaa Fremaa herself. Whether or not the defendant is the head of the family, in his absence Attim was the proper person to act as such head. It would be intolerable if a head of family be allowed to globetrot around the countryside, and suddenly come home to impeach transactions solemnly entered into by those who according to customary law are authorised to act on behalf of the family even though third parties have thereby incurred liabilities and acquired rights. There will be no security in business transactions if the law makes this possible. It would then be possible for a family to snap their fingers at bargains deliberately made, bargains not unfair in themselves and in which the persons seeking to enforce them have a legitimate interest to enforce. This would be unreasonable, and customary law as Griffith C.J. said in Yerenchi v. Akuffo "generally consists of the performance of the reasonable in the special circumstances of the case".

The defendant further contends that even if a loan was granted by Kwakye, it was taken by Attim in his individual capacity and that Kwasi Poku and Yaa Fremaa signed the mortgage deed in their individual capacities. Under no circumstances therefore can family property be sold to satisfy such a debt. Reliance was placed on a mass of authority which I find wholly irrelevant. The question is whether the family, i.e. that family originating from Yaa Fremaa, was aware and if so, did it concur in the mortgage effected by Attim. The mere fact that the family did not have a share of the money is only a factor and to a large measure an irrelevant factor at that, in determining whether the family concurred in the mortgage. There is nothing in law to prevent a family allowing or permitting family property to be used as security for the debt of an individual member of the family.

Several fidelity guarantees granted to commercial firms for the employment of young men are secured by family property. Conversely there is nothing to prevent an individual member of the family consenting or permitting his self-acquired property to be utilised in securing a family debt. Family debts arising from family litigation are sometimes secured by the self-acquired property of individual members. In this case I am satisfied that Yaa Fremaa, Attim, Fokuo and Nkansa are sufficiently representative of the family originating from Yaa Fremaa, and that they can by their acts bind [p.638] the family. If they allowed one of their members to use family property to secure his private debt, I do not think they can be allowed to retract at this late stage when others have acquired rights thereby. From the evidence and from the legal propositions I have reviewed above, I am carried irresistibly to the conclusion that the mortgage of the farm to Kwakye was proper and regular, and that there is no room for impeachment either by a recalcitrant or itinerant member of the family.
Judgment for the plaintiff.

BADU AND OTHERS v. AMOABIMAA AND ANOTHER [1961] 1 GLR 506-511
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
26TH JULY, 1961

LORD DENNING, LORD MORRIS OF BORTH-Y-GEST AND THE RT. HON. Mr. L. M. D. DE SILVA

RT. HON. MR. L. M. D DE SILVA
The plaintiffs-respondents, who are the Queen-Mother of a section of a family (the Ampiakoko section of the Yego family of Nyakrom) and a linguist instituted this action on behalf of the

members of the said section against certain persons in the Agona Native Court "B" for a declaration that three parcels of land known as the Buafi, Otsinkorang and Busumpa lands had been founded or acquired by Ampiakoko, their ancestor. They also asked for possession of these lands. The appellants consist of some of the original defendants, persons substituted in place of original defendants, who had died and certain persons who were added as defendants on their application that this should be done.

The Agona Native Court "B" entered judgment in favour of the respondents. On appeal this judgment was set aside and the action dismissed by the Land Court. On a further appeal the West African Court of Appeal reversed the judgment of the Land Court and restored the judgment of the native court. The appeal now under consideration is from the judgment of the West African Court of Appeal.

It is common ground that several generations ago the ancestors of the parties migrated as four or five distinct families (all of the Yego clan) from different parts of Ashanti to Nyakrom which is within twenty-five miles of the sea coast. At Nyakrom they united to form one composite group. As a result of the union every member of each of the four or five houses had the right to farm freely on all the lands of the composite group so long as he did not trespass on land already cultivated by others.

The question debated before the native court is stated thus in the judgment of that court:

"Now the question at issues is this: Were the lands in dispute i.e. Buafi, Otsinkorang and Busumpa founded by Ampiakoko, the plaintiffs' ancestor or by Buasi, Otsinkorang, Abuenyi, the defendants' ancestors and Ampiakoko?"

This appears to have been the substantial question raised in the native court. It was essentially a question of fact to be determined on evidence. It was, as already stated, answered in the plaintiffs' favour by the trial court which held that the lands had been founded by Ampiakoko "for his descendants" before the union with other families to form a composite group. Their Lordships agree with the Court of Appeal that there is no reason to disturb this view. This does not conclude the matter.

In 1949 disputes arose within the Yego family of Apaa quarters and one consequence of these disputes was that an action was instituted in the Agona Native Court "B" by one Kofi Donkor a member of the Ampia koko house against one Kwesi Eduamoah a member of the Eduamoah house. In the course of the hearing a settlement was reached by which the houses agreed to sever the family ties which bound them into a composite group. There were representatives of other houses there. They were consulted and agreed. There was a special ceremony to mark the severance. The president of the court asked each side to provide a live sheep and a bottle of rum. The sheep were slaughtered and the cutting of the tie ceremony was accomplished. An order of the native court was drawn up on the 13th May, 1949, in these words:

"In view of the agreement arrived at by both parties as to separation of family ties, it is needless calling upon any other witnesses in this case nor asking the defendant to make his defence.

It is hereby ordered and directed, by consent of both parties, that the family ties hitherto existing between Kofi Donkor as representing the members of Ampiakoko section at Yego family (Apaa section) of Nyakrom and all his descendants of the one part, and Kwesi Eduamoah and with him Henry Saah, Kwami Badu and Kerami Otsinkorang as representing the other four houses of Yego family (Apaa section) at Nyakrom and all their decendants of the other parts, Be separated and the same are hereby separated, each party not having any further family dealing with the other.

The question of the Yego family (Apaa section) stool of Nyakrom and all the properties attached to the said family shall be later settled amicably between the parties by Nana Kobina

Botchey, Adontehene of Agona State, who shall see to the division of such properties and to the ownership of the stool."
In the present case the native court expressed the view that under the consent order there had been a severance of family ties, and that on severance the ancestral property of the Ampiakoko section reverted to it for the sole use and occupation of its members. It did not say in express language that the latter was a consequence of the former but their Lordships have no doubt that that view was implicit in what it said. The Land Court found itself unable to accept the view of the native court. With regard to this the West African Court of Appeal said:
"The learned judge [of the Land Court] expressed a view as a general proposition that lands of a family stool cannot revert to one branch of a family. The native court, however, in the particular circumstances of the present case, held that on severance each house assumed title, to the exclusion of the other houses, of the lands acquired by its founder. That is a finding on the native custom applicable to the case."

It went on to say that the Land Court could not properly on the material before it have taken the contrary view. Their Lordships agree. There was no material upon which it could be said that the view of the native court upon this point of customary law was wrong.

It was urged for the appellant that in the absence of a term in the agreement (of the 13th May) to the effect that the ancestral properties were to revert to each house no such consequences followed. Their Lordships being of opinion as already stated, that under the relevant law applicable to the parties in the circumstances of this case the reversion of the ancestral properties followed as a matter of course they do not think any such term was necessary.
It was also urged that the amicable settlement referred to in the second paragraph of the order had not taken place and that in consequence the whole of the order was ineffective in law. Their Lordships do not agree. On severance the ancestral lands at once reverted to the houses to which they originally belonged. That did not depend on any "amicable settlement". The only need for an amicable settlement was as to any property of the Yego stool, which was not the ancestral property of any one of the houses, but was the property of the stool which it itself had acquired whilst it was a composite stool. No one house was entitled to that stool property and a division had to be made.

It should be mentioned that both parties tool the order twice before a magistrate for reasons which do not appear in the record of the proceedings in this case. It is not of much importance that they do not. On the 13th August, 1949, Kwesi Eduamoah appealed to Mr. Wallis, who dismissed the appeal saying: "The parties need not comply with the order. Arbitration is essentially voluntary. There is therefore nothing to appeal against". On the 7th February, 1950, Kofi Donkor appealed to Mr. Ferguson, who said: "No order by a court which this court could direct should be enforced has been brought to my notice". Their Lordships are of opinion that these proceedings before the magistrates did not affect the validity of this separation or its consequences in native customary law. Each house was entitled to its ancestral property. But it did mean that the position of the stool property was unresolved.

It has been urged that the findings in a case (now under appeal) brought by one Kwami Badu and others against Kofi Donkor are a bar to the present proceedings. It is necessary to consider this argument.
Kofi Donkor was at one time the head of the Yego family. On the 22nd November, 1950, a general meeting was held of the Yego family and it was resolved that "Kofi Donkor be removed and he is this day removed from the position of head of the Yego family (Apaa quarters) of Nyakrom". Kwami Badu was appointed head of the family in his place. Kofi Donkor does not

appear to have handed over the paraphernalia and other property of the stool to his successor. On the 11th June, 1951, Kwami Badu and other heads of houses brought an action in the Native Court "B" at Swedru asking for the delivery of the stool property against "Kofi Donkor (ex-head of Yego family Apaa quarters)". The action was not against him as representing the Ampiakoko section. On the 5th July, 1953, the court gave judgment for the plaintiffs and ordered Kofi Donkor to deliver up the stool with its paraphernalia and lands. That judgment only affected the stool lands.

The order in that case made by the native court is as follows:
"Judgment in this case is therefore entered for plaintiffs for the said stool with its paraphernalia and all the lands, with costs to be taxed.
Defendant is hereby ordered to deliver up possession and surrender all the properties mentioned hereunder to plaintiffs for the whole Apaa Yego family, Nyakrom including defendant's section or before the 19th day of July, 1952."
It will be observed that the Ampiakoko section of the Yego family ("defendant's section") was one of the parties in whose favour order was made against Kofi Donkor and there is no order adverse to the Ampiakoko section.
The subject-matter of the present proceedings, namely, the lands at Otsinkorang, Busumpa and Buafi are included in the order but in the circumstances mentioned this cannot prevent the Ampiakoko section from asserting that those lands are their ancestral lands. Moreover, Amba Amoabimaa, the Queen-Mother of the Ampiakoko had applied to be joined as a party to the case but her application was rejected. She is a plaintiff in the present proceedings and it is not disputed that she rigthly represents the Ampiakoko section. The action, as already stated, was against Kofi Donkor personally as ex-head of the Yego family as a whole. Their Lordships are of opinion that the Ampiakoko section are not prevented by those proceedings from asserting the present claim.

It has been held by the native court that "consequent upon the breaking of the family tie" the heads of the appellants' sections of the Yego family prevented the respondents "from having anything to do with their family lands of Kyekyegya". This finding was confirmed by the Court of Appeal. Both courts took the view that the appellants by this action regarded their ancestral lands as their sole property and that the respondents were equally entitled to regard their ancestral property as solely theirs. Their Lordships agree. Some evidence was pointed out to their Lordships that the action taken by the appellants was for reasons other than those mentioned but this evidence has not been accepted.

A point which found favour with the Land Court was that it was not established that the appellants were in possession of the lands in question and that therefore no order for possession should be made against them. Their Lordships do not think it is well-founded. The appellants undoubtedly claimed the right to go on the lands and farm them. If they are there an order is necessary to get them out. If they are not there is does them no harm.

DECISION
For the reasons which they have given their Lordships will report to the President of Ghana that this appeal ought to be dismissed and that the appellants should be ordered to pay the costs of this appeal.

LITIGATION

In the case of KWAN v. NYIENI & ANOR. [1959] GLR 67-74 the plaintiff prayed the court to declare a mortgage transaction entered by the head of the family on

behalf of the family void on the gound that the family never consented to it. Mean why, some members of the family had earlier tried to remove the head of the family, but the family head who was to be removed took the members before an arbitrator whose decision was that the removal was invalid. The members not withstanding the decision of the arbitrator, still considered the head of the family as been removed. The court decided that the family was bound by the decision of the arbitrator and hence the mortgage was valid since the head of the family was the person that carried out the transaction.

KWAN v. NYIENI & ANOR. [1959] GLR 67-74
IN THE COURT OF APPEAL
26TH FEBRUARY, 1959.

See Alienation supra

LAMPTEY AND ANOTHER v. NEEQUAYE AND OTHERS [1968] GLR 257-266
HIGH COURT, ACCRA
19 MARCH 196?

CAMPBELL J.

The plaintiffs and the defendants are by Ga-Mashie customary law of intestate succession all members of the immediate family of Madam Amorkor Abbey, deceased, being respectively her children and uterine grandchildren through one Madam Koshie Lamptey deceased, a sister of the plaintiffs. On the evidence, apart from one Kotchou Neequaye, a younger sister of the defendants, there are no other persons who rank in the class of her immediate family. The present head of Madam Amorkor's wider family is one Tei Nortey who is a patrilineal cousin of the aforesaid Madam Amorkor.

The present dispute arises out of a house, No. 405 Kaneshie Estate, Accra, which the plaintiffs assert is the self-acquired property of their mother. They therefore claim a declaration to that effect also that they are entitled as against the defendants to succeed and inherit the said property, that they are entitled to the control and management of the house, to an account of rents and profits accruing therefrom from June 1962, the date of death of Madam Koshie Lamptey, to date of judgment; in addition they claim damages for trespass against the defendants, an order of ejectment against them and perpetual injunction restraining them from interfering with the premises.

The house in question was a rental unit allocated to Madam Amorkor in or about 1939 of which she died possessed on 26 July 1950. Subsequent to her death Madam Koshie Lamptey, her eldest daughter, exercised control and management and had her name substituted for Madam Amorkor in 1953 in order to exercise an option to acquire a permanent four bedroomed dwelling-house the construction of which was then contemplated by the Department of Housing in substitution for the temporary building then existing on the site. The permanent building was constructed somewhere between 1 November 1953 and April 1954 during which period vacant possession of the premises was delivered up to the Department of Housing; the keys of the reconstructed premises were handed over on completion to Madam Koshie Lamptey on or about 6 May 1954. Subsequently in January 1956, in conformity with the conditions for the exercise by her of the option to acquire this permanent building, she executed a lease tendered in evidence as exhibit E wherein she undertook to pay off £G740 being the freehold purchase price of the premises in equal monthly instalments of £G3 18s. per month over 30 years and in fact down to the date of her death had paid off a little over £G150 of the purchase price in addition to the pure rent element contained in the monthly payments.

These facts are not readily apparent from the oral evidence given in court, but become clear from a perusal of the Housing Corporation file relating to this house which was tendered in evidence as exhibit B.

The defendants in evidence admit that the property in dispute belonged to their grand-mother; in their defence filed to the plaintiffs' claim in 1963 they had asserted that the property was the self-acquired property of their mother, Madam Koshie Lamptey, no doubt relying on exhibit E, however, during an adjournment of the case for settlement in 1964 they had delivered over all documents in relation to the house to the second plaintiff and he on his own evidence, had been in receipt of the rents from two rooms and a store of the premises from 1964, the second, third and fourth defendants being in occupation of two rooms and a kitchen.

There can be no doubt on the evidence that the property in question is the self-acquired property of Madam Amorkor and that despite its reconstruction on the initiative of Madam Koshie Lamptey, her defraying of the instalments thereon, the execution of the lease in her name in January 1956, the aforesaid property throughout, retained its original character of self-acquired property of her mother. This is so because once it is shown that Madam Koshie Lamptey exercised control and management of the original rental unit as caretaker or de facto head of Madam Amorkor's immediate family of which she is herself a member, the strong presumption which arises is that improvements made on the premises by her are for and on behalf of the immediate family in whom both the title and the beneficial interest vests eo instanti with the death of Madam Amorkor. The defendants most likely were advised of this fact, consequent on which the documents including exhibit E were handed over to the second plaintiff in or about 1964.

This having been done, it is difficult to understand why this internecine family dispute should have been continued in court involving the odious spectacle of the plaintiffs as uncles litigating with nephews and nieces for nothing less than a declaration of their right, if such they have, of ejecting the defendants from the partial occupation by them of family property and for restraining them from interfering with the premises.

The defendants having admitted that the property was family property and having pursuant to that, handed over the document to the second plaintiff from as early as 1964, I think it is an abuse of the process of the court to have litigated this particular issue. This court will therefore merely declare formally that the property in question is the self-acquired property of Madam Amorkor and that having regard to the admission by conduct of the defendants in 1964, the plaintiff would, notwithstanding this declaration, not have been awarded any costs arising from this issue.
The second plaintiff said in evidence that as the eldest child of Madam Amorkor he took possession of her belongings including the documents relating to the house in question. He communicated this fact to one Tei Nortey the head of Madam Amorkor's family who confirmed that he should look after his deceased mother's estate. He said further that because he was working and residing at Sekondi he asked the defendants' mother, Madam Koshie Lamptey, to control the estate as caretaker during his sojourn in Sekondi. From this evidence he would like the court to draw the inference that he is the lawful successor to the estate of Madam Amorkor with the right as successor to control the property and determine which members of the immediate family of the deceased, if any, should occupy the house and in what proportion. The defendants not having received the second plaintiff's consent to occupy the rooms which they presently occupy would be trespassers liable to ejectment on this thesis and could be enjoined not to interfere with the premises in perpetuity.

The rule of customary law does not provide for the unilateral appointment by the head of family of a successor to an intestate's estate, and this is so even where the head of family is the deceased's mother; a fortiori the head of family could not lawfully acquiesce or confirm unilaterally the self-appointment by a person of himself as successor. The second plaintiff has not shown that there was any family convocation at which he was selected as successor. Tei Nortey who is alive has not been called as a witness to testify on the second plaintiff's averment that he Tei Nortey confirmed the appointment of the second plaintiff even assuming that such unilateral confirmation could have validated the alleged self-appointment.

I hold on the evidence that the second plaintiff was at no time appointed successor to Madam Amorkor and is not therefore entitled to control and manage the estate. The only person presently entitled to control the said estate is Tei Nortey by virtue of his headship of Madam Amorkor's wider family. The only person entitled to call for an account of rents and profits of the estate, to determine who may or may not occupy the premises in what proportion, and whose consent is requisite to occupy the said premises is the existing head of family by virtue of his right as successor pending the special appointment of a successor to Madam Amorkor. In the absence of evidence that the estate is in jeopardy or is being dissipated with the head of family merely standing by and refusing to act, or that he is biased in favour of the defendants against the plaintiffs necessitating the latter bringing this action in defence of the property or for an order of the court declaring no more than their right to a fair share in the enjoyment thereof, I must hold that the plaintiffs not having on the pleadings or on the evidence established that the suit was brought in the name of and on behalf of the head of Madam Amorkor's family or with his authority and consent have no locus standi in this court and on this ground alone ought to be non suited.

I have already found that the declaration sought by the plaintiffs that the property in question was Madam Amorkor's self-acquired and individual property had ceased to be an issue in this litigation from 1964 and ought not to have been pursued. I have equally found that the plaintiffs are not entitled exclusively to succeed and inherit the estate in question, that they are not on the facts in evidence entitled to an account from the defendants even if in law they were persons who would otherwise be entitled to call for an account, that further as a matter of customary law they were not the persons entitled to call for an account, or in the absence of appointment as successor, to control and manage the property as an inherent right flowing from their being children of Madam Amorkor. On the other reliefs claimed, namely, damages for trespass, ejectment and perpetual injunction the plaintiffs in my opinion must necessarily fail in any case, even if I am wrong in holding that they have no locus standi in this court.
The evidence shows that the defendants occupied the rooms and kitchen with the consent of Madam Koshie Lamptey who was put in control of the property by the plaintiffs and without any objection from Tei Nortey the head of family, they have been occupying the said premises without objection from the plaintiffs from 1960 even though the plaintiffs were in Accra at the time when Madam Koshie Lamptey put them in occupation. Two rooms and a store are in the possession of the plaintiffs who are collecting the rents therefrom; no objection appears to have been raised to the defendants' occupation of the premises until after the death of Madam Koshie Lamptey and the only objection has been from the plaintiffs, leading to the present litigation but not from Tei Nortey the head of the family. This court must therefore presume that the portions of the premises occupied by the defendants were properly allotted to them in accordance with customary law and being members of the immediate family of Madam Amorkor they are entitled to remain in occupation and enjoyment of their allotted portion of what is now family property. The claim of the plaintiffs for damages for trespass, for an order of ejectment and perpetual injunction restraining the defendants from interfering

with the said premises is therefore not well founded in customary law and is accordingly dismissed.

In the circumstances the plaintiffs' claim in respect of all the issues which were still open for adjudication by this court are dismissed. The defendants will have the costs of this action assessed at ¢105.00 against the plaintiffs jointly and severally.
DECISION
Action dismissed.

SERWAH v. KESSE [1960] GLR 227-231
IN THE SUPREME COURT
28TH NOVEMBER, 1960

See .....

DOTWAAH AND ANOTHER v. AFRIYIE [1965] GLR 257-269
SUPREME COURT
12 APRIL 1965
MILLS-ODOI, OLLENNU AND BRUCE-LYLE JJ.S.C.

See Alienation supra

November 22, 1958.
DAATSIN *v.* AMISSAH [1958] 3WALR
(High Court, Central Judicial Division, Divisional Court
Adumua-Bossman J

ADUMUA-BOSSMAN J
"Uncle Sam," a member of the Anona family, owed £28 to Kwesi Asafuah, a member of the Anona family (Kumah branch). Debtor and creditor both died, and Kwaw Daatsin (head of Asafuah's branch of the family) sued Chief Sam Amissah (head of Uncle Sam's branch of the family) for the £28.

The action was tried in the Municipal Court" B," Cape Coast, which gave judgment for the plaintiff. An appeal by the defendant to the Magistrate's Court was unsuccessful. He took a second appeal to the High Court, where it was argued that the plaintiff was not the proper person to sue for the debt, nor the defendant the proper person to be sued.
The case of *Asiedu* v. *Ofori and Another* would therefore seem to cover this case, so far as it concerns the allegation that the defendant is liable to pay solely on the ground that he is the head of the larger Anona family, of which the late" Uncle Sam" (the debtor) was in his lifetime a member.

But it seems to me that the question of the plaintiff's right to sue to claim payment of the debt which he says was due to Kwesi Asafuah, deceased, who was a member of that Anona family (Kumah branch) of which the plaintiff claims to be head, ought also to be considered. Indeed, logically, that question ought to have been considered first, since a plaintiff's *locus standi* to maintain an action ought to be considered before any: other question arising in it. On that question-the plaintiff's right (according to the now recognised prevailing native customary law) to sue to claim a debt due and owing to a deceased member of his family-it seems to me that the decision must be adverse to the plaintiff.

The prevailing customary law on that point also was lucidly enunciated by the same Chief Justice in unmistakable terms, in the case of *Larkai* v. *Amorkor and Others* in which the head of the wider family sued in respect of the property of an individual member of the family, in respect of which property the latter had died intestate. The court said as follows:
"Now the plaintiff has claimed this land as being the head of the Larkai family. Ahuru, it is true, was called 'Ahuru Larkai,' and it seems was a member of the Larkai family, but individually owned property of his would, on his death intestate, become the family property, not of the Larkai family, but of his own family The plaintiff is the present holder of the Larkai family stool but ... certainly he would not be a member of Ahuru's family so as to become the head of his family and as such entitled to the family property of Ahuru so as to sue for it in this court." *Larkai* v. *Amorkor* has been adopted and followed in many subsequent cases including *Arthur* v. *Ayensu.*

In the result, I am of opinion that authority is now clear and decisive that in the existing state of native customary law the plaintiff has no right to claim the debt due to a member of the family of which he is the recognised head, or the defendant liable for payment of the debt of a member of the family of which he is the recognised head. The decision of the Municipal Court, confirmed by the Magistrate's Court, contravenes the now recognised and settled native customary law, and the decision cannot be supported.
The appeal is therefore allowed, and the judgment of the Municipal Court (confirmed by the Magistrate's Court) is hereby set aside. In place thereof judgment is entered dismissing the plaintiff's claim with costs.
Appeal allowed.

AKROFI v. OTENGE AND ANOTHER [1989-90] 2 GLR 244-252
SUPREME COURT, ACCRA
16 MAY 1989

SOWAH C.J., ADADE AND FRANCOIS J.J.S.C., OSEI-HWERE AND AMPIAH J.J.A.

ADADE, JSC.
This case commenced in the High Court, Koforidua where the plaintiff, describing himself as head of family, sued to set aside the sale of a farm by public auction in execution of a judgment obtained against one Lawrence Mark Gyewu alias Yaw Gyewu in his private personal capacity. The said Gyewu is a member of the plaintiff's family. The plaintiff says that the farm did not belong to Gyewu personally, and therefore could not be sold to satisfy his personal debts. Accordingly, he sought a declaration of the family's title to the farm; recovery of possession; an order for accounts from the date of the sale till the date of judgment; perpetual injunction; and lastly, an order to set aside the sale.

The trial High Court judge found for the plaintiff on declaration of title, recovery of possession and perpetual injunction. But he dismissed the claim for accounts, and refused to set aside the sale. On appeal, the Court of Appeal, by a majority of two to one, came to the conclusion that on the evidence the probabilities are that the farm was not family property. The court therefore reversed the High Court, and dismissed the plaintiff's claim. From that decision the plaintiff had come to this court on further appeal.

It is clear that the main issue for determination is whether the farm is family property, or was the private property of Gyewu, the judgment debtor. In this court the plaintiff has filed five grounds of appeal, but these are adequately covered by the first two grounds only, namely:
"(1) The Court of Appeal erred in holding that the plaintiff-respondent did not discharge the onus of proof.

(2) The Court of Appeal erred in law in holding that the plaintiff-respondent had no capacity to sue as head of family."
Although the plaintiff's capacity was in issue, the trial judge made no direct finding on it. In the Court of Appeal, one of the majority opinions expressed the view that the plaintiff failed to prove his capacity as head of family, and on that ground his action should have been dismissed. The learned judge said:
"I hold that on the evidence available the plaintiff completely failed to discharge the onus on him in proving that he was the head of family of the Okanta family of Larteh. Having failed to prove his capacity the law is that he should fail in his action. I am therefore of the opinion that his action ought to have been dismissed on this ground alone by the trial court."

I am afraid I do not share this assessment of the evidence. After all what is proof? It is no more than credible evidence of a fact in issue. This may be given by one witness, or by several witnesses; what matters is the quality of the evidence. The plaintiff led evidence that he was the head of family, and he was supported by a member of the family. If the defence deny this, they should have put forward an alternative story, in the event mentioning the person they contend is the head of family, and calling witnesses, if need be, to support them in that. After all, in our local communities the heads of the various families are fairly well known, especially by the elderly members of the towns and villages. Evidence of these heads should not be difficult to come by. As it happened the defence made no effort to get this evidence. They rested their case on a mere suggestion in cross-examination, which was stoutly rejected. Beyond this, they did nothing else. Therefore on the question of the headship of the Okanta family, the only evidence on record is that of the plaintiff and his witness, the second plaintiff witness. The court did not express itself as disbelieving that evidence; indeed there could have been no reasonable grounds for disbelieving it. Thus the plaintiff, having led some credible evidence, the burden shifted on to the defence, since they stood to lose on that issue if no further evidence were introduced. The defence did not even take the first step to discharge their burden; they led no evidence. Accordingly, they had to lose on that issue. I find, contrary to the pronouncement by the Court of Appeal, that the plaintiff sufficiently succeeded in discharging the burden, and establishing his capacity as head of the Okanta family of Larteh, Akwapim.

On the whole, I find that the plaintiff failed to prove that the farm belonged to his family. The balance of probabilities are clear to me. The farm was for Gyewu, the chief of Larteh and the Benkumhene of the Akwapim Traditional Area. Having lost it as a result of the fi:fa, he now tries to get it back by putting forward the family. It is a ploy which must be seen through and rejected. I would dismiss the appeal.
Incidentally, because of exhibit 1, the deed of pledge, the impression is created by certain pronouncements on record that Christian Otenge Odonkor was, and through him the first defendant is, in possession of the farm as a result of the loan transaction between Odonkor and Gyewu. This is erroneous. Odonkor bought the farm at a public auction, which has been found to be regular in all respects. The sale was independent of the loan transaction between him and Gyewu. Of course, he might have taken an interest in the auction sale because of his special relationship with the farm; it had been pledged to him, and he would not like to lose his security. But he paid for the purchase, as any other purchaser would have done. The evidence is that he paid ¢5,000. There is no evidence that Gyewu has himself repaid the loan he took from Odonkor. That loan must therefore still be outstanding.

DECISION
Appeal dismissed.

ASAFOATSE LAWER KORNOR DJABAKOR vrs TETTEHYUM AMARTEY [NO. J4/1/2010] 9TH JUNE, 2010 (unreported)

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA

CORAM: BROBBEY, JSC (PRESIDING)
DATE-BAH (DR), JSC
YEBOAH, JSC
ARYEETEY, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL
NO. J4/1/2010
9TH JUNE, 2010

ASAFOATSE LAWER KORNOR DJABAKOR … PLAINTIFF/ RESPONDENT/ APPELLANT

VRS.

TETTEHYUM AMARTEY
JAWANO AMARTEY … DEFENDANTS/APPELLANTS/RESPONDENTS
MYSTERY KOFI AMARTEY
4. STEPHEN LAFIA AMARTEY
5. FRANCIS KATA AMARTEY

J U D G M E N T

ARYEETEY, JSC

In this judgment we refer to the plaintiff/respondent/appellant as the plaintiff and the defendants/appellants/respondents as the defendants. What the plaintiff took to the High Court for determination was in respect of his family's ancestral land which his great-grand-father, Tei Djabakor, and his brother Tetteh Akporsuer acquired by settlement. According to his pleading, his ancestors gave a portion of their land to the defendants' ancestor by name Numo Amartey in 1910 as a licensee. What brought about the dispute between the plaintiff's family and the defendants' family, being descendants of Numo Amartey, is the refusal by the defendants to recognize the plaintiff's family as owners of the land in respect of which they are licensees. Besides, the defendants by their conduct assert their rights supposedly as owners of the land in dispute which their ancestor Numo Amartey acquired by settlement. The plaintiff's claim before the High Court was therefore for the following reliefs:

Declaration of title of the Djabakor-Akporsuer-Kornor family of Tsangmer clan of Osudoku, to the triangular piece or parcel of land at Old Kadjanya in the Osudoku Traditional area ...
A declaration that, by denying the title of the plaintiff's family to the Old Kadjanya land, the defendants have forfeited the customary license granted to them.

An order for recovery of possession of the land at the Old Kadjanya described in (i) above.
An order that the first defendant shall refund to the plaintiff's family the amount of ¢9,522,000.00 being compensation which he collected from Irrigation Development Authority for wild palm trees, on the land at Old Kadjanya.

General Damages for trespass from December 14th 2002, when the customary license was revoked by the plaintiff's family to the date of judgment.
Mesne profits.
An order for permanent injunction restraining the defendants, their children, agents, assigns, workmen etc from interfering with the land in whatsoever manner.
The trial court gave judgment in respect of all the reliefs claimed by the plaintiff. Sowah J., reading the judgment of the trial court had this to say at pages 285-286:

"The general rule that the head of a family as a representative of the family is the proper person to institute a suit for the recovery of family land is so settled that there is no need to belabour the point. (See Kwan v. Nyeni [1959] GLR 67 and Yormewu v. Awute [1987-88] 1 GLR 19, CA). So also is the principle of law that a plaintiff whose capacity is put in issue must establish it by cogent evidence (See Sarkodee IV v. Boateng II [1982-83] GLR 715.

Was the plaintiff able to establish his claim to be the head of family? It was submitted by the plaintiff that there is sufficient evidence on record proving his capacity. PW1, Michael Kwao, PW2 Godlieb Kofi Agorku and PW5 Col. Amuzu, all grantees of land, testified that they had been invited by Tawiah Kornor, an elder of the family and introduced to plaintiff after the funeral of Asafoatse Akwetey Djabakor as the new head of family. Raphael Teye Kofi Kornor, PW6, a member of plaintiff's family testified that he was one of 3 nominees chosen but lost out to plaintiff who was duly elected by the elders of the family. The elders were named without challenge. I consider such evidence from a contender convincing proof of plaintiff's status. In addition, PW 10, Gordon Van Tay, also testified that whilst an engineer with Impregillo Reccelli, he obtained a Right of Entry to win gravel on the disputed land from the plaintiff."
The learned judge then gave a summary of the grounds upon which the defendants base their contention that the plaintiff lacks capacity to pursue the action and continues at page 286 of the record of appeal as follows:
"In sum it is contended for defendants that cogent evidence had not been led to establish any of the above. It is argued that rather, the evidence of PW7, Emmanuel Kofi Klemeh that there is no division in the functions and roles of heads of family in the Osudoku traditional area had corroborated defendants' assertion. PW7, head of Tsungwanya family had been called to testify as to his boundary with the plaintiff.

Apart from stating in their evidence that they did not know plaintiff as Asafoatse and 1st defendant stating that he knew Mama Korletey as head, no evidence of rebuttal of plaintiff's assertion was adduced. ... Further the defendants did not deny that Asafoatse Akwetey Djabakor was the former head of family. When PW7 was asked, "What was the title of the immediate past head of family?", his answer was: "Asafoatse". The defendants themselves and counsel repeatedly referred to Akwetey as Asafoatse. I therefore fail to see the basis of the challenge to plaintiff being head by reason that as Asafoatse he cannot by custom be head

of family. Here again no evidence was led or authorities cited to support the assertion. I find that sufficient evidence of the plaintiff's capacity was led."

Subsequently the defendants appealed and filed as many as twenty grounds of appeal, that is Grounds "a - t". However for the purposes of the judgment of this court we would only refer to the first three grounds as reproduced below since they relate directly to the only two grounds of appeal filed in this court. The first three grounds before the Court of Appeal are:
It was an error of judgment when the High Court held that the plaintiff suing as "functional head of family" had capacity to sue, even though there is a substantive head of family who is alive and has not been deposed, and there is also another person who is termed "the ceremonial head of family" all within the same family at the same time.
It is an error to hold that there is a dichotomy in the traditional office of a head of family.
It is erroneous to hold that the plaintiff is the "functional head of family" even though none of the persons who allegedly installed him and are all still alive was called to substantiate the allegation when challenged.

The remaining 17 grounds of appeal before the Court of Appeal relate essentially to the ownership of the land in dispute. The Court of Appeal determined the issue of ownership in favour of the plaintiff but allowed the appeal on the basis that the plaintiff lacked capacity in the first place to bring the action. Therefore the appeal before this court has to do only with headship of the plaintiff's family and the capacity of the plaintiff to bring the action.

In his written submissions, counsel for the appellant reminded the court that the plaintiff sued on behalf of Djabakor-Akposuer-Kornor family and had authority to pursue the action and highlighted paragraphs 1 and 2 of his Statement of Claim. He pointed out that even though the plaintiff sued on behalf of Djabakor-Akposuer-Kornor family the majority of the Court of Appeal erroneously at page 548 lines 3 and 4 of the record of appeal referred to his family as Djabakor-Akposuer-Kornor clan and in another breath as Tetteh Akposuer and Numatsu clan as stated in exhibit 4. He referred to the evidence of the witnesses respecting proof of plaintiff's headship of his family, notably the evidence of PW1, PW2, PW5, PW6, PW7 and PW 10. He submitted that documents which were tendered in evidence in proof of the headship of the plaintiff of his family were ignored by the majority decision. It is his stand that exhibit E titled RIGHT OF ENTRY which gave Impregilo Recchi J. V. and their workmen licence to enter a portion of plaintiff's family land to win gravel was signed by plaintiff as head of family in 1985.

According to the plaintiff's counsel since the defendants' counsel did not ask any question in cross-examination when the documents exhibits E and F were tendered in evidence they are deemed to have admitted the contents of those documents especially when they did not lead any evidence in rebuttal. He relied on the case of Takoradi Flour Mills v. Samir [2005-2006] SCGLR 882. Also, he referred to the case of Akrofi v. Otenge [1989-90] 2 GLR 244, SC. In that case it was held that since the plaintiff's evidence that he was the head of his family was supported by a member of the family, the defendants who denied his capacity should have mentioned the person they contended was the head of family and, if necessary, called witnesses to support them, especially since in Ghanaian local communities the heads of the various families were well-known and it was thus easy to come by that evidence. However the defendants did not even take the first step to discharge their burden; they led no evidence in rebuttal. Thus the only evidence on record on the issue of the headship of the family was that of the plaintiff and his witness. Since that evidence was credible and the defendants had failed to discharge the burden that then shifted to them, they had to lose on that issue.

On the issue of a family having a 'functional head' and 'ceremonial head' counsel for the plaintiff referred to the AMENDED REPLY TO THE AMENDED STATEMENT OF DEFENCE filed on 2nd August 2004. Paragraph 3 of that document reads:
"Plaintiff denies paragraph 1a of the amended statement of defence and says that he is the functional head of the Djabakor family and as such he is the actual and active head of the family as distinguished from one Tawiah Kornor who (although, not specifically appointed as ceremonial head) is generally regarded as the ceremonial head by virtue of being oldest member of the family."
Counsel further contended that there is nothing wrong with the positions of 'functional' and 'ceremonial' heads of family so far as customary law is concerned. He referred to what the trial judge said about 'functional head' in the portion of her judgment quoted above. The question posed by the two judgments of the majority decision on 'functional' and 'ceremonial' heads have an answer in paragraph 3 of the AMENDED REPLY TO THE AMENDED STATEMENT OF DEFENCE quoted above. Counsel argued further that *"As to which of the two can sue and be sued, the plaintiff explained that the ceremonial head sued the 1st defendant at the circuit court, Accra for palm trees i.e. Suit no. TCC113/96 as a result of equivocal legal advice, to the effect that he (plaintiff) could sue and the 'ceremonial' head too could sue. That suit was dismissed on the grounds that Tawiah Kornor, the ceremonial head referred to in those proceedings as 'Setse' in Ga-Dangme meaning 'Stool father' had no capacity to sue as head of family. It is therefore known that the ceremonial head cannot sue for the family and that is why the plaintiff herein as the functional head sued at the High Court."*

The response from the defendants' counsel was brief. He submitted that since capacity was put in issue that must be established. He referred to the cases of Akrong V Bulley [1965] GLR 469 and Sarkodee I v. Boateng II [1982-83] GLR 715 and submitted that there is no position of 'functional' head of family in contrast with 'ceremonial' head of family known to customary law.

The majority decision consists of the judgment of Ofoe, J.A. and that of Mariama Owusu, J.A. After giving an extensive overview of the case law relating to the right of the head of family to sue and be sued, Ofoe J.A. had this to say on the subject of 'functional' head of family and 'ceremonial' head of family at page 554 of the record of appeal:
"How can the respondent say that Tawiah Kornor sued as the ceremonial head when clearly from the process filed in that case and the evidence before the court he sued as the head of family and not as a ceremonial head? If we accept the respondent's evidence in the circuit court that Tawiah Kornor sued as ceremonial head is he contending that as ceremonial head Tawiah could also sue on behalf of the family? If the answer is yes then the respondent is saying that both the ceremonial head and functional head can sue. The public will have to know who the head of family is. For by law it is only the head of family who can sue and can be sued. It can't be acceptable having both functional head and ceremonial head suing as and when the family wants it."

Also to Mariama Owusu, J.A. the use of the descriptions 'functional' head of family and 'ceremonial' head of family makes it impossible to identify who is the head of the family especially when there is evidence that both the functional' and 'ceremonial' heads sued on behalf of the plaintiff's family. She expressed this in her judgment at pages 571 and 572 of the record of appeal in the following words:
"From the cross-examination and the answers given, the trial judge's observation that there are no strict rules as to how a family should run its internal affairs is begging the question. The problem is not the description of someone as the ceremonial head, but the ceremonial head suing for and on behalf of the family when the head of family is there and even testified for the ceremonial head as PW1. The duty is cast on the plaintiff to tell the court the respective

roles of the functional and ceremonial head. This the plaintiff did not do and same must be held against him. Obviously when Tawiah Konor instituted the action in the circuit court, he was not performing a ceremonial function. The principle in the Kwan v. Nyieni [1959] GLR 67, 68-69 states that: "As a general rule the head of family as representative of the family is the proper person to institute a suit for recovery of land." And exceptions to the general rule could not avail the said Tawiah Kornor as the head of family was there and testified for the said Tawiah Kornor as PW1. ... Even if Tawiah Kornor in exhibit 1 sued as the ceremonial head, still the respondent needs some explanation to do as to why he the head of family is there and some other member of the family is suing on behalf of the family. With the descriptions functional and ceremonial head it becomes difficult to say who the head of the family is especially when the ceremonial head also sues on behalf of the family as in exhibit 1. It is for these reasons that I say the respondent was not able to establish his capacity at the court below and his claim should have failed on this ground. I agree that the appeal be allowed".

However Irismay Brown, J.A. who wrote the minority judgment was of the view that the description of the plaintiff as 'functional' head of his family did not make any difference. This is what she said at pages 577 and 578 of the record of appeal:
"The case of the plaintiff was that he was the functional head, and sues with the authority of the family to protect a portion of the family's land. His position as one of the principal elders of the family is indisputable. Evidence of appointment and the succession to the position of Asafoatse in 1985 was not disputed. His statement that he sits on the family war stool was not challenged, but more importantly he provided conclusive evidence of being the main source of power in relation to the family land. In 1985 he wrote and restrained the first defendant from clearing a portion of the disputed land. Beneficiaries of grants of the disputed land made by the family testified that they had to introduce themselves to him and recognise him as the person with authority over the land.

The plaintiff participated in arbitration between one of the grantees, one Kwapong and the first defendant in respect of the disputed land. Judgment of the arbitration and of a subsequent hearing at the Circuit Court in favour of the said Kwapong also confirmed the family's ownership of the land. In 1990 he caused a warning letter to be written to the first defendant by an elder of the family Mama Korletey about the illegal fishing in a stream on the diosputed land. He sold palm trees growing on the disputed land to a lady for distilling alcohol.

He received a complaint and reported to police when one of the grantees of the family, one Colonel Amuzu was being harassed by members of the defendants' family. He joined the 'Ceremonial head' Tawiah Kornor in an application for compensation for portions of the disputed land affected by the irrigation project. He had testified as the first witness for the family in the Circuit Court suit by Tawiah Kornor already mentioned above. Finally in 2002 he caused a letter to be written to the defendants revoking their licence on the land.

He produced evidence to the court that the person alleged by the defendants to be head of the family Mama Korletey is ill, has had a stroke and cannot speak very well. Plaintiff tendered in a medical report exhibit Q in support. This evidence was not challenged by the defendants. There is no record that Mama Korletey had ever claimed to be the head of plaintiff's section of the family. It is also on record that there is a dispute pending as to Mama Korletey's headship and his position is being challenged by one I. K. Apafo, another member of the family. In the light of the above evidence and in the light of the activities of the defendants to consolidate their claims over the disputed land, it is not surprising that other members of the family including the plaintiff herein would be propelled in pursuing an action against the defendants."

The two grounds of appeal filed before this court are as follows:
That the Honourable Court of Appeal ignored finding of fact and evidence on record that the plaintiff/respondent/appellant is the functional head of family and has been recognised as such by all family members and grantees of the family who dealt with him as such and without any challenge from a rival claimant to the headship of the family and fell in error by holding that he has no capacity to sue for and on behalf of the family.
That the Honourable Court of Appeal erred when it held that customary law forbade a family to regard the oldest in the family as ceremonial head and at the same time have a functional head.

Looking at the conclusions of the majority judgment it does not appear as if they took into consideration the pains taken by the learned trial judge to point out indisputable pieces of evidence which convinced her to take the stand that indeed the plaintiff was the accredited head of his family and acted with the total support of the family. Besides, they did not indicate where the trial court went wrong. After all it is the trial court that has the exclusive right to make primary findings of fact which would constitute the means by which the final outcome of the trial would be arrived at. Where such findings of fact are supported by evidence on the record and are based on the credibility of witnesses, the trial tribunal having had the opportunity and advantage of seeing and observing their demeanour and having become satisfied of the truthfulness of their testimonies touching on any particular matter in issue, the trial court's finding is virtually unassailable.

In the case of Cross v. Hillman Ltd. [1969] 3 WLR 787 at 798, C.A. Lord Widgery cautioned that an appellate court *"... which sees only the transcript and does not see the witnesses, must hesitate for a very long time before reaching a conclusion different from the trial judge as to the credibility and honesty of a witness".* The appellate court can only interfere with the findings of the trial court if they are wrong because (a) the court has taken into account matters which were irrelevant in law, (b) the court excluded matters which were critically necessary for consideration, (c) the court has come to a conclusion which no court properly instructing itself would have reached and (d) the court's findings were not proper inferences drawn from the facts. See the case of Fofie v. Zanyo [1992] 2 GLR 475. However, just as the trial court is competent of make inferences from its specific findings of fact and arrive at its conclusion, the appellate court is equally entitled to draw inferences from findings of fact by the trial court and to come to its own conclusions. See also Kofi (Oppong) v. Fofie [1964] G.L.R. 174, S.C.; Praka v. Ketewa [1964] G.L.R. 423, S.C.; Azagba v. Negov [1964] G.L.R. 450, S.C.; Asibey III v. Ayisi [1973] 1 G.L.R. 102. In Adorkor v. Gatsi [1966] G.L.R. 31 at 34, S.C., the Supreme Court summed up appellate powers as follows:
"The law governing this is that while findings of specific facts are within the competency of the trial court alone, a finding of fact which is an inference to be drawn from specific facts found is within the competency of an appeal court no less than the trial court; in other words, an appeal court is in as good a position as the trial court to draw inferences from specific facts which the trial court may find."
What the Court of Appeal set aside in the Fofie v. Zanyo case (supra) were not inferences draw from facts but the very findings on specific facts of the trial judge. This court therefore ruled that since the conclusions of the trial court were supported by the evidence, most of which were supplied by the plaintiff and his witnesses there was no lawful warrant for the Court of Appeal to differ from the findings of the trial court.

Neither of the two judgments which constitute the majority decision pointed out what the trial judge did wrong in her consideration of the evidence which led to her conclusion that the plaintiff is the head of his family and had the mandate of the family to sue on its behalf,

judging from the evidence before her. In effect the conclusion of the majority decision was that the plaintiff has no capacity to sue irrespective of the leadership role the plaintiff plays in matters affecting his family's interest in land and ancillary matters, coupled with his recognition by members of his family as well as outsiders to be the person who represents his family in all land transactions. The majority decision that the titles "functional head of family" and "ceremonial head of family" are unknown to customary law and practice completely ignored the specific finding of the trial court based on the evidence. Neither was that decision based on detailed analysis of the evidence before the court which would illustrate the areas where the trial court went wrong. In any case the decision of the trial court was based on a primary finding of fact. The conclusion of that court is that indeed the plaintiff is the head of his family and acted as such with the backing of members of his family without exception. That issue had to be dealt with first. The question to ask is: Is the appellate court entitled to substitute its own findings of fact for that crucial finding of fact by the trial court judge without coming out with what went wrong with the conclusions of the lower court?

In the case of Kyiafi v. Wono [1967] GLR 463, CA it was held that, as stated in the head note: "The principles which regulate the right of an appellate court to interfere with findings of fact made by a trial court were as follows: Where the appellate court was satisfied that the reasons given by the trial court in support of its findings were not satisfactory or where it irresistibly appeared to the appellate court that the trial court had not taken the proper advantage of having seen and heard the witnesses, then in such a case the matter would become at large for the appellate court, in which the appellate court was under a duty to give such decision as the justice of the case required, and, if need be, reverse the decision of the trial court and substitute its own judgment for it. In any other case the appellate court should not interfere with the findings of fact made by a trial court."
For the reasons given in this judgment we allow the appeal.

B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

V. AKOTO-BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

COUNSEL;-

PETER KWAME KORNOR FOR THE PLAINTIFF/RESPONDENT/APPELLANT.

COL. G. Y. TSAHEY (RTD) FOR THE DEFENDANTS/APPELLANTS/RESPONDENTS.

ASHIE NEEQUAYE vrs. ADEE KOTEY [J4/26/2009] 10TH FEBRUARY, 2010
(Unreported)

IN THE SUPERIOR COURT OF JUDICATURE
SUPREME COURT OF GHANA
ACCRA

CORAM: AKUFFO (MS), JSC (PRESIDING)
ADINYIRA (MRS), JSC
OWUSU (MS), JSC
BAFFOE-BONNIE, JSC
ARYEETEY, JSC

CIIVIL APPEAL
J4/26/2009
10TH FEBRUARY, 2010

ASHIE NEEQUAYE ... PLAINTIFF/RESPONDENT/RESPONDENT
(SUBT. BY JULIANA KOOTSO NEEQUAYE)
H/NO. 3/2/2 ABEBRESEM STREET
OSU-ANORHOR, ACCRA
VRS

ADEE KOTEY ... DEFENDANT/APPELLANT/APPELLANT
218 EAST CHRISTIANBORG
OSU-ACCRA

J U D G M E N T

BAFFOE-BONNIE, JSC:-

The PL/RESP/RESP (hereinafter referred to as plaintiff), originally instituted this action claiming among others:
A declaration that the original house number 160 was allocated to Moses Neequaye which house was later exchanged for plot 218 renumbered F.793a/2 and 801/2 East Christianborg Osu and same formed part of his estate.
A further declaration that the said house i.e plot 218……was never allocated to Clifford Cudjoe but that he held the house in trust for the beneficiaries of the estate of Moses Neequaye (deceased)

The basis of their claim is simply that their father and predecessor in title Moses Neequaye, was allocated the subject matter of the suit by the State Housing Corporation when his own house was wrecked by the earthquake that rocked Accra and its environs in 1939. Subsequent to the allocation but before the completion of the instalmental payments of the building, the defendants father, one Clifford Cudjoe, was permitted to live in the houe on his return from Burma Campaign in the 2nd World War. He lived there with another son of Moses Neequaye. When the installmental payment ended, the family sought to have the documentation on the building done in the name of Dina Neequaye. It was then that they got to know that Clifford

Tagoe had earlier in 1949 attempted to have the documentation effected in his name through an affidavit he swore to that effect.
The affidavit of Clifford Cudjoe, notwithstanding, the SHC did the documentation in the name of Dina Neequaye and this has remained so till today. Clifford Cudjoe died and when the family of Moses Neequaye wanted to take over the property, the children of Clifford Cudjoe, with the active support of one Seth Neequaye, another son of Moses Neequaye, resisted this take over claiming, the property belonged to their father Clifford Cudjoe. The family sued Seth Neequaye who later died and was substituted by the current defendant.
At the end of the trial the trial judge dismissed the plaintiffs claim on the grounds that the plaintiff lacked capacity to bring the action. This was because at the time of the institution of the action the plaintiffs had not applied for L/A to administer Moses Neequaye's estate and that since they were suing in a representative capacity it was only the head of family who could sue. On the basis of the evidence on record he also dismissed the defendant's counterclaim.
Dismissing the defendant's counterclaim the trial judge held;
"On the evidence as a whole I find that preponderance probability(sic) would be in favour of the plaintiff in respect of the following:-
That the original house number 160 was allocated to Moses Neequaye, that it was later exchanged for plot 218……."

Neither the plaintiff nor the defendant appealed against this judgment.
The plaintiff who had secured an L/A in respect of the estate of Moses Neequaye, even before the suit was actually dismissed for want of capacity, instituted the current action claiming virtually the same reliefs as those in the earlier action. The defendant raised 3 main issues in her statement of defence.

That since by their own showing the property passed on to Dina Neequaye on the death of Moses Neequaye the plaintiff should have applied for L/A to administer the estate of Dina Neequaye and not that of Moses Neequaye. And so they still lacked capacity to institute the action in respect of the property.
That by their failure to appeal against the decision of Justice Yakubu Armah with regard to lack of capacity the plaintiffs are estopped from relitigating on the property.
The action was statute barred.

The issues set down for trial at the High Court were as follows
Whether or not the plaintiffs as administrators of the estate of Moses Neequaye(deceased) have capacity to institute the present action.
Whether or not the plaintiffs are stopped from contesting the facts found by the trial judge in suit No. 175/81
whether or not the action is statute barred
Whether or not the doctrine of res judicata is applicable to this case

The trial judge resolved all these issues in favour of the plaintiffs. Feeling aggrieved, the defendants appealed to the Court of Appeal. The appeal failed. The defendant has appealed to this court and, the difference in wording notwithstanding, I find that the issues before us for resolution are essentially the same as those ruled upon by the learned judges of the High Court and the Court of Appeal.

Since an appeal is by way of rehearing , I propose to deal with the present appeal as if this court were a court of first instance and make the necessary orders as were available to the trial High Court. I will however remind myself of the admonishment of Acquah JSC(as he

then was) in the case **of Achoro and Another v Akanfela and Another [1996-97]SCGLR 209** where he said,

" *In an appeal against findings of fact to a second appellate court like the Supreme Court, where the lower court had concurred in the findings of the trial court, especially in a dispute, the subject matter of which was peculiarly within the bosom of the two lower courts or tribunals, this court would not interfere with the concurrent findings of the two lower courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice, was apparent in the way in which the lower courts had dealt with the facts."*

See also the case of **Nyame and Tarzan Transport [1973] IGLR 8 CA 9.**

RES JUDICATA

I am a little bit intrigued that even at this late stage, and in spite of the decision of trial judge and the learned Justices of the Court of Appeal, the defendant insists that Justice Yakubu Armah's decision on capacity and his reasons for so finding operates as *res judicata*. The fact is, from the legion of authorities on res judicata, by no stretch of imagination can we say that Justice Armah's judgment operates as *res judicata,* That judgment did not touch on the merits of the case at all. If anything it is the findings that the learned judge made in dismissing the defendant's counterclaim that could operate as *res judicata*, because those findings touched on the facts of the case and the defendants did not appeal against the findings of fact made by Justice Yakubu Armah leading to the dismissal of their counterclaim.

The plea of *res judicata* is a well established part of our law and it is usually expressed to be based on a final judgment. In the case of **In re Sekyedumase Stol: Nyame v Kese alias Konto [1998-99]SCGLR 476 at pg 478,** Acquah JSC as he then was, delivering the judgment of this court said:

"My lords, the plea of res judicata is never a technical plea. It is part of our received law by which a final judgment rendered by a judicial tribunal of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies and , as to them constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action"

In the case of ***Dahabieh v SA Turqui &Bros [2001-2002]SCGLR498*** ,this court reiterated the above cited position of the law in the following terms,

" *it is well-settled under the rule of estoppel that if a court of competent jurisdiction has tried and disposed of a case the parties themselves and their privies cannot, thereafter, bring an action on the same claim or issue. The rule applies to issues actually dealt with in the previous litigation as well as those matters which properly belonged to that litigation and could have been brought up for determination but were not raised."*

Yakubu Armah's decision that the plaintiff lacked capacity to institute the action was borne out of the fact that since the property in dispute had become family property on the death of Moses Neequaye, the head of family was the only person customarily authorized to bring the action. Citing the case of **Kwan vs Nyieni and another 1959 GLR 59 at page 72/73**, he said,

"It should be mentioned here that at the death of Moses Neequaye the house or whatever interest he had in the house in dispute would vest in the family. The customary law as I understand it has been clearly explained by the court of appeal in Kwan vs Nyieni and another as follows;

'as a general rule the head of family is the proper person to institute suits for the recovery of family land;……'.

In the instant case the plaintiff in cross examination admitted that one Akwetey Palm was head of Moses Neequaye's family and the said Akwetey Palm was alive when the action was taken. It is therefore clear that the said Akwettey Palm would have been the proper person to have taken this action."
Later on he concluded as follows;
"I have come to the conclusion that the plaintiff has failed to establish that she had been authorized by the family to take this action in a representative capacity or the accredited successor of her late father Moses Neequaye. It means she lacked capacity when she took the action. I would dismiss the plaintiff/s claim for want of capacity."
These statements represent the true state of customary law. However, if the plaintiff later overcame this legal hurdle and secures the necessary authorization, either from the Head of family (power of Attorney)or the court (i.e L.A to administer a deceased person's estate), such a person could return to court, and the earlier holding cannot operate as *res judicata*. It is my view that having secured the necessary Letters of Administration to administer the estate of Moses Neequaye, the plaintiff was vested with the requisite capacity now to relitigate.
I will therefore not disturb the trial judge and the learned justices of appeal's holding on this issue.

CAPACITY

Equally intriguing is the defendant's insistence that the plaintiffs lack capacity to institute this action. The defendant/appellant insists that the plaintiff lacks capacity because, by their own showing, granted that the property was acquired by Moses Neequaye, the property had passed on to Diana Neequaye and therefore on the death of Diana the property vested in her estate and not that of Moses. So securing L.A. in respect of the estate of Moses will not confer on them capacity to bring an action in respect of the property which now forms part of the estate of Diana. This is how she put it in her statement of defence;

If the plaintiffs' allegation in paragraph 8 of the statement of claim is to be accepted, it would follow that the said house had passed and vested in the estate of Dina Dei Neequaye.
The plaintiffs have not applied for L/A to administer the estate of Diana Neequaye who died before 1981 the date of the first action in suit no1745/81, hence they lack capacity to sue.

Ingenious as this argument may sound it really does not contain much to write home about. The plaintiff brought this action as administrator of the estate of Moses Neequaye whose estate she claims, the subject matter of this litigation forms part of. She is not seeking to administer the estate of Dina Neequaye. She has all along insisted that the property was acquired by Moses Neequaye and that it was they the children who authorized their sister Dinah to have the documentation prepared in her name. Dina therefore holds the property only in trust for the other children. These facts are not disputed by the children of Dinah. And they couldn't be controverted by the defendant either. Because after all they are consistent with the earlier findings of Yakubu Armah J in the earlier suit from which the defendant did not appeal. Therefore if any body could challenge the capacity of the plaintiff to institute an action in respect of this property it is the children of Dinah and not the defendant. The defendant has no LOCUS STANDI to challenge the plaintiffs' claim of the property for the estate of Moses Neequaye as against that of Dinah Neequaye.

STATUTE BARRED
The appellant has referred copiously to the English Real Property Limitation Act of 1883 and said whatever interest Moses Neequaye had in the property was extinguished when the administrators failed to bring an action within twenty tears of the death of Moses Neequaye.

Counsel relies on the dictum of **Korsah CJ in the case of Nsiah v. UTC (1959) GLR 79** at pg 85 where he said,

`*With regard to the last issue viz., whether or not the claim is barred by statute, I am in full agreement with the views expressed by the judge as follows:-*

"By section 6 of the real property limitation act 1883 where an administrator claims, the time runs from the time of the deceased death and the same limitation applies to the plaintiff who has sued in respect of the estate of the deceased intestate…".'

The appellant had forcefully canvassed this argument at both the trial court and the Court of Appeal to no avail. Despite the reasons given for the dismissal of this argument by the two courts below he feels dissatisfied and has come before us. Clearly, from his argument it is the appellant who has failed to appreciate the import of the said section and the decision of the court in Nsiah v. UTC.

The section does not mean that accrual of cause of action in computing when limitation period starts. It does not mean that time starts running immediately a person dies, even if in his lifetime the deceased person's title or interest in the property was not questioned! What it means is that if in the lifetime of a person his interest in a property is challenged, or he deals with the property in a manner detrimental to or inconsistent with his interest in the property, then any person claiming through him has to come to court within twenty years of his death. That in essence was the import of the decision of this court in the Nsiah v. UTC case.

As the facts of this case show and as the two lower courts rightly found, in the lifetime of Moses Neequaye there was no adverse claim by the father of the defendant to the property in dispute. On the death of Moses, the plaintiffs found that Clifford Cudjoe, the appellant's father, had tried to gain access to the house through fraudulent means, but this was scuttled when the property was documented in the name of Dina Dei Neequaye on the insistence of her sibblings. Thereafter Clifford caved in, accepted his fate and only continued living in the house as licensee of the respondents. Therefore, the only time an adverse claim was made in respect of the property was after the death of Dina Neequaye in 1980 when, on the instigation of Seth Neequaye, the defendants and her sibblings started to claim that the property belonged to Clifford Cudjoe**. Section 10(1) of the Limitation Decree,1972 NRCD 54** which had then come into effect in 1972 provides that,

No action shall be brought to recover any land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or if it first accrued to some person through whom he claims.

We are not told of when the demand for the documents was made and refused. Suffice it to say that the refusal occasioned the institution of an earlier action in November 1981.That action was dismissed in 1991 for want of capacity. The current action was instituted in February 1993 which will still be within the limitation period of twelve years when the adverse claim was made. Therefore, on this ground too, the appeal is not sustainable.

The appeal therefore fails on all grounds and same is dismissed

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

S. A. B. AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

S. O. A ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT
R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT
B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

COUNSEL:

BRIGHT AKWETEY FOR THE PLAINTIFF/RESPONDENT/RESPONDENT
DR. EKOW DANIELS FOR THE DEFENDANT/APPELLANT/APPELLANT

ACCOUNTABILITY OF HEAD OF FAMILY

The general principle dealing with accountability of the head of the family was affirmed in the case of **HEYMAN *v.* ATTIPOE [1957] 2WALR 86** where the court held that by native custom the head of the family is the proper person to have charge of and control of the family land for and on behalf of the family. And that a member of the family cannot maintain an action against him for recovery of general family land in the possession of the head. The only instance in which he can maintain an action for recovery of possession against the head is when the head wrongfully takes possession of a portion of the family land which the individual member or a branch of the family has reduced, by one of the customary methods, into his possession, *i.e.,* land over which the individual member or branch of the family has established a usufructuary title.

CASES

September 6, 1957
HEYMAN *v.* ATTIPOE [1957] 2WALR 86
High Court, Eastern Judicial Division, Land Court
Ollennu J.

OLLENNU J.
The plaintiff and the defendant are both direct descendants of a common ancestress, one Adanshigbo. The defendant is the grandson of Nyanya, one of Adanshigbo's five children by her first husband, Chief Sokpui I; the plaintiff is a grandson of Hudzengor, one of Adanshigbo's two children by her second husband Kumorshie. It is common ground between the parties that the land in dispute belonged originally to Chief Sokpui I, and that he made a gift of it to his wife Adanshigbo. But while the plaintiff claims that Adanshigbo died intestate possessed of the said land, and that it has, by native custom, now become family property to be enjoyed in common by all the direct descendants of Adanshigbo, the defendant contends that Adanshigbo disposed of the land during her lifetime to her daughter Nyanya alone, that Nyanya died intestate and possessed of it and that it has therefore become the sole property of the direct descendants of Nyanya, his grandmother, to the exclusion of all other direct descendants of Adanshigbo.

The only issue thus joined between the parties which the Native Court was called upon to determine is simply this: did Adanshigbo die possessed of the property or did she dispose of it during her lifetime to her daughter Nyanya? In their judgment the Native Court held that the land was given to Adanshigbo for farming purposes and that upon her death it descended by Anlo custom only to her direct descendants by Chief Sokpui.

The first finding of the Native Court contradicts the case put up by either party, which is that Chief Sokpui I made an absolute gift of the land to Adanshigbo, such that Adanshigbo could deal with it in any way she liked. That decision, therefore, is not supported by the evidence and so cannot stand.

The second finding amounts to a decision that Adanshigbo died possessed of the land. As already pointed out, that in fact is the only issue the Native Court was called upon to determine. This finding is in favour of the plaintiff. Therefore the proper and indeed the only judgment which the Native Court should have given is one for a declaration in favour of the plaintiff that the property is family property for all direct descendants of Adanshigbo, including the plaintiff and defendant. But instead of giving judgment for the plaintiff the Native Court built up a case for the defendant which was quite different from the one he set up and tried to prove by the evidence he led. That new case is that Adanshigbo's only interest in the land was that of farming rights, which by native custom died with her, and thereupon the property descended by Anlo custom to her children by Chief Sokpui the donor exclusively.

Mr. Apaloo, learned counsel for the defendant, has properly conceded that that decision cannot be defended. A court is not entitled to make a case for any party. Its simple duty is to adjudicate upon the issues which are raised before it, and any others that are incidental to those issues. The Native Court therefore erred in taking it upon themselves to make a new case for the defendant, and in entering judgment in his favour on that case.

Now in addition to his claim for a declaration that the land is the property of all the direct descendants of Adanshigbo, the plaintiff also claimed recovery of possession and accounts. Mr. Akufo-Addo, learned counsel for the plaintiff, conceded that the claim for an account against the defendannt, the head of the family, is not maintainable according to native custom. As to the claim for recovery of possession, he says that he would not press for an order in that behalf: that was as far as he could go.

By native custom a member of a family eannot sue the head of the family for accounts. The authorities are many on that point; one of them is *Abude and Others* v. *Onano and Others*. The plaintiff's claim for account must therefore fail.

Again, by native custom the head of the family is the proper person to have charge of and control of the family land for and on behalf of the family. A member of the family cannot maintain an action against him for recovery of general family land in the possession of the head. The only instance in which he can maintain an action for recovery of possession against the head is when the head wrongfully takes possession of a portion of the family land which the individual member or a branch of the family has reduced, by one of the customary methods, into his possession, *i.e.,* land over which the individual member or branch of the family has established a usufructuary title. There is no evidence on the record that the area in dispute has ever been in the exclusive possession of the plaintiff, or of his small branch of the family, as their separate estate. In the circumstances the claim for recovery of possession must also fail.

Thus, of the three claims the plaintiff made, only the principal one, namely, the one for a declaration that the land in dispute is property of the family of all direct descendants of Adanshigbo, can succeed. For the reasons stated above I allow the appeal, set aside the judgment of the Anlo Native Court "A" including the order as, to costs, and substitute therefor the following:
"There will be judgment for the plaintiff against the defendant for a declaration that the land in dispute is the property of the Adanshigbo family, consisting of all direct descendants of the

said Adanshigbo, including the plaintiff and all those he represents, and the defendant and all descendants of Nyanya."
The plaintiff's claim for recovery of possession and for account are dismissed.
Appeal allowed in part.

Also, in the case of**ANNAN v. KWOGYIREM [1975] 1 GLR 291-297** the court held that when a member of the family, who is not qualify to be the head of that family assumes the duties of the head of that family, he will only be acting as a caretaker to the family property and so therefore, will be liable to account to the family on the activities he carried out on the family property. The court also held that where the family members believe that the head of the family is mismanaging the family property, the only option open to them is to remove him. However, the family can institute an action against him to account after he have been duly removed as head of the family

ANNAN v. KWOGYIREM [1975] 1 GLR 291-297
HIGH COURT, CAPE COAST
20 FEBRUARY 1975

EDWARD WIREDU J.
On 26 August 1971 one Chief Ankai of Cape Coast died intestate and the defendant claiming to be his head of family took out letters of administration to administer his estate. Some time after the defendant had taken out the letters of administration, the plaintiff, a maternal nephew of the deceased, was customarily appointed his successor. His present complaint against the defendant as contained in paragraphs (8)—(9) of his statement of claim reads as follows:
"(8) The defendant herein has since his appointment as administrator of the estate of the plaintiff's late uncle, collected various sums of money from the estate of the said Chief Ankai including the sum of ¢1,000.00 being compensation paid to the defendant by the government in respect of late Chief Ankai's building which was demolished by the government; ¢1,975.35 being house rents paid to the defendant by the Ghana Police Service in respect of house No. F48/1, Commercial Street, Cape Coast belonging to the late Chief Ankai and let out to the Ghana Police Service; fiscal cash ¢460.00 discovered from the late Chief Ankai's belongings by the family and which sum, together with the other belongings, were given to the defendant as administrator; Standard Bank (Ghana) Ltd. passbook containing a huge amount; Barclays Bank (Ghana) Ltd. passbook containing ¢1,000.00; 300 (three hundred) pieces of cloth; 31 kente cloths; six (6) velvets; seven (7) silk; 24 pieces of towel; fourteen trunk boxes; six portmanteaux and chest of drawers and three houses No. N3/16, Beulah Lane, Cape Coast, No. F111/2, Aboom Wells Road, Cape Coast, and No. F48/1, Commercial Street, Cape Coast.
(9) Since the plaintiff's appointment in or about 1973 as customary successor to the late Chief Kwesi Ankai, he has called upon the defendant as the administrator of the estate of the late Chief Ankai on several occasions to render accounts to the plaintiff but the defendant has refused and still refuses to render the accounts without any reasonable excuse."
He therefore on 12 February 1974 issued out of this court a writ of summons for:
"An account to the plaintiff, of all debts or liabilities (if any) and all assets of Chief Kwesi Ankai, late of Cape Coast (deceased) whose letters of administration were granted to the defendant on 5 July 1972, but account of which the defendant has not rendered and refuses to render to the plaintiff herein since the plaintiff's appointment as the customary successor with the knowledge of the defendant."
In his defence the defendant pleaded that he is the head of the late Chief Ankai's family and was therefore not accountable to the plaintiff. He therefore contended that it was incompetent for the plaintiff to have sued him for accounts. It must be mentioned here that the defendant's claim to be the head of the late Chief Ankai's family was denied by the plaintiff and this therefore became a triable issue of the case.

On the summons for direction coming on for hearing learned counsel for the parties by consent agreed to set down for legal argument the extent to which a head of family could under customary law claim immunity to account in respect of family property in his possession. This was done without prejudice to the plaintiff's stand as against the defendant's claim.
Sarbah in his invaluable Fanti Customary Laws (3rd ed.), p. 90 referred to by learned counsel for the defendant has stated the basic customary concept of the head of family's immunity to accountability as follows:
"If the family . . . find the head of the family misappropriating the family possessions and squandering them, the only remedy is to remove him and appoint another instead; . . . no junior member can claim on account from the head of the family, or call for an appropriation to himself of any special portion of the family estate, or income therefrom arising. . ."
Writing on the same concept in the Fynn case (supra) referred to by learned counsel for the defendant, Adumua-Bossman J. (as he then was) had this to say:
"This latter proposition that the head of the family cannot be called to render accounts by junior members of the family has received so much judicial recognition as to be quite common learning now."
In Nelson v. Nelson (1932) 1 W.A.C.A. 215 at p. 216, Sarbah's view as expressed above was quoted and was approved by the court which also drew a distinction between the position of a head of family as such and that of a person not being in the line of succession for the headship of a family had been appointed purely to the fiduciary position of caretaker for himself and others and held such a person accountable.

There is also an authority for the proposition that it was only when the head of family had been removed from office and replaced by another head that the latter could maintain an action for an account of the former head's administration.

On this concept of immunity to accountability of the head of family to junior members of the family in respect of family properties in his hands, there appears to be a common area of agreement amongst both text writers and the case law on the subject. What appears not to be certain is the nature and identity of such family property which is covered by the immunity. There are certain properties which belong to the wider family which are attached permanently to the position of headships of the family which properties are always held and controlled by the heads and pass on to their successors as such. There are also circumstances under which the head may by operation of law come into possession of a family property temporarily. One of such situations is where no successor had been appointed to succeed a member of family dying intestate. Under such a situation the self-acquired property of the deceased member of the family vests in the head of family or someone temporarily appointed to take charge of the property until an appointment is made. A clear distinction must be made between the two. In the latter case the position of the head in relation to the self-acquired property of the deceased is no better than any member temporarily appointed to take charge pending the appointment of a substantive successor. The rational underlying the above is that the person in temporary control of the property, be he a head or a junior member or even a stranger, loses control to the successor on the latter's appointment and becomes liable to account to the substantive successor because his duties cease with the appointment of the latter. It [p.296] is significant to note here that whilst the person who takes temporary control of the deceased's self-acquired property if he be head of family loses control over such property, he does not lose control of properties originally under his control and attached to the post of headship. He loses control of such properties only on his disposition as such head. The head's immunity to accountability therefore is customarily limited to properties attached to the post of headship and not self-acquired properties of a deceased member dying intestate which by operation of

law, comes under the head's control where no customary successor to the deceased has been duly appointed to take charge of them.

I think this is the true scope and extent of the head's immunity. For were it otherwise, it would make nonsense of the now accepted and recognised status of the successor as the head of the immediate family of the deceased and therefore entitled to immediate use, enjoyment and control of the deceased's property. For it would mean that the head could dissipate the deceased's property under his control, and whilst recognising the successor's right to take over from him when appointed will refuse to do so and claim immunity. This will be unreasonable and therefore not customary.

I therefore share the view of learned counsel for the plaintiff that vis-a-vis the self-acquired property of the late Chief Ankai the defendant in this action was in a position of a caretaker liable to account to the plaintiff. For that is the only way to put reason to the concept of the plaintiff's right to manage and control the deceased's self-acquired property. He being the head of the immediate family of the deceased, his relationship with the defendant as far as the self-acquired property of the deceased is concerned is not that of a junior member.
I am fortified in my view that the defendant is accountable to the plaintiff by the observation of the Supreme Court in Amoabimaa v. Okyir (Consolidated) [1965] G.L.R. 59 at p. 65, S.C. which reads:

> "There are three eventualities in which a family would, under customary law, be entitled to take charge and control of self-acquired property of a member of the family—a person's self-acquired property includes a portion of family land which he has reduced into his exclusive possession; those three eventualities are (a) where the member of the family dies intestate, (b) where the member of the family becomes incapable by reason of disease of the mind, incarceration or from some other cause, of controlling or managing his own affairs, or to appoint an agent or trustee to administer the same on his behalf and (c) where the owner himself voluntarily entrusts the same to the family, e.g. where he is going abroad. In the first eventuality, i.e. upon death intestate, ownership of the property vests in the family, and the person appointed by the family to administer the same is liable to account to the family."

The family in this context means the immediate family who are entitled to alienate the properties without the consent of members of the wider family. In my ruling therefore the objection taken by the defendant is hereby overruled. He is ordered to file accounts in respect of the administration of the estate of the late Chief Ankai on or before 20 March 1975. The plaintiff to falsify or surcharge such accounts filed within two weeks on being served with the same.

HANSEN v. ANKRAH [1987-88] 1 GLR 639-726

SUPREME COURT, ACCRA

21 MARCH 1985

APALOO C.J., SOWAH, TAYLOR JJ.S.C., FRANCOIS AND MENSA BOISON JJ.A.

Customary law—Family property—Accountability—Scope and extent of family head’s immunity to account—Rationale for the immunity—Procedure for aggrieved member to ventilate grievance against head—Sanctions available against head—Removal from office more efficacious deterrent than issue of writ—Action for account by heads of two branches of Mantse Ankrah family against overall head of family—Whether competent— Propriety of family head’s immunity to account.

Courts—Supreme Court—Jurisdiction—Power to legislate—Customary rule of head of family's immunity to suit for account one of judicial decision and not popular action—Rule can be changed only by legislation—Whether court competent to change rule.
Customary law—Head of family—Obligations of—Comparison with trustee's responsibilities—Head has both proprietary interest and wide discretion in administration of family property—Head's discretion wider than that of trustee—Whether institution of head of family known to Anglo-Saxon or Anglo-American jurisprudence—Whether head of family to keep books of account—Whether head of family a trustee.
Customary law—Chief and head of family—Accountability—Immunity to suits for account—Principles governing election, destoolment and powers over institutional properties similar—Abude v. Onano holding chief immune to suit from elders for account—Whether principle applicable to head of family.
Practice and procedure—Interlocutory appeal—Dismissal of action—Action against head of family for account—Preliminary objection by head that he is not accountable—Objection going to root of action—Trial judge overruling objection—Court of Appeal however reversing ruling and dismissing whole action—Whether Court of Appeal competent to dismiss substantive suit on interlocutory appeal.
[p.640]
HEADNOTES
The Mantse Ankrah family of Accra comprised three branches—the Ankrah, Ayi and Okanta branches. Each branch had a head. H, the first appellant was the head of the Ankrah branch; K, the second appellant, was the head of the Ayi branch and O, the second respondent, was the head of the Okanta branch; while A, the first respondent, was the overall head of the entire family. The family maintained an account at the Ghana Commercial Bank, High Street, Accra which was operated by the parties on the mandate of the family. Any two of them could operate the account. In 1977 an amount of ¢13,968.95 received by the family as compensation for family land compulsorily acquired by the government was paid into that account. However, A paid a further sum of ¢160,547.40 he received in 1979 from the government on behalf of the family into his personal and not the family account. The appellants (H and K) in their capacities as heads of their branches brought an action in the High Court against A and O for an account of their expenditure of the ¢13,969.95, some of which they claimed the respondents had spent on Homowo festivities against their express opposition. The respondents contended in their defence that they had spent the moneys on the Homowo festivities and paid the ¢160,547.40 into A's personal account in accordance with resolutions passed by the entire family in response to the appellants' unco-operative attitude to A in his discharge of family responsibilities. The respondents also raised a preliminary objection to the propriety of the action on the ground that they were not accountable at customary law to the appellants in court. The trial judge (see Hansen v. Ankrah [1980] G.L.R. 668) overruled the objection and ordered the respondents to pay the ¢160,547.40 forthwith into the family account pending the determination of the substantive suit. He further opined that Abude v. Onano (1946) 12 W.A.C.A. which the respondents had relied upon for their objection was of questionable authority and besides was inapplicable because it concerned stool and not family funds. On appeal by the respondents against the ruling, the Court of Appeal (see Ankrah v. Hansen [1981] G.L.R. 847, C.A.), inter alia, held that A as the overall head of the Mantse Ankrah family was not accountable to the appellants and therefore allowed the appeal and dismissed the suit against the respondents. On appeal by the appellants from that decision to the Supreme Court,

Held, dismissing the appeal (Apaloo C.J. and Taylor J.S.C. dissenting):
(1) the customary rule that a head of family, who symbolised the hopes and aspirations of the family which constituted the core of Ghanaian society, was not accountable in court to the writ of a member of the family, whether a principal or otherwise, while he still held the status

of a head was reasonable and justifiable because the head should have the capacity to handle the routine orders and disorders of the family. The head of family was however accountable to the family at a family meeting for his stewardship. Consequently a member of family who considered that an incumbent head of family was incompetent, irresponsible or frivolous in the handling of family matters or was dissipating family funds could ventilate his grievance against the head at a family meeting. He should first make the principal members of the family aware of his grievance for them to decide whether the allegations were sufficiently weighty enough to warrant the summoning of a family meeting. If their decision was in the affirmative a family meeting would be summoned and the allegations debated upon and a conclusion arrived at. If the head was found guilty of serious charges such as disobedience to the advice of his elders, dissipation or misappropriation of family funds then he might be removed. But if the charges were found to be less serious he might be allowed to continue in office provided he rendered apology to the family, if demanded by the elders. The removal from office was a more efficacious deterrent than merely issuing a writ, especially as had happened in the instant case when an action might drag on for several years **[p.641]** before it would be finally disposed of. The action by the appellants was therefore incompetent.
Per Francois. There is nothing fundamentally wrong in restricting the venue of inquiry into the head's maladministration to the cloistered sanctuary of the domestic hearth. In such a family enclave, a general consensus is promoted and the steps necessary to be taken to resolve any questions, are agreed upon by the family as a whole. Factionalism which disgruntled and fractious members might indulge in or fan, can be suppressed by the collective weight of the family before irreversible damage by publicity is done. By this course the dignity of the office of head and the unity of the family is preserved.

Contra per Apaloo C.J. It makes sense that members of a family who suspect their head of family to have misspent family funds should seek an explanation from him first in a family forum. And in a normal case, this is what would happen. But if the family proves fractious or as appears to have happened in this case, if attempts to get an explanation failed, what sound reason of public policy prevents the family from seeking the aid of the court to compel him to give an account of his disbursement of family resources?
(2) The customary rule that a head of family could not be assailed by a writ of summons emanating from a member of the family for an account of his stewardship was a custom of judicial decision and not a popular action. But since the precedent had the blessing of the superior courts of the land, it was binding upon all courts except perhaps the Supreme Court. In any event it had so crystallised and solidified into a rule of customary law that only legislation could change it. It was however not the function of the judiciary to legislate. The matter should therefore be left to the proper organ.

Per Francois. If the principle of non-accountability of the head before the courts has been accepted by hallowed practice and it now no longer meets the changing circumstances of a developing nation, then the answer is a change by legislation or decree and not pre-emption by judge-made reform. Law reform by judges in areas where the law is well settled and known and families have regulated their affairs by it, should rarely be undertaken.

Contra per Apaloo C.J. This court ought clearly to decline to follow the Pappoe v. Kweku and Abude v. Onano line of cases. The customary rule laid down by them is productive of injustice and provides a patent shield for the breach of fiduciary duties. After all, the law must adapt itself to changing social conditions and those precedents are inapplicable to modern conditions. There is some question whether doing this will amount to judicial legislation. Refusing to follow an obviously unjust precedent cannot rightly be construed as judicial legislation. We have constitutional authority to refuse to be bound by a precedent which injures the innocent, benefits the guilty and puts a premium on blatant breach of fiduciary

duty. To do otherwise, would be an exhibition of judicial inertia wholly indefensible in our day and age. Whatever may have been the true customary law in Sarbah's day, a head of family should be suable for accounts by principal members of his family or by ordinary members in circumstances in which they may sue within the guidelines laid down by the Court of Appeal in Kwan v. Nyieni.

(3) The head of family was not a trustee because:
(a) the responsibilities that attached to the head of family were complex: to succeed his first and primary duty was to maintain the unity and integrity of the family by acting as arbiter of disputes amongst the members, providing for needy members, performing their funerals and acting as the custodian or caretaker of family funds and properties. He **[p.642]** was therefore described as a caretaker in the context of customary land law because he did not only have an interest in the property he administered but also a very wide discretion in its administration. Such wide discretion was denied the ordinary trustee and would constitute a breach, if he so exercised it. In the performance of all those duties the head was accorded that due reverence befitting his status and he was in his little world a fount of honour. The institution of a head of family was unknown to Anglo-Saxon or Anglo-American jurisprudence. It was for the lack of adequate or compendious nomenclature in English that he was sometimes referred to in judgments and textbooks as a trustee.
(b) A proper trustee should by reason of his duties keep proper books of accounts of funds or property which were entrusted to him. His expenditure should be verified by proper receipts. However a head of family, unlike a trustee, owed no such duty. Consequently no member of family expected him to keep account books and ledgers. Nevertheless he owed the family a duty to give generally an account of his stewardship from time to time and if he should refuse to do so, he would be liable to be removed immediately and without notice.

Per Francois J.A. A lot of learning has gone into equating the trust concept with the patriarchal obligations of the head of family. But the unique nature and amplitude of the head's powers and responsibilities make the trust doctrine of Anglo-American jurisprudence totally inapposite to the Ghanaian situation ... when Sarbah said that the head of family holds the possessions in trust for himself and members of his family, he is stating the factual position of a joint proprietary interest of head and family member. The use of the term "trust" in that context is certainly not in the wide connotation of western jurisprudence. Anyone combining in his person the two offices of executor and trustee under a will may well be a beneficiary as well as administrator of the deceased's estate. But it will be of a specific property and specific shares. The distinction is of importance.
Contra per Apaloo C.J.: We do not think that it can be open to doubt that a head of a family who is in possession of family property fits the description of a fiduciary ... Cases and treatises on West African customary law abound with pronouncements which designate various customary functionaries, in particular the chief, the head of family and the caretaker as "trustees" or "fiduciaries" .... Sarbah's Fanti Customary Laws contains numerous references to the chief and head of family as trustee ... we think it is too late in the day to dispute that a head of family is, vis-a-vis the family, a fiduciary or trustee. That he is, seems to be the beaten track of the decided cases.
(4) The customary law principles governing the election and destoolment of a chief, his power over stool property including funds were not dissimilar to those appertaining to the appointment and removal of family heads and their powers over family property. Consequently the trial judge erred when he ruled that the principle laid down in Abude v. Onano (1946) 12 W.A.C.A. 102 was questionable.
(5) Although the appeal emanated from an interlocutory application the record revealed that not only had the respondents given notice in their defence that they were going to contend that they were not accountable to the appellants but they had subsequently raised that

preliminary objection; an objection that went to the root of the appellants' action. Since if that objection had succeeded **[p.643]** the substratum of the action would have disappeared completely and the action would then have failed, the Court of Appeal was right in dismissing the whole action when it reversed the trial judge and held that the respondents were not accountable in court to the appellants.

CASES REFERRED TO

(1) Hansen v. Ankrah [1980] G.L.R. 668.
(2) Ankrah v. Hansen [1981] G.L.R. 847, C.A.
(3) West of England and South Wales District Bank, In re; Ex parte Dale & Co. (1879) 11 Ch. D. 772.
(4) Amodu Tijani v. Secretary, Southern Nigeria [1921] A.C. 339, P.C.
(5) Ahoklui v. Ahoklui (1959) P.C.L.L.G., 212.
(6) Nelson v. Nelson (1932) 1 W.A.C.A. 215.
(7) Ruttmern v. Ruttmern (1937) 3 W.A.C.A. 178.
(8) Tamakloe v. Attipoe, West African Court of Appeal, 22 June 1953, unreported.
(9) Ansah-Addo v. Addo; Ansah-Addo v. Asante (Consolidated) [1972] 2 G.L.R. 400, C.A.
(10) Fynn v. Gardiner (1953) 14 W.A.C.A. 260.
(11) Abude v. Onano (1946) 12 W.A.C.A. 102.
(12) Pappoe v. Kweku (1924) F.C. '23-'25, 158.
(13) Vanderpuye v. Botchway (1953) 9 W.A.C.A. 127; [1956] 2 W.L.R. 16, P.C.
(14) Heyman v. Attipoe (1957) 3 W.A.L.R. 86
(15) Archibong v. Arhibong (1947) 18 N.L.R. 117.
(16) Kwan v. Nyieni [1959] G.L.R. 67, C.A.
(17) Fiaklu v. Adjiani [1972] 2 G.L.R. 209, C.A.
(18) Akuyea v. Kweku, 17 July 1888, unreported.
(19) Larkai v. Amorkor (1933) 1 W.A.C.A. 323.
(20) Amarfio v. Ayorkor (1954) 14 W.A.C.A. 554
(21) Akenten v. Dapaah (1954) D.C. (Land) '52-'55, 185.
(22) Baker v. Carr, 369 U.S. 186 (1962).
(23) Brown v. Board of Education, 347 U.S. 483 (1954).
(24) Broome v. Cassell & Co. Ltd. [1972] A.C. 1027; [1972] 2 W.L.R. 645; [1972] 1 All E.R. 801, H.L.
(25) Hammond v. United African Co. (1936) 3 W.A.C.A. 60.
(26) Daatsin v. Amissah (1958) 3 W.A.L.R. 480.
(27) Amekoo v. Amevor (1892) Sar F.C.L. 220.
(28) Annan v. Kwogyirem [1975] 1 G.L.R. 291.
(29) Gaisiwa v. Akraba (1896) Sar F.L.R. 94.
(30) Aworchie v. Eshon (1872) Sar F.C.L. 170.
(31) Bayaidee v. Mensah (1878) Sar F.C.L. 171.
(32) Assraidu v. Dadzie (1890) Sar F.C.L. 174.
(33) Bokitsi Concession Inquiry (1903) Sar F.L.R. 159; Ren 239.

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(34) Welbeck v. Brown (1884) Sar F.C.L. 185.
(35) Karaba v. Quansimah (1871) Sar F.C.L. 53.
(36) Owoo v. Owoo (1945) 11 W.A.C.A. 81.
(37) Sappor v. Amartey (1913) D. & F. '11-'16, 53; Ren. 787.
(38) Manko v. Bonso (1936) 3 W.A.C.A. 62.
(39) Agyapa v. Fosu (1952) D.C. (Land) '52-'55, 85.
(40) Agbloe v. Sappor (1947) 12 W.A.C.A. 187.
(41) Katai v. Katai (1956) 1 W.A.L.R. 151.
(42) Esson v. Moubarak (1938) D.C. (Land) '38-'47, 30.
(43) Ankrah v. Methodist Church (1949) D.C. (Land) '48-'51, 170.

(44) Etuah v. Richardson (1948) D.C. (Land) '48-'51, 378.
(45) Fynn v. Koom, High Court, Cape Coast, 20 February 1960, unreported.
(46) Osonoware v. Ayiku II, High Court, Accra, 27 July 1962, unreported.
(47) Isaac Ammetifi, Re. (1889) Red. 157.
(48) Villars v. Baffoe (1909) Ren. 549.
(49) Cole v. Cole, Supreme Court, Accra, 11 September 1939, unreported.
(50) Millers Ltd. v. Van Hien (1912) D. & F. '11 -'16, 15.
(51) Attipoe v. Shoucaire (1948) D.C. (Land) '48-'51, 17.
(52) Khoury v. Tamakloe (1950) D.C. (Land) '48-'51, 201.
(53) Wellington v. Papafio (1952) 14 W.A.C.A., 49.
(54) Laryea v. Union Trading Co. (1931) D. Ct. '29-'31, 122.
(55) Quassua v. Ward (1845) Sar F.C.L. 125.
(56) DeGraft v. Mansah (1871) Sar F.C.L. 125.
(57) Sackie v. Agawa (1873) Sar F.C.L. 126.
(58) Johnson v. Clark [1908] 1 Ch. 303; 77 L.J. Ch. 127; 98 L.T. 129.
(59) Harlley v. Ejura Farms (Ghana) Ltd. [1977] 2 G.L.R. 179, C.A. (full bench).
(60) Osborne v. Rowlett (1880) 13 Ch. D. 774, 49 L.J. Ch. 310; 42 L.T. 650.
(61) Asiedu v. The Republic [1967] G.L.R. 589.
(62) Owusu v. The State [1967] G.L.R. 435.
(63) Hammond v. Odoi [1982-83] G.L.R. 1215, S.C.
(64) Tamakloe v. Attipoe (1951) D.C. (Land) '48-'51, 378.
(65) Angu v. Attah (1916) P.C. '74-'28, 43.
(66) Abaka v. Ambradu [1963] 1 G.L.R. 456, S.C.
(67) Botchway v. Solomon, Divisional Court, 7 December 1935,unreported.
(68) Amoabimaa v. Okyir [1965] G.L.R. 59, S.C.
(69) Eleko v. Officer Administering the Government of Nigeria [1931] A.C. 662, P.C.

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NATURE OF PROCEEDINGS

APPEAL against the decision of the Court of Appeal reversing the decision of the High Court which overruled the preliminary objection of the respondent overall head of the Mantse Ankrah family of Accra that he was not liable to an action brought by the two appellant branch heads of the family. The facts are sufficiently set out in the judgments of Apaloo C.J., Sowah and Taylor JJ.S.C. and Francois J.A.

COUNSEL

Tsatsu Tsikata for the appellants.

S. A. X. Tsegah for the respondents.

JUDGMENT OF APALOO C.J.

The parties to this appeal are all members of the Mantse Ankrah family of Accra. That family seems to be possessed of substantial landed property. Sometime ago, the government acquired a portion of that land compulsorily and compensation fell to be paid therefor. The immediate cause of this litigation is that the sum of ¢160,547.40 was paid to the first respondent as part of the compensation money and this sum was received by the latter in his capacity as head of the family.

By a standing family arrangement, this money should have been paid into a designated bank account to the credit of the family. Apparently, to keep a check on the disbursement of this money, the family mandated four persons to draw cheques on that account. They are the parties to the suit which culminated in this second appeal. It is now clear from the evidence that the first respondent did not pay that sum into the family account but paid it into his own personal account. It is obvious that the check which the family devised for the disbursement of that sum would be negated by this course and it seems the main object of this action was to prevent it. The appellants before us also complained that the head of family in abuse of

his fiduciary duty towards the family, made some unauthorised expenditures out of this account. So they sought to hold him to the fiduciary duty of accounting for these moneys.
The appellants also felt that the sum of ¢160,000 odd was in danger of being misspent by the first respondent. Accordingly, they applied to the judge, Amua-Sekyi J., before the hearing of the substantive suit to make an order preserving it from misuse. They invited the judge to order that that sum be paid into the designated family account. After an in-depth examination of the customary law on the subject, the learned judge thought this was a deserving plea and he made the order sought.
The respondents appealed against the order to the Court of Appeal. Their main complaint to that court was that the appellants were not, as a matter of customary law, entitled to the remedy of accounts. There **[p.646]** were, on the pleadings, disputed issues of fact but as there was no hearing of the substantive suit on the merits, the learned judge did not resolve the factual conflict. Like the trial court, the appellate court also examined the customary law in some depth. In the end, they reached the conclusion that the respondent's objection to the legal propriety of the relief sought, namely accounts, was valid and that the action failed in limine. It would be necessary to examine the reasons given for the contradictory opinions expressed by the High Court and the Court of Appeal on the legal competence of the claim for accounts.
But before examining the customary law position, it is necessary to look at the internal structure of the Mantse Ankrah family. It is common ground that the family has three branches, each with its own head and were described in the proceedings as the Ankrah, Ayi and Okanta branches. Sitting on top of all these three, is the overall head of the composite family. He is the first respondent. The second respondent is the head of the Okanta branch. The course which this suit took and the way in which the parties ranged for battle, suggests that there is a serious dissension in the family. The appellants before us, are the heads of the Ankrah and the Ayi branches. The mandate given to the bank was that the first respondent and any one of the three heads of the branch families could validly operate the family account. So that account can be legitimately operated and moneys required for family purposes withdrawn under the signatures of the two respondents alone. But the reason proffered by the first respondent for not paying the money in question into the family account was that as the appellants were unco-operative to him in the discharge of his family responsibilities, especially the payment of family debts, a later family meeting decided that he should open an account for the family's business and operate it all by himself—not even jointly with the second respondent who was apparently "co-operative" towards him. It is understandable therefore that this reason for opening the sole account which removes the small check that the family decision devised to safeguard ground funds seemed odd to the trial judge.

In the circumstances, it is hardly surprising that Amua-Sekyi J. should have formed the view in Hansen v. Ankrah [1980] G.L.R. 668 at 677 "that the plaintiffs have shown clearly and convincingly that the aid of the court is necessary to protect the interests of the family pending the final determination of this suit." It is this view of the matter that led him to direct at 678 that "the order for the payment of the proceeds of the Lands Department cheque into the family bank account is to be complied with forthwith." The learned judge did not make an order for accounts although his appreciation of the customary law **[p.647]** entitled him to conclude that that remedy was competently sought. The Court of Appeal disagreed (see [1981] G.L.R. 847, C.A.). They did not concern themselves with the desirability or otherwise of preserving the family funds pendente lite. That court reasoned that as the main remedy account sought against the respondents was not a competent remedy according to customary law, the interim preservation order, was like the main relief itself, incompetent. The appellants invite us to say that the Court of Appeal was wrong and that the ruling and consequential order of the High Court were right and should be restored.

In view of the position taken by the Court of Appeal and its expressed view on the law, it is perhaps necessary to pose and attempt answers to a number of questions: first, is the head of family a fiduciary of the family in relation to family property in his possession? Secondly, is the remedy of accounts available against fiduciaries generally? Thirdly, is the notion of accountability repugnant to customary law? Fourthly, what is the policy justification for granting the head of family immunity from the duty to account? It is now necessary to attempt answers to these questions.

We do not think that it can be open to doubt that a head of family who is in possession of family property fits the description of a fiduciary. The American Restatement of the Law of Trusts provide a helpful definition of a fiduciary-beneficiary relationship. It says: "A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation." In In re West of England and South Wales District Bank; Ex parte Dale & Co. (1879) 11 Ch. D. 772 at 778, Fry J. attempted a definition from a procedural standpoint. He said:
"What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust."
Cases and treatises on West African customary law abound with pronouncements which designate various customary functionaries, in particular the chief, the head of family and the caretaker as "trustees" or "fiduciaries." In the well-known case of Amodu Tijani v. Secretary, Southern Nigeria [1921] 2 A.C. 399 at 404, P.C., the Privy Council said:
". . .in every case the Chief or Headman of the community or village, or head of family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family."

Sarbah's Fanti Customary Law contains numerous references to the chief and head of family as trustees. He says at 89 that "... in this country, the head of a family holds family possessions in trust for himself and members of the family." Writing earlier at 65-66 the learned author writes:
"At the most the king or headchief is but a trustee, who is as much controlled in his enjoyment of the public lands by his subordinate chiefs and councillors as the head of a family by the senior members thereof."
The well-known customary successor is, in certain cases, regarded as the head of the immediate family and as such, is entitled to litigate the family's title to the property even against the head of the wider family to whom this right ordinarily belongs. Even he is regarded as a fiduciary. In Ahoklui v. Ahoklui (1959) P.C.L.L.G. 212 at 213, Ollennu J. (as he then was) said: "A successor according to native custom, is in the position of a trustee and holds the estate to which he had succeeded in a fiduciary capacity."

We think it is too late in the day to dispute that a head of family is, vis-à-vis the family, a fiduciary or trustee. That he is, seems to be the beaten track of the decided cases. Yet in her short supporting judgment in the Court of Appeal Jiagge J.A. seems to dispute this with some apparent depth of feeling. She said at 865 that: "... the pressure on the courts to equate the position of the head of family with that of a trustee should be firmly resisted."
But the learned judge did not say what the head of family who jointly with the rest of the family has the legal and beneficial title to family property but who alone has the right of management and control and the sole right to assert or defend the family's title by action, is? Unless the head of family is not under a duty to act for the benefit of the family, then the learned appellate judge must be wrong in asserting, contrary to the weight of decided authority and textbook writers, that the position of a family head cannot be likened to that of

a trustee. To the extent that that faulty appreciation of the head's position vis-à-vis the family informed her eventual holding that such head is not accountable, then she was, with respect, in error.
The next question is, are fiduciaries generally accountable? This question admits of no doubt in equity jurisprudence and to a large extent in customary law. Dr. Asante puts it in his book, Property Law and Social Goals in Ghana 1844-1966, at 110 as follows:

"A trustee in Anglo-American law is under a duty to keep accurate and clear accounts in respect of the administration of trust property, showing receipts and expenditure, accretions and **[p.649]** losses. The duty to account may be described as the handmaiden of the duty of loyalty; it translates the lofty incantations of the duty of loyalty into the harsh realities of financial liability. The duty to account is so fundamental that in some jurisdictions an express exemption therefrom is adjudged contrary to public policy."
What is the position in customary law? It is perhaps accurate to say generally that the duty of account exists in a principal-fiduciary relationship at customary law. In Nelson v. Nelson (1932) 1 W.A.C.A. 215 some of the children of the deceased brought an action for accounts against a brother of theirs who had been appointed by the deceased on his deathbed to look after the interests of the estate. He was held accountable to them. Michelin J. who spoke for the court said at 217-218:

"In my opinion, this is not the case of an action by a junior member of a family against the head of a family but is brought by brothers and sisters of the defendant against him in his fiduciary position as a caretaker on their behalf, not only at the request of the deceased but also at the request of the head of the family, to look after their interests in the property of the deceased.
He was therefore clearly liable to account to the plaintiffs."
In Ruttmern v. Ruttmern (1937) 3 W.A.C.A. 178, a member of the family who acted as agent for the family in conducting its affairs, was held accountable to his brothers and sisters. In Tamakloe v. Attipoe, West African Court of Appeal, 22 June 1953, unreported, the West African Court of Appeal held that two joint heads of a patrilineal family not having any beneficial interest in the deceased's estate, were accountable to the deceased's children. In Ansah-Addo v. Addo; Ansah-Addo v. Asante (Consolidated) [1972] 2 G.L.R. 400, C.A., the defendant and co-defendant acted for a syndicate of farmers who pooled their resources together and purchased a piece of land. They received rents and other moneys in that capacity. It was held that they were fiduciaries and were accountable to the syndicate. The Court of Appeal said, inter alia, at 411:
"The liability to account is indeed one of the main vehicles by which a court of equity enforces the trustee's fiduciary duty. That principle of the received common law is wholly in consonance with our indigenous conceptions of justice."

In Fynn v. Gardiner (1953) 14 W.A.C.A. 260, the plaintiff representing a branch of the family claimed in the native court as against the defendant, a head of family, for a declaration that they were **[p.650]** joint-owners with the defendant and for an account of the rents which the defendant had been collecting and appropriating to her own use pursuant to her claim of exclusive ownership of the house. The native court not only granted the declaration, but acceded to the claim for accounts. The defendant appealed to the Land Court where the decision of the native court was reversed. On further appeal to the Court of Appeal, the judgment of the native court was restored save the order for accounts. It is to be noted that the order of the native court for accounts was disallowed by the appellate court not because it was opposed to any principle of justice but because it was not available to a defined class of family members against their head and the plaintiff was assumed to be a member of that class.

I think on a proper analysis of the case law on the subject, it is accurate to say that the duty to account cast on a fiduciary towards his principal far from being repugnant to customary law, is in fact accord with customary notions of justice.

But it cannot be denied that there are a number of decisions even at appellate levels which hold, professedly on the authority of Sarbah in his book Fanti Customary Law, that the head of family as long as he remains in office, cannot be sued for accounts. The learned trial judge went through the cases thoroughly and expressed the view at 675 that "Sarbah's cautious statement of the custom of his day [has] acquired, by constant repetition in the courts, the posture of an inflexible rule of law." The case which is often cited as giving its final stamp to the proposition of the customary rule that an incumbent head of family is immune from suits for accounts is the appellate decision in Abude v. Onano (1946) 12 W.A.C.A. 102. The trial judge, with admirable boldness, thought that decision "questionable." The judge's examination of the decided cases against Sarbah's conception of the customary law and his final view seems to me eminently reasonable and had I not been pressed with some of these older cases in argument, I should have been content to adopt the trial judge's analysis and evaluation of these decisions. But out of deference to the detailed argument presented to us and out of respect for the Court of Appeal which, perhaps less critically, adopted that statement of the customary law, I should myself look at the statement of the customary rule and how it accords with both the equitable and customary law requirement that a fiduciary is under an obligation to account to the beneficiaries and that this duty is enforceable by action. The immunity rule, so to speak, has its origin in Sarbah's statement in his Fanti Customary Laws at 90 that:

"If the family, therefore, find the head of family misappropriating the family possessions and squandering them, the only **[p.651]** remedy is to remove him and appoint another instead; and although no junior member can claim an account from the head of family, or call for an appropriation to himself of any special portion of the family estate, or income therefrom arising, yet the Customary Law says they who are born and they who are still in the womb require means of support, wherefore the family lands and possessions must not be wasted or squandered."

(The emphasis is mine.)

This statement carries the clearest implication that a family consists of both senior and junior members. That such a classification exists in our family set-up is a truism beyond dispute. Sometimes the more senior members of the family are designated principal members. They, in fact, act jointly with the head in alienating family property. But it is the class designated junior members who in Sarbah's conception of the Fanti customary law that are denied the right of suing the head for accounts. That is how the law was conceived and applied both at the trial and appellate level in Pappoe v. Kweku (1924) F.C. '23-'25, 158.

It is only fair to point out that Sarbah, that learned jurist, did not pretend that his exposition of the customary law was of universal application throughout the country. Clearly, custom varies in various parts of the country. But Pappoe v. Kweku (supra)—a Ga case was based on Sarbah's exposition of the Fanti customary law. Sarbah's conception of the customary law was not accepted as necessarily reflective of the true position throughout the country. For instance, in Solomon and Vanderpuye v. Botchway (1943) 9 W.A.C.A. 127 at 131, Kingdon C.J. quoted Bannerman J. as having observed in the trial High Court on 21 December 1942 that:

"I should like to mention that it was Sarbah, in his books, who propounded the principle that a member of the family cannot claim an account from the head of the family. This is an Akan custom and not a Ga custom. With the utmost respect to the learned author I hold that this principle is contrary to equity and natural justice and it is not unknown that some unscrupulous and callous heads of families have mercilessly exploited this so-called custom to the detriment of individual members of the family. This is common knowledge."

This case came on appeal and the West African Court of Appeal was thus afforded an excellent opportunity of deciding whether Sarbah's views on the custom is of universal application and whether it has a tendency of shielding callous family heads who exploit it to their advantage and to the detriment of the family. The court would also not **[p.652]** be drawn on the question, whether a custom which grants immunity to a fiduciary from accountability offends natural justice. The appellate court burked a decision on this issue and merely concluded that that dictum was obiter.

So the immunity of a family head from suit was questioned by an important legal personage, at least in so far as it purports to apply to a Ga as distinct from a Fanti area. But Bannerman J. (as he then was) was not alone in questioning the soundness of the immunity doctrine. In his book John Mensah Sarbah, Azu Crabbe J.A. (as he then was), went further than Bannerman J. He not only concurred in the strong criticism of that principle by Bannerman J., but went further to contend that Abude v. Onano (supra) "was decided per incuriam."

It seems therefore that when Amua-Sekyi J. doubted the correctness of the Abude judgment (supra) at 675 and stigmatised it as "questionable" he was in respectable company. Yet the Abude judgment was the authority which Ollennu J. (as he then was) claimed and on which he founded his decision in Heyman v. Attipoe (1957) 3 W.A.L.R. 86 at 88 when he stated that "by native custom a member of a family cannot sue the head of the family for accounts."

This case originated in Keta, i.e. an Ewe area. And the custom which allegedly precluded the suit was what Sarbah propounded as applicable to the Fanti area and which by judicial pronouncements was extended to the Ga jurisdictional area. Its correct applicability in Ewe territory was disclaimed by Dr. Kludze in his book, Ewe Law of Property. At 91 of his book, the learned author says:

"The general rule of Ewe law is that the head of family is accountable for family property under his management and administration. He accounts to the family of which he is the head, and this means the principal elders of the family as representing the entire membership."

As regards the enforcement of this duty by suit, he says at the same page:

"... if the head of family declined to account for family property under his control, or if his accounting was unsatisfactory, members of the family could enforce the obligation to account by instituting proceedings in the tribunal ..."

This exposition of the customary law cuts across Sarbah's up to a point. But it cannot be said to be the unsupported theory of an academic. It has the blessing of a court of no less standing and authority than that which appeared to have set the customary rule to rest in Abude v. Onano. That is the West African Court of Appeal in **[p.653]** the case of Tamakloe v. Attipoe (supra). The facts are these: T. died intestate leaving substantial immovable property at Pagan Road, Accra. He was survived by nine children. On his death, the wider family appointed two persons, one from the paternal and the other from the maternal branch of the family as joint heads to administer his estate. The children thereafter appointed their eldest brother as their father's successor and the property was transferred to him. Three of the children then sued the joint heads and their brother, the successor, for account. Jackson J. held them all accountable and so ordered. The heads of family appealed against the order for account and it was urged on their behalf that in accordance with native custom, the children being junior members of the family had no right to call on the heads for account. The appeal was dismissed and Coussey J.A. who spoke for the court, disposed of that argument as follows:

"I can see no difference in principle in their liability to account both by English law and by the customary law, once it is appreciated that the first and second defendants [meaning the joint heads] have no beneficial interest in the estate of the deceased, and that their true function as the heads of the larger family is advisory and protective..."

This case established two principles, first, that a head of family is a fiduciary, and secondly, that he is not immune from a suit to account. The only apparent difference between that

case and the Abude and Fynn v. Gardiner type of cases, is that in the Tamakloe case the heads of family have no beneficial interest in the property whereas in the latter cases, they have such interest jointly with other members of the family. But in equity, the fact that a trustee is also a beneficiary of the trust estate, does not confer on him immunity from accountability. Once he is in possession or control of property of which he is not the sole beneficial owner, he has a duty to account to other beneficial owners for whose benefit he is expected to act. It would seem therefore that the Tamakloe case was more soundly based than Fynn v. Gardiner and the Abude type of cases.

Apart from Amua-Sekyi J. whose decision on the question of accountability was reversed by the Court of Appeal, all text-writers who had the chance of looking at this aspect of our customary law, had nothing but unflattering comments to make on the rule which grants immunity to a head of family from a duty of accountability. For instance, Bentsi-Enchill in his book, Ghana Land Law (1964) thought it significant that In the Fynn v. Gardiner case the native court which is the repository of customary law should have granted an order for **[p.654]** accounts against the head of family only to be reversed by the appeal court. As he put it at 98:

"It is indeed significant that the trial Native Court had had no difficulty in upholding the claim for an account. By contrast the only ground advanced by West African Court of Appeal in support of its rejection of the claim for account in a clearly proven case of adverse user by a head of family was the fiat of an allegedly settled doctrine which turns out to be nothing more than a verbatim reproduction without acknowledgement of Sarbah's unelaborated statement ..."

Dr. Asante in his Property Law and Social Goals in Ghana 1844-1966, also referred to Sarbah's pronouncements on the head family's power of disposition of family property including his dictum that "no junior member can claim an account from the head of family ". And at 110 he considered that: "What looks like a passing reference to the head of family obligations in this area has now achieved the hallowed status of the first authoritative pronouncement." He considered that the abstention of the courts in pre-independent days from affirmative involvement in customary law of trusteeship may have been sound colonial policy but he thought it resulted in relieving customary fiduciaries, especially the head of family, of any institutional checks, and ultimately paved the way for the decline in fiduciary standards.

Dr. Ekow Daniels in his learned article on "Law of Trusts in West Africa" (1962) 6 J.A.L. at 164-178, considered the Ghana customary law on the accountability of a head of family and having noted Sarbah's oft-quoted dictum reproduced earlier in this judgment, was of the view that Sarbah's statement calls for fresh interpretation. He pointed out at 173 that: "the law on this point also need looking into again, for customary law has undergone considerable change."

Dr. Kludze, like the rest of the legal scholars, was not enamoured with the rule which grants the head of family immunity in a suit for accounts. At 97-98 of his Ewe Law of Property, he states:

"The rule that in Ghana the head of family cannot be held accountable until he has been deposed is, in any case, an absurd one which needs to be changed. It denies members of the family the right to go into accounts with their head and yet retain him in office notwithstanding any irregularities. It engenders instability in the family since any suspicion of mismanagement can only be investigated after first deposing the suspected head of family. Furthermore, it is a strange rule that requires a suspected or accused head to be first removed from office before he can be compelled to account; for removal from office can only be a sanction for mismanagement or misconduct."

[p.655]

It seems manifest that in considering the West African Court of Appeal decision in the Abude case (supra) "questionable" and in feeling that the cause of justice is not served by slavishly following it, the learned trial judge had behind him considerable body of enlightened opinion. What then is the policy-justification for granting a head of family who ex concesis, is a fiduciary, immunity from suit for account? Sarbah, the acknowledged father of the doctrine, did not put forward any reasoned argument for the exemption. There is very much to be said for the view that his doctrine was "unelaborated", or "was a passing reference" to a head's obligations vis-à-vis his family. It was thus left to that learned and resourceful judge and author Ollennu to put forward a theoretical justification for the head's immunity. He says at 138-139 in his Principles of Customary Land Law in Ghana (1962) that the proper place to inquire into these is the family or traditional Council. Therefore if it is sought to call the holder of any such traditional office to account in his individual capacity, custom requires that complaints against him must be dealt with at the proper customary forum and when he has been proved there to have mismanaged the property or the affairs, or abused his office, he is removed from office.

It makes sense that members of a family who suspect their head of family to have misspent family funds should seek an explanation from him first in a family forum. And in a normal case, this is what would happen. But if the family proves fractious or as appears to have happened in this case, if attempts to get an explanation failed, what sound reason of public policy prevents the family from seeking the aid of the chief's court to compel him to give an account of his disbursement of family resources? The native court in the course of time became the successor of the chief's court. It is to be remembered that in the Gardiner case (supra) that court acceded to the claim for accounts.

Yet another reason proffered by that learned author is a somewhat legalistic one. He said an action in respect of family property can only be a representative one. And therefore if an individual brings this suit against a head, he can only sue him also in a representative capacity. So it will, in effect, be an action by the individual as a representative of the family against the head who is equally a representative of the family. So the author argued that it will be an action by the family against the family "which is absurd": see Ollennu, Principles of Customary Land Law in Ghana (1962) at 138-139. That point has been well answered by Dr. Asante in his book, Property law and Social Goals in Ghana, 1844-1966, and it is sufficient to quote his answer in reply thereto. He said at 117:

[p.656]

"There is in fact no general procedural bar against members of the family suing the head in respect of family property. Members have been allowed to sue the head for a declaration that a certain property in the hands of the head is family property, and for a rescission of dispositions of family property without the consent of principal members of the family."

Jiagge J.A. in the Court of Appeal gave what appears to be the true reason for the head's immunity from action for accounts. She said at 866: "Taking action against the head of family while he is still the head derogates from his authority as head . . ." Can it be a sound rule that a privileged position conferred on the head by the family be regarded as a shield for wrongdoing? One's experience of the world teaches one that that question should be answered firmly in the negative. It is now necessary to look at the reasons why the appellate court upset the trial judge whose reasoning and analysis of the law and facts seem impressive and who prima facie reached a just result. The main judgment of the court was read by Wiredu J.A.

After reciting the facts and taking note of the well-nigh unanimity of the text-writers urging a fresh look at the law granting the head of family immunity from a suit for accounts, he summed up the customary law just as Sarbah implied it was. And that is (a) principal elders of the family can call the head to account at a family meeting, (b) that before the head can be sued for accounts, he must first be removed from office. These are the only summations of any relevance to this case. He offered no criticism of the way Sarbah's "unelaborated" statement

was by process of interpretation made into an inflexible rule which absolutely shields the head of family from a suit for accounts. It is unclear whether the Court of Appeal thought if by reason of dissension in the family, a family meeting was impracticable, the immunity rule could be relaxed. The learned judge made no comment on the critical view expressed on the doctrine of non-accountability by text-writers. The court clearly did not engage in the detailed analysis of the immunity rule and the cases that laid it down as Amua-Sekyi J. did. He did not contest the trial judge's conclusion that the Abude decision (supra) was open to question and one cannot help feeling that the Court of Appeal saw nothing objectionable in principle about shielding a wrongdoing head of family from suit for accounts—a remedy available against other customary fiduciaries.

What about the two opposing results reached by the trial and appellate courts? There is evidence on which the trial court could hold as it did that, the court's assistance was necessary to preserve the family's funds from being dissipated to the prejudice of the family. The **[p.657]** appellants cannot by any stretch of imagination be described as "junior members". They are admitted heads of two of the three branch families. And the order they sought was the payment of family funds into family account. They sought nothing for themselves. They are joint signatories with the respondents to the designated family account and are as much family fiduciaries as the respondents. In seeking the preservation of the funds they were acting for the benefit of the family as was their fiduciary duty. The appellate order put an end to the action and whether the appellants were right in thinking that the respondents were breaching their fiduciary duty and squandering family funds cannot be determined. In these circumstances, it should not be difficult to hold that of the two conclusions, it is the trial court's that produced anything nearly like a just result.

In the Nigerian case of Archibong v. Archibong (1947) 18 N.L.R. 117, the facts were not dissimilar to the present one but the court reached a conclusion which while not ignoring the exalted customary position of the family head, kept him to his fiduciary duty. In that case, members of a Calabar family sued their head for accounts in respect of compensation and other income which the family ought to have received from the Nigerian Government in respect of compulsory acquisition of family land. The family head accepted £353 from his negotiating agent instead of the £600 paid by the government. The court held that the head had to justify his action in respect of the £600 in proper accounts supported by receipts in accepting the lesser amount in his capacity as Etubom of Archibong House. At 123 of the report Robinson J. said:

"What is defendant's position, as Etubom, towards Archibong House and its members? It seems to me that he must be regarded as a kind of trustee and that each member of the Achibong House has some kind of interest in the trust moneys. His obligations to the cestus que trust are not nearly as high as those of a trustee known to English law. He is given considerable latitude, but his actions must be capable of reasonable explanation at any time to the reasonable satisfaction of members of a sub-branch of his House. He cannot treat House money as his own. If it is his own, he can throw it away or misuse it. He cannot do that with House money. Although I think he can spend it without consulting any member, if he thinks reasonably it is in a good cause and for the good of the House. He should certainly keep accounts and work on some rules, either laid down by himself or preferably after consulting with the Heads of the House."

In this case, family land was compulsorily acquired by the government. That family has three branches. Compensation money was paid **[p.658]** to the family and received by the overall family head. The family itself had made provision for the payment of that money into an account it designated. It mandated the family head and the three heads of the branch families to operate that account on the family's behalf. That money was not paid into the account so designated by the family but into an account over which none of the three branch heads had any control. Two of the branch heads sought the court's assistance after trying unsuccessfully

in family circles to keep the head to his duty. The court considered that its assistance was necessary and gave it. A higher court said the trial court should not have given its assistance because an "unelaborated" customary rule, judicially hallowed in Abude v. Onano (supra), precluded it from so doing.
The question is, ought we to keep such rule in our day and age? The Court of Appeal were not bound in 1980 to follow a precedent which yields this result. Whatever that court might have thought of the binding efficacy of that principle, it is plain beyond the possibility of controversy that this court is not bound by it. The constitutional position of precedent in 1980 was laid down by clause 2 of article 116 of the Constitution, 1979, in these words: "The Supreme Court shall not be bound to follow the decisions of any other court." That position has been preserved by section 9 of the Provisional National Defence Council (Establishment) Proclamation, 1981 and the repeal of the Constitution, 1979 by the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982 (P.N.D.C.L. 42) has not altered the position. The fact that we are not bound by precedent does not mean that we should, as it were, by a stroke of the pen strike down a customary rule that has stood for the best part of 50 years. There is such a maxim as communism error facit jus—common error sometimes passes current as law. But the application of that maxim is normally predicated on the fact that a party acquired some rights, usually proprietary rights, on the basis of that error. As the matter is put in Brooms Legal Maxims (9th ed.) at 100:
"But where a decision of the Courts, originally wrong, or an erroneous conception of the law, especially of real property, has been made, for a length of time, the basis upon which rights have been regulated and arrangements as to property made, the maxim ... may be applied."
The first respondent acquired no rights in this case and cannot be heard to say that in reliance on the customary rule that he cannot be sued for accounts, he has squandered the acquisition money. Such a plea would sound ill in his mouth. He has not said so. On the contrary, **[p.659]** the averment in his affidavit is that he has regularly accounted to the family of the trust moneys. But he made the verification of that fact impossible by his eventually successful contention that the customary law shielded him from a suit for accounts.

This court ought clearly to decline to follow the Pappoe v. Kweku (supra) and Abude v. Onano (supra) line of cases. The customary rule they laid down is productive of injustice and provides a potent shield for the breach of fiduciary duties. After all, the law must adapt itself to changing social conditions and those precedents are inapplicable to modem conditions. There is some question whether doing this will amount to judicial legislation. Refusing to follow an obviously unjust precedent cannot rightly be construed as judicial legislation. We have constitutional authority to refuse to be bound by a precedent which injures the innocent, benefits the guilty and puts a premium on blatant breach of fiduciary duty. To do otherwise, would be an exhibition of judicial inertia wholly indefensible in our day and age.

Whatever may have been the true customary law in Sarbah's day, a head of a family should be suable for accounts by principal members of his family or by ordinary members in circumstances in which they may sue within the guidelines laid down by the Court of Appeal in Kwan v. Nyieni [1959] G.L.R. 67.
In the result, I think the judgment and order of the Court of Appeal should be set aside and that of the High Court restored with costs.

JUDGMENT OF SOWAH J.S.C.
The issue which is placed before this court is whether or not an incumbent customary head of family is accountable in court to the writ of a member or members of the family whether principals or otherwise, while he still holds the status or position of head? The High Court

answered the inquiry affirmatively but the Court of Appeal upset that decision holding that the answer must be in the negative.
The matters leading to the action are quite simple. The parties all belong to the Mantse Ankrah family of Dadekome Otublohum, Accra. The family consists of three branches. The first plaintiff is the head of the Ankrah section; the second plaintiff, Mark Kodjo Ankrah, is the head of the Ayi section; the second defendant is the head of the Okanta branch; and the first defendant, Joseph Adjabeng Ankrah also known as Nii Ayi Ankrah I (his stool name), is the overall head of the entire Mantse Ankrah family.

The pleadings indicate that sometime in 1977, the family received compensation from the Lands Department in the sum of ¢13,968.95 which was paid into a family account at the Ghana Commercial Bank, High Street, Accra operated by the parties on a mandate of the family. **[p.660]** The bank accepted as valid, cheques signed by any two of the four signatories.
It is alleged by the plaintiffs that sometime in the third week of August 1979 "against the express opposition of the plaintiffs" the defendants withdrew certain sums and expended them on Homowo festivities. The defendants do not deny the averment, indeed they admitted they withdrew the sum of ¢4,000 in August 1977—
"entirely in accordance with the resolution of the whole Mantse Ankrah family for such withdrawal and that the said amount was expended on various rituals, customary observances and ceremonies which every head of the Mantse Ankrah family is in duty bound to perform and observe at every Homowo festival."
The next important averment pertinent to this inquiry was that on 13 September 1977, the Ministry of Finance paid the sum of ¢160,547.40 to the first defendant on behalf of the Mantse Ankrah family which he failed to pay into the family account at the Ghana Commercial Bank, High Street, Accra, despite strong and persistent pressure from the plaintiffs and other elders of the said family. The first defendant admits its receipt but alleges that owing to the behaviour of the plaintiffs, their obstructive and unco-operative attitude, the family resolved that the said sum be paid into a separate account to meet urgent family liabilities and he accordingly did so.
We must observe that the pleadings in this action have been reproduced almost verbatim in both judgments of the High Court (see Hansen v. Ankrah [1980] G.L.R. 668) and the Court of Appeal (see Ankrah v. Hansen [1981] G.L.R. 847, C.A.) therefore we consider it otiose and burdensome to recite them in detail. But amongst the defences raised, was whether the defendants were accountable at customary law to the plaintiffs in court. In our view, there is no question that a head of family is accountable to the family at a family meeting for his stewardship. We think it convenient at this stage to set down reasons why the customary rules abhors the procedure initiated by the plaintiffs. Who is a head of family in Ghanaian society? The status of "head" can be traced to the origin of our society. Every family has a head whether formally elected or informally appointed. On the death or removal of an incumbent, the principal members of the family meet and appoint a successor in place of the departed or the removed.
The duties and responsibilities attached to the office are of a complex character. If he is to succeed as head, his first and perhaps primary duty is to maintain the unity and integrity of the family.

In furtherance of this duty, he becomes an arbiter of disputes amongst members of the family. In this onerous duty he avails himself **[p.661]** of the aid of the principal members. In the rural environment if a member of a family behaves anti-socially it is to his head that the victim of such anti-social behaviour complains and expects redress. The rural population by and large are governed by the ethics and morality of the community in which they live.

It is a proverbial saying that Ghanaian marriages are marriages not of individuals but of the families of the bride and the groom. This is because the couple owe it a duty to their respective families to maintain the integrity of their marriage obligations whether performed under customary law or under statute. It is the responsibility of a head of family to assist in the observance of their obligations by settling matrimonial disputes and discords. If and when the marriage finally breaks down, it is the head that the customary law spouses turn to for the dissolution of their marriage. The family in the Ghanaian context is a microcosm of social services and its head is the administrator. There is no universal social security service covering every citizen in this country. The percentage covered is a minute proportion of the population and the beneficiaries are mostly urban dwellers. In this country there are no old age pensions, no old people's homes: it is to the family that its indigent members look up to for these provisions and maintenance.

Every citizen is aware of the Ghanaian's inordinate love for funeral and funeral observances. Huge sums of money are spent on funerals which could usefully be employed otherwise. The family is in honour bound to bury its dead even though the deceased might have been delinquent in the observance of such practices in his lifetime. It is the head of family who must perform these funerals, sometimes at his personal expense; finally the head is the custodian or "caretaker" of family funds and properties. The description "caretaker" is used in the context of customary land law. A caretaker is a person who not only has an interest in the property he administers but also a very wide discretion in its administration. Such wide discretion is denied the ordinary trustee and would constitute a breach, if he so exercises it.
In the performance of all these duties, the head is accorded that due reverence befitting his status. He is, in his little world, a fount of honour. This peculiar institution is unknown to Anglo-Saxon or Anglo-American jurisprudence. It is for the lack of adequate or compendious nomenclature in English that the head is sometimes referred to in judgments of these courts and in textbooks as a trustee. A proper trustee must by reason of his duties keep proper books of accounts of funds or property which are entrusted to him. His expenditures must be verified by proper receipts. A head of family unlike a trustee, owes no **[p.662]** such duty. No member of the family expects him to keep account-books and ledgers. Nevertheless he owes it a duty to give generally an account of his stewardship from time to time. If he refuses to do so, he is liable to be removed immediately and without notice.
The learned High Court judge, it is said, considered in depth the genesis of the customary rule that a head of family cannot be assailed by a writ of summons emanating from a member of the family for an account of his stewardship and came to the conclusion that all the decisions and precedents were wrong, and further that the errors were due to a misunderstanding or misappreciation of Sarbah's exposition of Fanti customary law on this aspect of customary law. He opined at 675 that "After Pappoe v. Kweku [[1924] F.C. '23-'25, 158] Sarbah's cautious statement of the custom of his day acquired, by constant repetition in the courts, the posture of an inflexible rule of law."

There, the learned judge questioned the principle laid down in Abude v. Onano (1946) 12 W.A.C.A. 102 and ruled it "questionable" for the only reason that Abude v. Onano concerned stool funds and not family funds as was the action before him. In our view, the customary law principles governing the election and destoolment of a chief and his powers over stool property including funds are not dissimilar to those appertaining to appointment and removal of family heads and their powers over family property. In so far as the judge considers the decision in the Abude case to be questionable, we think he was in error.
In any event, today we recognise that the custom is a custom of judicial decision, and not of popular action: see Benjamin Cardozo, Nature of the Judicial Process at 60. Sowah J.A. (as he then was) perhaps put the principle more bluntly in Fiaklu v. Adjiani [1972] 2 G.L.R. 209 at 212 when he stated:

"Whatever be the content of a custom, if it becomes an issue in litigation and the courts are invited to pronounce thereon, any declaration made by the courts supersedes the custom however ancient and becomes law obligatory upon those who come within it confines."
An illustration of the above principle where judicial decisions appear to be at variance with popular custom is succession amongst the Ga Mashi people of Accra. The courts have in a series of cases held that succession amongst the Ga Mashi people is maternal, the same as the Akan custom, vide Akuyea v. Kweku, 17 July 1888, unreported; Larkai v. Amorkor (1933) 1 W.A.C.A. 323; Amarfio v. Ayorkor (1954) 14 W.A.C.A. 554 and others. But every Ga knows contrary to these decisions and judgments, that inheritance amongst Gas is patrilineal **[p.663]** and that upon the death of the father his children inherit; it is only when he enters a court room that he is confronted with the judicial custom. This precedent has the blessing of the superior courts of the land and is binding upon all courts except perhaps the Supreme Court. In any event, it has so crystalised and solidified into a rule of customary law that only legislation can change it. Equally we consider that it is not the function of the judiciary to legislate. This should be left to the proper organ of State.

We may turn our attention to the cases of Pappoe v. Kweku (supra) where the following appears in the headnote at 158:
"The defendant as head of family, took out letters of administration of the estate of a deceased member. Held that he was not liable to [give an] account [of his administration] to another member of the family [who was only a beneficiary in respect of his membership]."
The next case of importance is Kwaku Abude, Adjetey Konobi, Elders of the Labadi Stool, for themselves and on behalf of the Elders of the Quarters of Abese, Abafum, Nmati Abonase and Krana v. Adjei Onano and Others (1946) 12 W.A.C.A. 102. We have set out the names and positions of the plaintiffs in full to indicate that they were by no means junior members of the Labadi stool; they were elders of the stool and brought the action as such. Their claim (which is not dissimilar to the claim in this court) is also of some interest; it is, as stated at 103, for:
"(a) An injunction restraining the defendants from making any further withdrawals from the said account except with the consent and approval of the Elders of the Stool.
(b) An account of all moneys that have come into the possession of the defendants or any of them for the Labadi Stool."
This, if we may say so, was a straightforward action for account from the defendants whom the plaintiffs regarded as trustees. The action was dismissed and the plaintiffs appealed to the West African Court of Appeal. In the course of his judgment, Korsah J. (as he then was) said at 104:
"It is an accepted principle of Native Customary Law that neither a chief nor the head of family can be sued for account either of state or family funds.

Counsel for appellants admitted before us that he could not quote one case which has been brought in the Supreme Court **[p.664]** against a chief and/or his elders and councillors to render account of Stool funds or Divisional Council fund . . . "
The membership of the court in that appeal is also of some interest: the presiding judge was Harrangin C.J. (Gold Coast) and the other members, Lucie-Smith C.J. (Sierra Leone) and Korsah J. (as he then was) (Gold Coast). The court considered the reasonableness of the customary law rule which insulates the head of family or a chief from attacks by individuals or factions of the family and held at 104-105: "This native law is in our opinion reasonable and not contrary to natural justice or good conscience." In effect a policy justification was given for the decision.
These judges must have been aware of the ordinary equitable principle of trusts in relation to trustees and fiduciaries.

Reference ought to be made to the case of Akenten v. Dapaah (1954) D.C. (Land) '52-'55, 185 which went on appeal to the Lands Division, Kumasi, from the Asantehene's "A1" Court. In the Asantehene's court the following rule of customary law on the issue as to whether or not an incumbent head of family could be sued in court while occupying that office was stated at 186:
"There is sufficient evidence proving that the defendant holds the disputed cocoa farm in trust for the whole members of the family, and it stands to reason that when the relations detect or have reasonable cause to suspect any acts of embezzlement and wanton waste by the successor (defendant) then they reserve legal and customary right to call him to give account of his stewardship and if they are dissatisfied with his conduct they can remove him from office. It is then and only then that the relations can, according to custom, claim recovery of possession of the property he holds in trust for them."

An appeal was lodged from that decision. The learned High Court judge before whom the appeal was heard gave approval stating at 187:
"I agree with the view of the Native Appeal Court that before the plaintiff could sue for the recovery of possession of the family property, the Native customary procedure should be followed, the defendant removed from office, and a new person substituted in his place."
How then does a member of family ventilate his grievance against a head whom he considers incompetent, irresponsible or frivolous in the handling of family matters or dissipates family funds? It is at a family meeting. It is usual that the elders or principal members of the family are made aware of any grievance a member may have, for it is they **[p.665]** who will decide whether the allegations are sufficiently weighty to warrant the summoning of a family meeting. If their decision is in the affirmative, a family meeting is summoned and the allegations are debated upon and a conclusion arrived at.
If the head is found guilty of serious charges such as disobedience to advice of his elders, dissipation or misappropriation of family funds, he may be removed. If the charges are found to be less serious, he may be allowed to continue in office provided he renders an apology to the family, if demanded by the elders. We think the removal from office is a more efficacious deterrent than merely issuing a writ especially as has happened in this case when an action may drag on for several years before it is finally disposed of.
We have already observed that the core of Ghanaian society is the family and that the head symbolises the hopes and aspirations of that family. We have also given reasons why we think it is irreverent and improper for a member to bring him to court while he occupies that office and have given justification for the customary law rule. The head of family must of course have the capacity to handle the routine orders and disorders of the daily life of the family.
We must emphasise that we are not against judicial activism or creativity, indeed we welcome and applaud it. We are aware of the American cases like Baker v. Carr, 369 U.S. 186 (1962) and Brown v. Board of Education, 347 U.S. 483 (1954) in which after 50 years, the American Supreme Court made a complete somersault and rendered an opinion completely at variance with its own previous decision. We think that the American Supreme Court was responding to the heartbeat of its current society as indeed it was, when it delivered its earlier judgment. Our society is still very much attached to the family system and the justification for the powers reposed in the head of family still exists. We think it just, right and reasonable to maintain the system, rather than by judicial action destroy it. Our view is that law should be based on society rather than it be foistered on it.

Our courts should also be alert and remain faithful to the heartbeat of our society if we are to do justice. As we have already observed, the debate is simply in what forum should the head of family be called upon to account? Is it the family forum or the court? And what advantage

has the court over the family forum? Are the courts in a better position to determine what is right expenditure to be allowed than the family? We have given our opinion on these issues. We think the customary law rule that a head of family should be taken to task for his default by his own family in the first instance is sound in principle and is in accordance with the established custom of our society. We will observe that the proposed piece of legislation **[p.666]** "Head of Family Accountability Law" will when enacted, endorse this customary law principle.

I have had the privilege of reading the admirable and erudite judgment of my brother Taylor J.S.C. It is not often that he reconciles himself with opinions which are not in consonance with his own. In his view Korsah C.J., van Lare, Ollennu J. (as he then was) and Azu Crabbe C.J. are all wrong in their opinions on the principles at issue. He sits on appeal on the judgments of these great and illustrious jurists. As a High Court judge he refused to follow the decisions of superior courts if, in his opinion, those decisions were wrong even though in our jurisprudence, precedential value is attached to decisions rendered. If they are by superior courts they are binding on courts of subordinate jurisdiction. The suspended Constitution, 1979 and the P.N.D.C. (Establishment) Proclamation, 1981 mandate that inferior courts shall accept the decisions of courts of superior jurisdiction. There must be some discipline in the judicial system and judges must obey the dictates the Constitution, 1979 and the Proclamation, 1981.

In Cassell & Co. Ltd. v. Broome [1972] 1 All E.R. 801, H.L. Lord Hailsham observed at 809: "...in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers." Lord Diplock also observed in the same case at 874 that:

"It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary ... But the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted."

Of course, under our suspended Constitution, 1979 and the P.N.D.C. (Establishment) Proclamation, 1981 the present Supreme Court is not bound by its own decisions and may depart from them when necessary. But there will be chaos in the system if on each and every occasion the Supreme Court departs from its own decision because there is a change in its composition.

It is true that the origin of this appeal emanated from an interlocutory application of which notice had been given by the defendants. Paragraph 8 of the defence reads: "The defendants will contend that they are not accountable to the plaintiff in respect of the several matters alleged in the statement of claim."

Subsequently the defendants by counsel raised the preliminary objection; an objection which went to the root of the plaintiff's action; if it had succeeded the substratum of the action would have disappeared completely and nothing would be left before the court to proceed with. **[p.667]** In the event it failed and an appeal was lodged. The Court of Appeal allowed the appeal and held that the defendants were not accountable in court to the plaintiffs. In my view, that was the end of the proceedings and the action. The Court of Appeal was right in dismissing the whole action.

Before I am done I consider it ethically and judicially unacceptable the comments on the composition of the panel in this appeal. If my brother Taylor J.S.C. had reservations, he should have made them abundantly clear before the hearing and not after opinions have been rendered which are contrary to his own. And in any event the judges referred to are by all standards, including their knowledge of the law and integrity, competent to adorn the Supreme Court bench. It is by sheer accident of past politics that they have not taken precedence over some members of the Supreme Court.

JUDGMENT OF TAYLOR J.S.C.

I have had the advantage of digesting beforehand the splendid and scholarly judgment of the Chief Justice. I have also had the privilege of studying all the learned and lucid judgments of my other brothers who have delivered the majority judgment in this appeal. Naturally, it is with considerable regret that I find myself unable with the utmost respect, to concur in the majority judgment of this court. On the other hand I support completely the logic of the Chief Justice's line of reasoning and I accept as legally valid, his conclusions that the judgments and orders of the Court of Appeal (see Ankrah v. Hansen [1981] G.L.R. 847, C.A.) should be set aside and the High Court ruling of Amua-Sekyi J. (see Hansen v. Ankrah [1980] G.L.R. 668), an excellent ruling if I may say so, restored.

In my respectful opinion Amua-Sekyi J. in a praiseworthy and certainly erudite effort subjected the authorities such as he was able to consider in his ruling to impeccable and critical scrutiny and I entirely agree with his brilliant analyses of these cases as well as the faultless steps in his reasoning which founded his rational conclusion, if I may say so, that the interlocutory application of the plaintiffs should not be dismissed in limine.
In the circumstances I am tempted to short-circuit the reasons for my own decision by merely registering my approval of the able judgment of the Chief Justice which has in my view so convincingly upheld his ruling. I have however resisted the temptation to so concur because his, is a minority opinion. Moreover it seems to me, with respect, that this appeal appears to involve an unnecessary pronouncement of the validity of a dubious customary law principle of alleged importance concerning a recurrent problem of the property rights of litigants in family property and in my opinion the purpose of a final **[p.668]** appellate court whose membership is invariably large, is best served when many minds once and for all conscientiously grapple with the challenging questions thus posed by such a problem. Secondly, as the minority opinion championed by the Chief Justice is contrary to the unanimous judgment of the Court of Appeal, I consider it more decorous if I also give expression to my own views to supplement the Chief Justice's learned exposition. Thirdly, it is my opinion that in this Supreme Court we are now obliged by the fundamental law governing our decisions to operate the common law doctrine of judicial precedent in a much more modern and discriminating manner and hopefully less rigidly than the other courts in our judicial hierarchy. For this reason also I have thought it expedient to articulate fully my own views why at least as a court of last resort, committed to advancing the interests of substantial justice, untramelled by the will-o'-the-wisps of pretentious technical legal restraints, the proposition of customary law propounded by the Court of Appeal and acquiesced in by the majority judgment even if it has been sanctioned by our courts in the past ought not to have been countenanced by this Supreme Court. Furthermore, although our customary laws and principles are undoubtedly heterogeneous in character the so-called immunity rule has nonetheless been formulated in a form suggestive of a consistently uniform principle applicable throughout Ghana. Lastly, there are one or two elements of the facts in the proceedings of the court below, sadly overlooked on all sides, which cast grave doubts on the correctness of the Court of Appeal judgments and which I do not feel disposed to gloss over.

In the circumstances, I regret I am obliged to give elaborate and I suspect time-consuming explanations why I am dissenting from the majority judgment in this case. I propose to concentrate on Sarbah and the cases exhaustively. I will not touch the text-writers because I accept the criticism of these text-writers who have expressed dissatisfaction with the immunity rule and by and large I concur and adopt in the Chief Justice's judgment his appraisal of these text-writers.

In his Judgment, the Chief Justice in his characteristically lucid manner has set down substantially the facts which grounded the ruling of Amua-Sekyi J. These are thus the facts which informed the judgments of the Court of Appeal and which perforce must be the only

basis for the judgment of this Supreme Court. It will therefore serve no useful purpose for me to repeat the facts. However, I believe, it is essential for a clear understanding of one of my reasons for differing from the learned conclusion of the Court of Appeal to reiterate and highlight at least one or two important and decisive aspects of the case which it would seem were inadvertently ignored by the Court of Appeal. One of the important features I speak of is the fact that the plaintiffs made an interlocutory application in the High Court for **[p.669]** interim preservation of the property, the subject matter of the action, pending the final determination of the suit.
It seems clear therefore that the merits of the substantive case were not the subject matter of the appeal and the decisions of the courts should not turn on the pleadings since these could have been amended in the course of the proceedings. In my view, unless a High Court decision on a motion to dismiss the suit under Order 25, r. 4 of the High Court (Civil Procedure) Rules 1954 (L.N. 140A), had been the subject matter of the appeal, the plaintiffs action should not be dismissed in this court.

Be it noted that it is an interlocutory application. The proceedings in the suit had not reached even the summons for directions stage. It is therefore the ruling of the High Court granting the interlocutory application which triggered the appeal by the defendants in this case and consequently the appeal was solely against the said ruling.
It seems to me, in the circumstances that the interim orders which the plaintiffs asked for, deserve to be looked at. They are the following orders:
"1 A mandatory injunction requiring the first defendant forthwith to pay into the Mantse Ankrah family's current account with the headquarters at High Street, Accra branch of the Ghana Commercial Bank the proceeds of the cheque for the sum of ¢160,547.40 . . . due to the said family.
2 A prohibiting injunction restraining the defendants until judgment or further order herein from drawing any cheque or order upon any bank or branch bank in Accra wherein moneys belonging to the said family have been deposited.

3 A further prohibiting injunction restraining the defendants until judgment or further order herein from making any disposition of lands or any interest therein belonging to the said family."
Counsel for the plaintiffs was absent in court when the application of his clients was being considered and counsel for the defendants after referring to Abude v. Onano (1946) 12 W.A.C.A. 102 at 104; Pappoe v. Kweku (1924) F.C. '23-'25, 158; Dr. Asante's Property Law and Social Goals in Ghana 1844-1966 at 89; Hammond v. United Africa Co. (1936) 3 W.A.C.A. 60 and Daatsin v. Amissah (1958) 3 W.A.L.R. 480, submitted:
"that a head of family while head of family cannot be called upon to account by any member of the family however important or by any group of members however large ... That a head of family or chief has absolute discretion in the disposal of family funds and **[p.670]** property including land; the only consideration is what the head considers to be the general welfare of the family or stool.... It is entirely for him to decide into what account he should pay moneys. He can even pay family moneys into his personal account or any other account. The application is misconceived and should be dismissed."
(The emphasis is mine).

I should have thought that if counsel for the plaintiffs was aware that an application to dismiss the action was in the offing, he would hardly have absented himself from court. Moreover no application to dismiss the action under the rules of court or the inherent jurisdiction was made to the court and dismissal of the action therefore was never an issue before the trial court or the Court of Appeal. I am unable to appreciate therefore how we can permit or tolerate dismissal of the suit to be in issue before this Supreme Court as the majority decision would

seem to have done. Furthermore, the suit was against two defendants one of whom, the first defendant, was admittedly the overall head of the family, but the second defendant had a status equal to that of the standing of the plaintiffs, and the application for the last two interim orders was directed also at the second defendant who was not the head of the family. In fact the learned High Court judge appreciated fully the issue before his court when he pointed out poignantly in his ruling at 673: "[T]he defendants resist the application on the ground that they are not accountable to the plaintiffs." (The emphasis is mine.)

It is obviously the grant or refusal of the application for these interim orders that is the issue that the parties litigated at that stage of the proceedings and it is with respect, the issue and nothing more before the Court of Appeal. In the circumstances one would have thought, with respect, that on the appeal succeeding, the interlocutory orders of the High Court, consequent upon the application, would be set aside and the substantive suit would be left to take its normal course. This however was not to be, for on the apparent success of the interlocutory appeal the substantive suit was for inexplicable reasons dismissed by the Court of Appeal in limine in favour of both the head of family and the non-head of family. I have read the judgments of the Court of Appeal and I have devoted considerable time to a study of the case, but I have not succeeded in finding any possible legal ground both in substantive law or in procedure which warrants and justifies this order of dismissal of the plaintiff's suit, in blatant disregard of the issue before the Court of Appeal. Even if the court's dubious invocation of the so-called head of family's immunity doctrine is accepted as a legal ground for dismissal, it can hardly affect the continuation of the plaintiff's suit against the non-head of the family.
[p.671]
I am firmly of opinion that this course of action pursued by the Court of Appeal has, with respect, no rational foundation and was an obvious and glaring error, for quite plainly the Court of Appeal granted a relief wider in scope than the appellants asked for and would have been entitled to at the court of first instance. I cannot help feeling, with the utmost respect, that the Court of Appeal was misled into this serious error by the following extravagant formulation of the relief claimed by the appellants in their notice of appeal: "That the judgment of the High Court be reversed and judgment entered for the defendants." In my opinion, having regard to the ruling appealed from, all that could possibly be meant by this relief asked for is that the interim orders granted in the ruling of Amua-Sekyi J. in the High Court be set aside and nothing more. The inept and infelicitous wording is clearly an unfortunate lapsus linguae, a mimicry of some textbook form of irrelevant precedent, obviously not intended to have the effect given to it probably inadvertently by the Court of Appeal in its final decision. Clearly, even if the court's ratio decidendi is accepted, the interlocutory application, and not the action should be dismissed. For this reason alone, I will without any hesitation allow the appeal since in the circumstances, the judgment of the Court of Appeal dismissing the action and not the interlocutory application is, with respect, misconceived and cannot be supported in law.

The ratio of the judgment of the Court of Appeal is, however, founded on a proposition of a customary law theory said to be well-settled and alleged to have support in the writing of the celebrated Sarbah to the apparent effect that as a general proposition, barring exceptional cases which the court indicated, a head of family cannot be called upon for account at the suit of any member of the family in the courts of this country unless he is first removed as head of the family. The ratio is in effect a recognition of a customary law procedural bar to the institution of proceedings in all cases where it is intended to call on the head of family to account. In the instant case, as I have already pointed out, although the appeal was mounted in order to test as an issue the legal validity of the interlocutory orders granted by the court, the Court of Appeal abandoned that issue and resorted to the said immunity doctrine to non-suit the plaintiffs. The doctrine therefore and its ambit deserve to be canvassed.

This alleged customary doctrine with its conceptual implications was elaborately formulated and explicitly categorised in the leading judgment of the court by Edward Wiredu J.A. 863-864 as follows:
"... (a) he cannot generally be sued for an account; (b) the immunity is not an absolute one; (c) that principal elders of the family who appointed the head can call on him at a family meeting **[p.672]** for an account; (d) that junior members of the family cannot call on the head for an account; (e) that in order to sue the head for an account he must be first removed or that facts must be shown that it is either unjust and unreasonable or that it is impracticable and impossible or that the head has, by his acts, been frustrating all attempts to convene family meeting to go into accounts. And in any such situation, which, of course, must be pleaded in the statement of claim, the court may intervene. It should be stressed that the immunity is limited to funds or property which was succeeded to by the head as such and moneys accruing from such property and not in relation to funds or property (which though are family funds) yet which should go to some other member of family as successor but which has come into the hand's of the head as a temporary custodian . . ."

From a close study of the leading judgment, it is obvious that the supposed principle with its elaborate subsidiary judicial accretions stated by Edward Wiredu J.A. therein was distilled from a consideration of statements of Sarbah and Ollennu and the cases of Amekoo v. Amevor (1892) Sar F.C.L. 220; Pappoe v. Kweku (supra); Abude v. Onano (supra); Heyman v. Attipoe (1957) 3 W.A.L.R. 86; and Annan v. Kwogyirem [1975] 1 G.L.R. 291. I propose to consider the ratios of these cases and other relevant cases which have a bearing on the said principle. As the alleged principle is however attributed to Sarbah with the ratio decidendi of the case founded on his formulation and as this is the first time the validity of the so-called principle has been questioned in this Supreme Court, it seems to me that the time has now come for us to examine critically in its proper context what Sarbah actually said. The exercise will enable us to decide whether or not the principle advocated does really exist and has "crystallised and solidified" into a well-settled principle of such a nature as can presumably only be discarded by the legislature.
In this respect I note that Ollennu's statement of the principle was admittedly founded on Sarbah and previous judicial decisions which merely drew inspiration from Sarbah. As Sarbah is by common consent the source of the alleged principle, it is the statement attributed to Sarbah and the context within which the statement was made which deserve to be studiously examined and to Sarbah therefore I now turn.

Sarbah's book, Fanti Customary Laws, is divided into two parts. Part I is concerned with the principles of Fanti customary laws and Part II with Fanti law reports of decided cases. We are not concerned with Part II.
[p.673]
Part I is a 116 page monograph in nine chapters, the first of which contains his fifteen page "introduction to the customary laws." Chapter II is headed: "Persons" and covers "the family, marriage, divorce, husband and wife, parent and child." It spans pages 15 to 56. Chapter III at pages 57 to 64 is a short treatise dealing with "Property." Chapter IV at page 65 to 74 is entitled "Tenures." Chapter V at pages 74 to 77 covers rather very briefly "Suretyship." Chapter VI at pages 78 to 100 is the longest chapter and deals extensively with "Alienation." Chapter VII at pages 100 to 113 embraces "Succession and Inheritance." Chapter VIII at 113 to 114 contains a very short dissertation on "Slander" and the last chapter, chapter IX at page 114 to 116 discusses also quite briefly the various "Modes of enforcing payment" under customary law.
The statement of the great Sarbah which appears to be authority on which the cases expostulating the alleged immunity principle are founded is at page 90 in chapter VI, the

chapter is concerned specifically with all forms of alienation of property both moveable and immovable.

Sarbah's format in dealing with "alienation" generally in chapter VI, illustrative of the approach of a tidy and disciplined mind, is to expound this topic under five heads. After two and-a-half pages of introductory and preliminary remarks, he dealt comprehensively with his five heads one after the other in the following order, namely alienation by means of (i) gift, (ii) mortgage and pledge, (iii) loans, (iv) sale and (v) testamentary dispositions. The Sarbah statement was in connection with the fourth head: "sale." In a neat and methodically scientific treatment of this head at page 86 he itemised the customary ingredients of a valid sale of land when he stated:

"To constitute a valid sale of land ... there must be—

1 Competent contracting parties;
2 Mutual assent of such parties;
3 The marking out or inspection of the land and its boundaries ...
4 Valuable consideration ...
5 The payment of Trama (earnest money) to the vendor ..."

This treatment of the topic enabled him to tackle the stated ingredients one by one and at 87 under "competent contracting parties" his irrepressible and analytical mind postulated five further sub-heads for exhaustive exposition. As he put it:

"1. To find out who are the competent contracting parties, one must know whether the land about to be sold or purchased is—

(a) Land appurtenant to a stool; or

[p.674]

(b) Land held in common by members of a village community or a company; or
(c) Ancestral property; or
(d) Family property; or
(e) Self-acquired property."

It is in his brief discussion in three pages of the last subheading: "Self-acquired property" under (e) above at 89 to 91 that his oft quoted statement appeared. It is of some importance to appreciate the statement in the context within which it was made. Before making the statement Sarbah commenced his discussion by explaining what self-acquired property as distinct from ancestral property connotes under customary law and he dilated on the owner's power of disposition. He stated also the peculiar status of the head of family and his position as the possessor and controller though not the owner of the family property. Furthermore at 89 he emphasised the customary law rule that "all the self-acquired property of a person which remains undisposed of at his death descends to his successors as ancestral property." And he pointed out that it is the head of family who has possession of such ancestral family property in trust for the members of the family. He then drew attention to the fact that although under English law individual ownership of property is the rule, the converse holds in Ghana: and it is at this stage in his discourse while thus dealing with alienation by sale that he made his famous statement at 90:

"The head of a family has greater powers of alienation over moveable than he has over immovable ancestral property and family property. He can alienate such moveable property in gifts to any of the members of the family, for their education, support, or getting a wife for any member of the family.

If the family, therefore, find the head of the family misappropriating the family possessions and squandering them, the only remedy is to remove him and appoint another instead; and although no junior member can claim on account from the head of the family, or call for an appropriation to himself of any special portion of the family estate, or income therefrom arising, yet the Customary Law says they who are born and they who are still in the womb require means of support, wherefore the family lands and possessions must not be wasted or squandered.

The head of a family cannot, without the consent of or notice to all the principal members of the family or the greater part thereof, alienate any part of the family immovable possessions, and if such consent is secured, the alienation must be for the benefit of the family, either to discharge a family obligation, or the proceeds of such alienation must be added to the family fund."

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As can be seen from this excerpt, if the Sarbah statement is not taken out of context, then there is no doubt whatsoever that primarily Sarbah was merely dealing with the power or competence of the head of the family to dispose of the moveable and immovable property of the family by sale. In respect of the moveables, the text would seem to be authority for the proposition that normally the Akan head of family as a trustee with a customary responsibility, inter alia, for the education and support of members of the family and for their relief from distress or for starting them in trade or business and the duty if necessary to procure a wife for a member, has considerable power of suo motu alienating the moveable as distinct from the immovable property of the family to fulfil these obligations. With regard to the immovable property, the Sarbah statement above is declaratory of the customary principle that the head of family acting on his own and without the consent of, or notice to, all the principal members or a majority thereof is incompetent to dispose of immovable family property. In support of this last principle Sarbah referred to two authorities, namely the decision of Hayes Redwar J. in Gaisiwa v. Akraba (1896) Sar F.L.R. 94, and the case of Aworchie v. Eshon (1872) Sar. F.C.L. 170, the judgment of Chalmers, the Judicial Assessor, before the establishment of the Supreme Court in 1876.

Sarbah concluded his exposition of this matter of who is the competent authority to sell immovable ancestral property by asserting a consequential subsidiary principle of customary law of alienation; that one of the senior or elder members of a family who had opposed a sale acting timeously has a right to sue apparently on behalf of the family to rescind or set aside a sale or mortgage of ancestral family land. A proposition which he buttressed by quoting in support, the judgment of the Full Court presided over by Marshall C.J. in Bayaidee v. Mensah (1878) Sar F.C.L. 171; the judgment of Hutchinson C.J. in Assraidu v. Dadzie (1890) Sar. F.C.L. 174 and the Bokitsi Concession Inquiry (1903) Sar. F.L.R. 159 in which he appeared as counsel for the respondents.

It is clear to me beyond any doubt on examination of his statement that Sarbah was not dealing with the civil procedure or the procedure under customary law by which a member of the family asserts his right against the head of family in a court of law or even in a traditional customary tribunal. The topic, namely customary civil procedure was to be the subject of an exhaustive and learned dissertation nine years later in 1906 in his other book: Fanti National Constitution (2nd ed.) at 31-47. A close study in his historical perspective of the customary civil procedure spanning a period of over 300 years from 1600 to about **[p.676]** 1903 as was thus canvassed by Sarbah in the said book demonstrates rather vividly that the head of family's alleged immunity which the statutory courts of the Supreme Court Ordinance, 1876 were supposed to have fathered and foisted on the law was never and could never have been conceived by the indigenous customary law. The rule if it exists is clearly a judge made one and since it post-dates the Supreme Court Ordinance, it should not on the authority of the Full Court judgments of Bailey C.J. and Smallman Smith J. on 21 April 1884 in Welbeck v. Brown (1884) Sar. F.C.L. 185 be considered as a rule of customary law.

If the statement of Sarbah is analysed and the context considered very carefully it becomes evident that in the first paragraph he was only considering the head of family's power to dispose of moveable family property and in the third paragraph he dealt merely with the head's capacity to alienate ancestral immovable family property. If the substance of the first paragraph is in the circumstances recast and expanded for the purpose of elucidation what emerges is this:

"The head of family apparently acting on his own has considerable discretionary powers in respect of the disposal of moveable family property in his possession, and because of his obligations to the members of his family, he and he alone has a customary discretion to determine the amount, if any, which any member should be given. This means quite obviously and logically that no individual member can call for an appropriation or allocation of a specified sum or a specific property to himself."

If this is acceptable as the meaning of the paragraph, as I think it should be, then considerable light is shed on the penultimate paragraph which is alleged to contain the pith of the so-called immunity rule. In that paragraph the adverb "therefore" in the first line is very significant. It means "for that reason", or "in consequence" and is in the circumstances only understandable and meaningful when one considered what had been. said before it in the first paragraph.
Clearly the said paragraph with its conjunction "if" which means: "supposing that" or "on the condition", must as a matter of good English be joined to another sentence to complete it. The "if" in the paragraph, when linked with the adverb "therefore" in "if the family, therefore", means: "supposing that the family for the reason, e.t.c.", and predicates logically a prior state of facts which will be precedent and consequently dependent on a subsequent state of facts. In my view, and on this analysis, the second paragraph if allowed to stand by itself will be inchoate and incomplete and will do no credit to clarity because from the point of view of English grammar it needs a conjunction to link it to a relevant sentence in order to make sense and attain semantic harmony. If this is done an elucidation of its meaning will run like this:
[p.677]
"The head of family exercises a great discretionary power in the interest of the family over the moveable family properties in his possession and in its exercise he can choose to quantify and allocate any amount of family money or portion of family property to any member of the family.
For this reason, in discharging this function supposing the members consider that he is misappropriating or squandering the family property by depriving them of what they consider to be their fair share, their only remedy is to replace him. Furthermore although no junior member of the family can:
(1) ask the head of family for an account to be gone into so that his claim for a sum due to him can be given to him; or
(2) call for an appropriation of any portion of the properties to himself,
nevertheless under customary law the family properties are for infants and unborn children as well and therefore the head and indeed the family must not waste or squander them."
In my respectful opinion the true meaning of Sarbah's penultimate paragraph is as I have stated it above. It is remarkable that with the exception of the admirable judgment of Amua-Sekyi J. in this case, in most of the judgments in which the judges have had occasion to rely on Sarbah's statement to elucidate the alleged immunity rule, including the judgment of the Court of Appeal in this case, the very relevant first paragraph had been consistently ignored with the result that what Sarbah meant has been emasculated and virtually made vacuous.
On my analysis and having regard to Sarbah's introductory remarks at 78 of his book, I am of the considered opinion that significant principles which can be gathered from the Sarbah statement touching the rights, privileges and duties of an Akan head of family under customary law in respect of family property are the following:
1 The head of family has the moveable ancestral property including family money in his control and management in trust for the family and has a customary law discretion to allocate any such money or property in any manner he deems fit to any family member of his choice.
2 The discretionary power of thus allocating family money or moveable property to a member of the family belongs to the head of family alone and so no member of the family specially a junior member can call or sue the head of family for account merely to compel him to exercise the said power in a particular way or to his personal benefit.

[p.678]
3 A member who is aggrieved because of the manner the discretionary power of the head is being exercised has as an individual no remedy outside the domestic forum, where of course he can prevail on the family to remove the head on proof that by his conduct the family property is being squandered or wasted.
4 The head of family can only alienate the immovable property of the family for the benefit of the family with the consent of or knowledge of all principal members of the family or a majority of them.
5 A senior member of the family can sue for an account for the benefit of the family to preserve the family property and prevent it from being squandered or wasted.
I am persuaded of the correctness of these principles when I consider the whole of Sarbah's discourse under his sub-head (e): "Self acquired property" at 89 to 91 of his book together with his other view, inter alia, in his introductory remarks at 78 of the said book when he stated:
"Amid all the conflict of contradictory accounts which meet one at every turn, it is nearer the mark to say, that the head of family has the moveable ancestral property in his absolute control; if, therefore, the family find he is misappropriating, wasting, or squandering the ancestral fund, it is to their interest to remove him at once and appoint another in his stead."
The following one single sentence in the Sarbah statement, in my view a correct general statement of the customary law if considered within its context, would seem to be the genesis of the present so-called immunity rule that: "no junior member can claim an account from the head of family."

Quite apart from the fact that within the, context of the overall Sarbah statement, this sentence was obviously not dealing with procedure, what, one may ask, did Sarbah mean? Even from this distance of time, his writings, I think, do declare his meaning. When Sarbah mentioned "Claim on account", he no doubt had in mind the situation canvassed in the unreported judgment of Chalmers, the Judicial Assessor, on 17 May 1871 at Cape Coast in Karaba v. Quansimah (1871) Sar F.C.L. 53 where as a result of money transaction between two spouses involving the giving of sums of money to each other and the incurring of expenses on behalf of each other a balance was struck on the dissolution of the marriage and the balance paid to the party entitled: see Fanti Customary Laws (3rd ed.) at 53-54. Where a party or one for whom he claims is not entitled to a specifically ascertainable sum a claim for account must of necessity fail.
[p.679]
Why did Sarbah mention "junior member"? Certainly in the scheme of the nomenclature he adopted he drew a sharp distinction between a junior member and a senior or elder member of a family and so by deliberately debarring junior members, he impliedly conceded that the prohibition about the claim for account does not necessarily apply to senior members on the apparent strength of the legal maxim: expressio unius est exclusio alterius.
Although this maxim as I have applied it here to the rule was trenchantly criticised by Azu Crabbe C.J. in his book, Mensah Sarbah, I do not think, with respect, that the criticism is sound. Indeed, when a senior or principal member claims an account against the head not for himself but on behalf of the family, there is no customary law reason why the claim should fail. This is because although the senior member has no right to call for any sum or specific property to be allocated to him personally, nonetheless by virtue of being a principal member and consequently a trustee with the head and the other principal members of the power of alienation, he can claim an account from the head of family on behalf of the family in order to preserve the property and thus fulfil his fiduciary customary obligation as one whose knowledge or consent is necessary for a valid alienation to strangers of the family property. This is no doubt the reason why Sarbah confined the prohibition, and rightly so, to junior members.

The point is clearly brought home in Sarbah's consideration at 78-79 of the part played by senior members in valid alienation of family property, when he said:
"The head of a family cannot, without the consent of all the principal members of the family, or the greater part thereof, that is the Ebusuafu, alienate the immovable ancestral or family property. And although an alienation may be necessary for some family purpose, or for the discharge of a family obligation, nevertheless, unless confirmed by the senior or principal members of the family, such alienation is revocable.
Neither the head of the family acting alone, nor the senior members of a family acting alone, can make any valid alienation nor give title to any family property whatsoever."
(The emphasis is mine.)
It seems to me that on the authority of Sarbah, senior members of a family as joint trustees for valid alienation of family property can jointly or severally claim an account from the family head either at a family meeting or before a competent court, otherwise they cannot vindicate their undoubted customary law right of knowing or giving **[p.680]** their consent to a valid alienation of family property and their right can then be violated by the head of the family with impunity.
In so far as the Court of Appeal in this case repudiated the absolute right of senior members on behalf of the family to sue the head qua head for account without first removing him, its appreciation of the formulation of the rule is erroneous. The maxim is ubi jus ibi remedium and the customary rule disqualifying junior members from suing is nothing but an antonymous conceptualisation of this maxim. The rule is not peculiar to our customary laws. It is in fact nothing more than a trite common law principle well-known to the jurisprudence of many nations, ancient and modem, that a claim for account cannot be made against a person who is not an accounting party. The head of family is an accounting party to the whole family or the senior members, but he is not, without more, an accounting party to the junior members, consequently the use of the word "junior" by Sarbah is deliberate and understandable.
I will venture to think that if a junior member can by virtue of his lawful dealings with the family property bring the head within the compass of an accounting party, he can maintain the supposed proscribed action for account against the head. Suppose a man were to die and bequeath to a junior member of the family the proceeds of his cocoa farm, for say two years after his death by valid samansiw. If the head of family were to incur expenditure in collecting the produce of the farm within the two years and eventually mix the amounts obtained from the proceeds of the farm with family account, I am unable to appreciate the soundness of any principle of law customary or otherwise which debars him from maintaining an action for account against the head of family, a junior member though he may be.
The distinction thus drawn between "junior" and "senior" members would seem to be founded on, inter alia, at least two customary law norms. The first is the respect which the customary law expects the junior members to have for the senior members by not disregarding their experience and mature views; and the second is the respect which the entire family reposes in its own accredited head. These norms generate in the relationship between all the members of the family including the head a collective attitude calculated to promote reconciliation and respect for the elders who are the most important members of the family and in the process to eschew conflicts. McCarthy J. delivering the judgment of the West African Court of Appeal in Fixon Owoo v. Owoo (1945) 11 W.A.C.A. 81 at 84 came very near, indeed, to appreciating this position. In a comment on the reason for this attitude of members of the family in our customary society he said: "This attitude becomes more intelligible if one remembers ... the great respect usually paid by a family to its most important members." **[p.681]** With regard to the head of family's position he observed that one must have: "regard no doubt to the latitude not infrequently allowed to an influential member who is for the time being enjoying the usufruct of the family property."
It appears to me with the greatest respect that the immunity rule as was generally stated in the leading judgment of the Court of Appeal and as has been consistently formulated in some

judgments by our superior courts lacks clarity and in the form in which it is couched, it is not supported and is not legitimately derivable from what the great Sarbah said in his book on Fanti Customary Laws. On the contrary, it would seem to be merely an inchoate product of the statutory courts which subsequently emerged after the Supreme Court Ordinance, 1876 (No. 4 of 1876).

After 1897 when Sarbah first published his book, the courts in their enthusiasm to declare the customary law as was expounded by Sarbah inadvertently, due no doubt to a misreading of Sarbah, formulated the so-called immunity rule in such vacillating and elusive forms as to militate against its easy reception as a consistent principle within the matrix of the customary law. It remains now to examine precisely the scope and purport of what the courts have actually decided and the rationale of the decisions as well as what they have said obiter in regard to the so-called immunity rule.

Before considering these, however, one or two matters need to be clarified. It must be kept in mind that the alleged immunity rule as asserted even by the courts is restrictive and is an immunity to actions for account against the incumbent head of family at the instance of a member of the family if the head of family has not been first removed. It does not therefore cover other actions not involving accounts or those mounted to preserve family property. This was conceded very early by the statutory courts more than 70 years ago in a judgment of Lennard J. in the Full Court in Sappor v. Amartey (1913) D & F '11-'16, 53 at 55. In that case in concurring with the judgment of Crampton Smyly C. J. that a single member of a family cannot maintain an action of trespass against the head of family in respect of family land which the plaintiff had unilaterally appropriated to his exclusive use, Lennard J. said:

"...it seems to me that the majority of a family can depose a head whom they dislike and that under ordinary circumstances no Court ought to interfere with this domestic discipline. Assuming however that the head of a family can carry a majority of it with him and his intentions are entirely selfish and unjust I have no doubt whatever that upon ... a proper case made a Court of Justice can afford relief."

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The principle that in a case at least not involving a claim for account the head can be sued by a member was impliedly conceded by Bayaidee v. Mensah (supra) and Manko v. Bonso (1936) 3 W.A.C.A. 62 and was not questioned in Agyapa v. Fosu (1952) D.C. (Land) '52-'55, 85. In the leading case of Pappoe v. Kweku (1924) F.C. '23-'25, 58 at 161, Gardiner Smith Ag. J. would seem to have echoed the 1913 views of Lennard J. when he took for granted the right of a family member to sue the head in appropriate circumstances. He said of the rights of the family member: "He has a certain claim upon the head of family for support—the extent of support varying with family means—and I assume that he could enforce this by action."

With respect, it would seem the dictum is perhaps too carelessly formulated. Between "that" and "he" I would interpolate "in appropriate circumstances." Be that as it may, Mr. Justice Azu Crabbe at 85 of his excellent book on John Mensah Sarbah (1971), has criticised this view of Gardiner Smith Ag. J. as "obiter dictum and . . . in any case not good law." It seems to me that if Gardiner Smith Ag. J. had in mind a case where in the absence of special circumstances a junior or ordinary member sues the head for account for the purpose of claiming that his customary interest of support in the family property be quantified, then the criticism of Azu Crabbe is well justified. Such an action is what Sarbah's statement proscribes and the Gardiner Smith dictum would seem to be amenable to such a construction. If however he was thinking of special circumstances which could render the head an accounting party then the criticism is misconceived. Suppose in fulfilling his obligation to a particular member of a family, a head of family were to give possession of a portion of the family land for a short term of years for the support of that member. If that member were to cultivate the land and before harvesting the products of his efforts, the head of family were to capriciously deprive him of his possession and appropriate further the proceeds of the farm to the family account, I cannot see what reasonable customary law principle can debar the member from suing the head of

family for an account of the farm proceeds of the said family land in enforcement of his right. Presumably Gardiner Smith Ag. J. had such analogous situation in mind in the view he expressed which Justice Azu Crabbe so nonchalantly deprecated. Indeed, Justice Azu Crabbe at 87 of his book would seem to concede such a right when on the ostensible authority of Heyman v. Attipoe (1957) 3 W.A.L.R. 85 at 88-89, to be discussed later in this judgment, he observed:

"where an individual member of the family has established a usufructuary title over a portion of the family land for his support he can maintain an action for recovery of possession against the head of the family when the head wrongfully dispossesses him of **[p.683]** that portion of land. This appears to be the only instance in which a junior or individual member of the family can sue the family head."

Before examining the decided cases, I think a second matter which also deserves attention and which was politely dealt with in a masterly manner by the Chief Justice is the caveat by Jiagge J.A. at the Court of Appeal at 865 that the courts should not "equate the position of the head of family with that of a "trustee"—a stand supported by the majority judgment and apparently by Wiredu J.A. when he said (supra) at 862 000: "I must remark here that even though the head of family's position in relation to family property in his possession has been likened to that of a trustee the two are not the same."

With the utmost respect, I am afraid it is too late in the day for the courts to resile from their previous unequivocal stance. The great Sarbah himself had no doubts about the nature of the relationship between the head and family members for at 89 of his Fanti Customary Laws, he stated the position thus: "But in this country the head of a family holds the family possessions in trust for himself and the members of the family." On 23 July 1890 barely fourteen years after the establishment of the Supreme Court, Hutchinson C.J. lent the full weight of his judicial authority to this view when he said in Assraidu v. Dadzie (1890) Sar F.C.L. 174 at 176, while referring to the family head as its chief that: "Family land does not belong to the chief: he is merely the trustee of it for all the family." Since 1890 the judges of our courts have consistently persisted in this position as can be seen in the opinion of Barton J. in Esson v. Moubarak (1938) D.C. (Land) '38-'47, 30 at 31. See also the views of Harragin C.J. to the same effect in Agbloe II v. Sappor (1947) 12 W.A.C.A. 187 at 189 and of Wilson C.J. in Ankrah v. Methodist Church (1949) D.C. (Land) '48-'51, 170 at 172 as well as van Lare J. (as he then was) in Katai v. Katai (1956) 1 W.A.L.R. 515 at 156.

I now turn to a consideration of the case law in chronological order. I propose to consider within a 100 years span all the cases relevant to the immunity rule which I have succeeded in laying hands on and which were decided between 1876 when the Supreme Court Ordinance came into force and 1975 when the last of the cases cited by the Court of Appeal was decided. These cases which are said to have institutionalised the so-called immunity rule directly or indirectly either in their obiter dicta or by their alleged ratios are, inter alia, the following;

(1) Amekoo v. Amevor (supra), an Ada case;
(2) Pappoe v. Kweku (supra), a Ga case;
(3) Nelson v. Nelson (1932) 1 W.A.C.A. 215, a Ga case;

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(4) Solomon and Vanderpuye v. Botchway (1943) 9 W.A.C.A. 127, also a Ga case;
(5) Abude v. Onano (1946), another Ga case;
(6) Etuah v. Richardson (1948) D.C. (Land) '48-'51, 64, an Akan case;
(7) Mary Vanderpuye v. Botchway (1951) 13 W.A.C.A. 164, also a Ga case;
(8) Tamakloe v. Attipoe (1951) D.C. (land) '48-'51, 378, an Anlo case;
(9) Fynn v. Gardiner (1953) 14 W.A.C.A. 260, an Akan case;
(10) Tamakloe v. Attipoe, W.A.C.A. 22 June 1953, unreported; also an Anlo case;
(11) Katai v. Katai and Abodin (1956) 1 W.A.L.R. 151, a Ga case;
(12) Vanderpuye v. Botchway (1956) 2 W.A.L.R. 16, a Ga case;
(13) Heyman v. Attipoe (1957) 3 W.A.L.R. 86, an Anlo case;

(14) Fynn v. Koo, Land Court, Cape Coast, 20 February 1960, unreported, an Akan case;
(15) Osonoware v. Ayiku II, High Court, 27 July 1962, unreported, a Ga case; and
(16) Annan v. Kwogyirem [1975] 1 G.L.R. 291, an Akan case.

Five of the cases emphasised above were specifically prayed in aid by the Court of Appeal as authorities vindicating the immunity doctrine. Amekoo v. Amevor (supra) was the first case quoted by the Court of Appeal in this case as authority in support of the doctrine. The case is certainly inapposite. It was an administration suit and was concerned with Ada customary law. In an earlier application on 13 June 1889 for letters of administration in Re: Isaac Ametifi (1889) Red 157, it was decided by Hutchinson C.J. that according to Ada customary law Amevor, the defendant, as the eldest uterine brother of the deceased, was prima facie entitled to the control and management of the property of the deceased and that he was justified to claim the largest share although he ought to give something, the amount of which was not fixed by Ada custom, to his brothers and sisters and children of the deceased. The instant administration suit before the same judge was apparently against the defendant as successor and although the precise amount to be given to the claimants was at large, Hutchinson C.J. upon equitable grounds after payment of the costs divided the resultant balance of the sum due to the estate from the Basel Mission equally amongst the widow and the sisters and children of the deceased, since on an examination of his filed accounts the defendant and his two brothers appeared to have already enjoyed part of the estate. The case had nothing to do with the immunity doctrine. On the contrary, it was a case of a member of the family suing another member who had the **[p.685]** control and management of the estate. Although it was an administration suit and the defendant filed account, his status as customary successor and manager and controller of the property is if anything, so analogous to that of head of family that the case must be considered to be in a sense at variance with the alleged doctrine.

Pappoe v. Kweku (supra) is the second case cited in support. It is the locus classicus. It is a Ga case. The plaintiff, the only surviving brother of the full blood of a deceased intestate, sued the head of family who had taken out letters of administration, inter alia, for an account of his administration. Smyly C.J. at the High Court in Accra held on the authority of Sarbah's statement that the plaintiff as a "junior" member could not claim an account from the head of family. The plaintiff's appeal to the Full Court coram Gardiner Smith Ag. .J, Michelin and Hall J.J. was dismissed. As the head of family had taken out letters of administration, the Full Court following its earlier decision in Villars v. Baffoe (1909) Ren. 546 at 550 where it had held that: "A man cannot by simply taking out letters of administration oust the native law so far as the 'family' is concerned", decided that the case must be governed by customary law and like Smyly C.J. at the court below, Hall J. relying on Sarbah's statement said at 165: "By native law the personal property of a deceased person on his death becomes family property, and no junior member of the family can claim an account from the head of family."

Michelin J. at 163 supported this correct and innocuous line of reasoning and the judgment of Smyly C.J. when he said:

"The onus was . . . on the Plaintiff to prove that in accordance with native customary law he could claim such account, and no such proof having been given by him, the learned Chief Justice was in my opinion correct in holding that no cause of action had been shewn and in dismissing such action accordingly."

It was his inelegant misreading of Sarbah's statement and some questionable pronouncements in the contribution of Gardiner Smith Ag. J. which subsequent courts did not examine critically that would seem to have given rise to so much confusion in the conceptualisation of the immunity doctrine as so stated in the majority judgment. At 161 of the report, this was what Gardiner Smith Ag. J. who would seem to have given the leading judgment said:

"[I]t is a general principle of native law that the personal property of a deceased head of a family passes to his successor (subject to certain obligations to support the other members of the family), and that an action of accounting is unknown to native law. It **[p.686]** may be

asked what remedy a member of a family has if the head refuses to give him anything. The answer would appear to be that although in the words of Sarbah he cannot claim an account from the head of the family or call for an appropriation to himself of any special portion of the family estate or income therefrom arising, yet he has a certain claim upon the head of the family for support—the extent of support varying with the family means—and I assume that he could enforce this by action.
(The emphasis is mine.)
The acting judge makes three positive statements here. I have emphasised them. First, he asserts that an action of accounting is unknown to the customary law. I have already referred to the case of Karaba v. Quansimah (supra) to show that before the establishment of the Supreme Court in 1876 an action of accounting was not unknown to Akan customary jurisprudence. The Karaba case (supra) for instance shows that Gardiner Smith Ag. J. was wrong and that in an action for dissolution of marriage, it is not unusual under the customary law for a subsidiary claim for account to be tagged to the substantive relief of divorce. I shall deal with this again later on in this judgment. Secondly, he purports in his second statement to reproduce the words of Sarbah. He says: "In the words of Sarbah he cannot claim ... therefrom arising." From the word "claim" up to "income therefrom arising", Gardiner Smith Ag. J. has repeated the actual words of Sarbah. However where Sarbah said: "no junior member can claim" he has converted to "he cannot claim" and has in the process deprived the Sarbah thesis founded as it is on the "junior" factor, of its most significant element; if his rendering of it is taken without checking from the Sarbah text as Sir William Brandford Griffith would seem to have done in his book: A Digest of and Index to the Reports of Cases decided in the Supreme Court of the Gold Coast Colony at 4, where a synopsis of the substance of the case of Pappoe v. Kweku (supra) in relation to the immunity rule is given as follows:
"Defendant, being head of family, took out administration of the estate of a deceased member:—Held, that he was not liable to give an account of his administration to another member of the family, who was only a beneficiary, in respect of his membership."
This would seem to be the ratio decidendi of the decision of Gardiner Smith Ag. J. If for "another" in the Digest is substituted "a junior" this will accord with the ratio decidendi of Smyly C.J. in the **[p.687]** court below and the majority decision of Michelin and Hall J.J. in the Full Court. In my view the reasoning of the majority and Smyly C.J. is unexceptionable and their decisions are therefore a correct statement of the customary rule on accounting to a junior member by an Akan head of family in the circumstances of the case, if, indeed, the plaintiff is merely a beneficiary in respect of his membership and not in fact a successor or a member with the right to inherit.
I have already discussed the inelegant dictum of Gardiner Smith's third statement which because of its lack of clarity and its ambiguous formulation was no doubt criticised by Mr. Justice Azu Crabbe in his book to which I have already referred.
Pappoe v. Kweku (supra) as I have indicated is a Ga case. Like the instant case, Nelson v. Nelson (supra) decided in 1932 is also a Ga case. In that case some of the children of the deceased brought an action for account against a brother of theirs who was appointed by the deceased on his death bed to look after their interest in his estate. The head of family confirmed the appointment and apparently gave the said appointed brother power to manage the estate presumably in his stead. A submission on behalf of the defendant that the plaintiffs were junior members of the family and that the defendant was virtually head of the family and so on the authority of Pappoe v. Kweku (supra) and the second paragraph of Sarbah's statement he was not liable to account was rejected by the court. At 217-218 of the report Michelin J. in whose views the other members concurred said:
"... this is not the case of an action by a junior member of a family against the head of family but is brought by brothers and sisters of the defendant against him in his fiduciary position as a caretaker on their behalf."
(The emphasis is mine.)

If the principle is a principle simpliciter of non-accountability to junior members and is an inflexible rule, then I would have thought an agent being in law his principal's alter ego, the caretaker if appointed by the head can take advantage of the rule and be accountable only to the head who appointed him; but although the member caretaker was held accountable to the children, the case would seem to have been distinguished in the subsequent case of Katai v. Katai and Abodin (supra) to be discussed later on in this judgment.

Solomon and Vanderpuye v. Botchway (supra), the next case decided in 1943, is another Ga case. The first and second plaintiffs were the nephew and eldest son respectively of the deceased and they sued the head of family for themselves and on behalf of the children and members of the family, inter alia, for a declaration that the children of the deceased have an interest in the self-acquired personal and real **[p.688]** property of their deceased father. The trial judge Woolhouse Bannerman sitting in the High Court, Accra on 21 December 1942 in an unreported decision granted the application. On appeal to the West African Court of Appeal, that court held in effect that on the assumption that the second plaintiff and his brothers and sisters were the children of A Ga six-cloth marriage, then on the authority of Cole v. Cole, Supreme Court, Accra, 11 September 1939, unreported, they were entitled to the said declaration. The case is hardly an authority on the immunity doctrine except that the trial judge, the first Ghanaian superior court judge himself apparently a Ga, criticised the alleged immunity rule in its application to Ga customary cases when he said:
"I should like to mention that it was Sarbah in his book who propounded the principle that a member of the family cannot claim an account from the head of family. This is an Akan custom and not a Ga custom."
The West African Court of Appeal daubed this statement a mere obiter and unfortunately they studiously ignored it instead of re-reading Sarbah and correcting the misapprehension so needlessly seeping into his statement and overflowing into the law.
Clearly like many judges before him and after, Woolhouse Bannerman J. has misread Sarbah's statement. The Gardiner Smith lapsus linguae has infected him. Outraged at the principle underlining such a custom revealed by his misreading he protested:
"With the utmost respect to the learned author, I hold that this principle is contrary to equity and natural justice and it is not unknown that some unscrupulous and callous heads of families have mercilessly exploited this so-called custom to the detriment of individual members of the family. This is common knowledge."
It seems to me that in his criticism of the custom as he understood it, Woolhouse Bannerman was being "alert and ... faithful to the heart beat of our society" if I am to borrow with permission the words of my brother Sowah J.S.C. in his judgment. I must say that the form in which the immunity rule is here attributed to Sarbah reflects the confusion in legal and judicial circles of what Sarbah had said, a misconception which Gardiner Smith Ag. J. had peddled in his views in Pappoe v. Kweku (supra). It is a misconstruction which Sir Brandford Griffith had institutionalised in his Digest and which is apparently still with us.
Although Woolhouse Bannerman's effort at repudiating the rule as a Ga custom was not heeded, the thrust of subsequent authorities would seem to indicate that he was right for it is inconceivable under Akan customary law for children who in theory are not members of their **[p.689]** father's family for the purpose of succession to claim shares in their father's estate; since sharing may necessitate going into account to determine the appropriate share of the child. For this, see Sarbah, Fanti Customary Law (3rd ed.), p. 274 where the right of children under Ga customary law to share in the estate of a deceased father is also conceded, thus vindicating the view of Woolhouse Bannerman that the rule, if it exists, is an Akan one and not a Ga customary law.
Abude v. Onano (supra) decided in 1946 is still another Ga case from Labadi. It is the third case quoted by the Court of Appeal in support of the so-called immunity doctrine of the head of family. The facts however are illuminating: The plaintiff, as elders of the Labadi stool, for

themselves and on behalf of the elders of four of the six quarters of the La Division of the Ga State brought an action at the High Court against the La Mantse as the first defendant and five other defendants styled trustees of the La Benevolent Society. They alleged that the La Mantse as custodian of money paid to the Labadi stool had deposited the said money in a Post Office Savings Bank in the name of "La Benevolent Society" and had constituted himself and the five other defendants trustees of the said fund. They claimed that the defendants were using the stool money so deposited, for their own selfish ends and for other purposes prejudicial to the interests of the La stool. Accordingly they claimed at 103:

"(a) An injunction restraining the defendants from making any further withdrawals from the said account except with consent and approval of the Elders of the stool.

(b) An account of all moneys that have come into the possession of the defendants or any of them for the Labadi stool."

The learned judge, Smith J., dismissed the action and the plaintiffs appealed. The case had obviously nothing to do with the supposed immunity of a head of family to account and any pronouncement on the matter must of necessity be obiter. However, Korsah J. (as he then was) who delivered the judgment of the West African Court of Appeal founded the judgment mainly on the ostensible authority of Pappoe v. Kweku (supra) as that case was erroneously digested at 4 of Griffith's Digest already quoted in this judgment. As I have already pointed out this Digest has misconstrued the ratio decidendi of Pappoe v. Kweku (supra) for that case decided that no junior member of the family can claim an account from the head of family and if its reasoning is to be applied by analogy to the Abude case, the plaintiffs who were admittedly elders of the stool can hardly be dismissed upon that ground. It seems to me with the greatest respect that Abude v. Onano (supra) was without doubt decided per incuriam.

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About two years after the Abude v. Onano case (supra), Quist J. sitting at the Lands Division of the Divisional Court at Cape Coast heard an appeal from the judgment of the native court in Etuah v. Richardson (1948) D.C. (Land) '48-'51, 64. It is an Akan case. The defendant as head of family had received compensation for compulsory acquisition of the family land. The plaintiff sued on behalf of a branch of the family for a half share of the compensation money. The defendant agreed that members of the family had equal rights to the family property, but contended that a member's right to a portion was at the discretion of the head of family and resisted the plaintiff's claim. The native court gave judgment for the plaintiff, but the defendant's appeal to the Land Division was allowed by Quist J.

It must be noted that this was an action for an appropriation of half portion of family property. It was not an action for an account. Admittedly, the family land has been converted into money by the payment of compensation and the plaintiffs were in the circumstances and in contemplation of the law virtually asking for partition. At 67, Quist J. however stated baldly the ratio of his decision:

"It is an accepted and well established principle of Native Customary law that the Head of Family cannot be sued by a member of the family for account or for apportionment of the family property."

(The emphasis is mine.) For this proposition he cited the second paragraph of Sarbah's statement and supported it with Sappor v. Amartey (supra) and the decision in Pappoe v. Kweku (supra) as attenuated in the summary of Sir Brandford Griffith in the Digest; and relying further on the Abude v. Onano case (supra) he said:

"Applying the principles enunciated in the cases I have referred to, and the Customary Law as stated by Sarbah, I hold that neither the plaintiff nor the members of his section can maintain an action against the head of the family for appropriation or payment to himself or to them of any special portion of the family estate—compensation paid in the present case."

The proposition regarding "account" is no doubt obiter and of course not necessary for the decision and as it is founded on a misreading of Sarbah and a misapprehension not only of

the basis of the decision in Pappoe v. Kweku (supra) but also on a reliance on the per incuriam ratio of Abude v. Onano (supra), it is clearly a misconceived proposition.
After Etuah v. Richardson (supra) the West African Court of Appeal in 1951 dealt with a case bearing directly and squarely on the **[p.691]** alleged immunity rule in a Ga customary law setting. The said case Mary Vanderpuye v. Botchway (1951) 13 W.A.C.A. 164 is the locus classicus of the Ga cases. It involved the Vanderpuye estate which had been the subject of their previous decision in Solomon and Vanderpuye v. Botchway (supra). Following the decision in the said Solomon and Vanderpuye v. Botchway (supra) the said case was remitted to the Divisional Court for a decision as to the status of the children under Ga customary law. McCarthy J. in the Divisional Court dealing with the referred case, declared that the children were the children of a Ga six-cloth marriage. In view of this declaration the children brought an action in the Ga native court against the head of family claiming:
(a) A declaration of their share (gbena) and the appropriation to them of such of the estate as represents the share to which they are entitled according to Ga customary law; and
(b) An account of all rents and profits of the estate since 1935 and payment to the plaintiffs of their share thereof

The native court held that under Ga customary law, the appointment of the head of family did not constitute succession to a deceased self-acquired property and that a head of family who was not the brother or the nephew of the deceased did not inherit the deceased. As a matter of interest it is worthy of note that this Ga custom would seem to be the same as the Akan and which Wiredu J.A. was to articulate later in his famous decision in Annan v. Kwogyirem (supra) decided in 1975.
Back to the Mary Vanderpuye case (supra) the court held that since the defendant was a cousin of the deceased, he had no right as long as the children were alive to succeed merely because he was the head of family. In the view of the court, he was head only for the purpose of managing the estate for the children in particular and the family in general—once again reminiscent of the subsequent view of Wiredu J.A. in the Kwogyirem case (supra) and a later view of Coussey J.A. in the Vidal Tamakloe case (supra) to be discussed later in this judgment, as to the status of a family head who is not a successor to the self-acquired property of an intestate.
The court found that the defendant had mismanaged the estate and held that since there was no brother or nephew of the deceased alive, the interest of the children extended to the whole estate and gave judgment accordingly against the head of family adding that the children were entitled to all rents and profits as would be shown by the defendant's account. On a peal to the Land Court Smith J. varied the judgment although he did not impugn the principle which the native court had upheld that the head was accountable to the children. The judgment of Smith J. was itself varied by the West African Court of **[p.692]** Appeal, but the principle of the head's accountability to the children as was advocated by the native court and supported by Smith J. was not disturbed. On further appeal to the Privy Council, in Vanderpuye v. Botchway (1956) 2 W.A.L.R. 16 at 23, Lord Cohen delivering the judgment of the board advised: "That the appeal be allowed, the orders of the West African Court of Appeal and of the Land Court be set aside, and the order of the Native Court be restored."
It is noteworthy that in this Ga case the children's right as members of the family to sue the family head for account of what was admitted to be their entitlement according to customary law was not questioned in all the judgments from the native court right up to the Privy Council. Perhaps it is worth stressing that the status of children of a legal marriage according to native law as was expounded by the native court is different under the Ga customary law from its conception under Akan customary law. As Crampton Smyly C.J. put it in Millers Ltd v. Van Hien (1912) D & F '11 -'16, 15 at 16: "The Accra law differing to the extent, that the children of the deceased of that marriage, inherit in conjunction with those, who would otherwise be

the heirs." The great Sarbah—Crampton Smyly's source, records the following at 274 of his Fanti Customary Law (3rd ed.):
" . . . in the Fanti country . . . [c]hildren are not considered members of the father's family, as far as having any right to his property. In ... Accra and east of it, children of legal marriage, that is, marriage according to native law said to be known as the six-cloth marriage—sometimes inherit the property of their father in conjunction with the heir—and the property cannot be disposed of without the consent of the children."
Edmund Bannerman, an eminent Ga solicitor whose knowledge of the customary laws and long experience as a practitioner were described by the great Sarbah as "unsurpassed", gave his opinion on the Ga custom in 1891 at the request of Hutchinson C.J. He said as recorded in Fanti Customary Law (3rd ed.) at 110:
"With reference to ... six-cloth marriage, real property descends the same as personal property with this exception, that it is inherited in conjunction with the children of the deceased of that marriage and such real property cannot be disposed of without the children's consent."
(The emphasis is mine.) Thus among the Gas in the case of "legal marriage" a person's family is made up of members of his maternal family and his own children of the marriage for the purpose of succession.
[p.693]
I have, in setting down the cases involving the immunity rule, indicated the applicable customary law in the community whose customary law is in issue. I have done this because in Ghana the expression "customary law" has for long been legally defined as "the rules of law which by custom are applicable to particular communities" in the country. The combined effect of section 4 (2) of the Proclamation 1981 and section 61 of P.N.D.C.L. 42 is to continue these laws in operation only in so far as they are compatible with "national aspirations." Although the term "national aspirations" has not been defined or clarified under the new dispensation, I dare say it connotes the articulation of public policy embodying, inter alia, what my brother Sowah J.S.C. aptly called just now "the ethics and morality of the community" by recognising those indefinable and subtle beneficial norms operating in the country as a whole and capable of judicious ascertainment for the purposes of the judicial process by virtue of a judge's membership as a citizen of the country. The effect of this new national aspiration principle sponsored by our present fundamental law is probably to bring some uniformity and homogeneity gradually as far as that is practicable into the whole corpus of the customary laws by this process of subjecting them to one national common denominator.
I have drawn attention to this legal position because the next case which was decided a few months after Mary Vanderpuye v. Botchway (supra) is an Anlo case: Tamakloe v. Attipoe (1951) D.C. (Land) '48-'51, 378. I have had to consider that case at length because another Anlo case, Heyman v. Attipoe (1957) 3 W.A.L.R. 86, was cited by the Court of Appeal in support of the supposed immunity doctrine. In the Tamakloe case (supra) the property in the suit was a house at Accra, the self-acquired property of one Emmanuel Tamakloe, an Anlo man, who had died intestate and was survived by nine children, five of them sons. The fourth defendant, one of the sons, was appointed successor to the deceased and the first and second defendants were the heads of family of the deceased representing the maternal and paternal branches of his family respectively. In this action before Jackson J., four of the children as plaintiffs sued the said heads and the successor as well as a third defendant as the lessee to whom the two heads with the concurrence of the successor had leased the property. The action was (1) for the lease to be set aside; (2) for an account of rents and profits received from the property; and (3) for an order that the two family heads assign their interest in the lease to the fourth defendant for himself and the other children. Jackson J. declined to set aside the lease. He examined the earlier proceedings before Coussey J. (as he then was) in Attipoe v. Shoucaire (1948) D.C. (Land) 148-'51, 16 and another before Smith J. in Khoury v. Tamakloe (1950) D.C. (Land) **[p.694]** '48-'51, 201 and found that according to Anlo

customary law, "the only persons entitled to any beneficial interest in the property of a father who dies intestate and leaving self-acquired property are the surviving children of that man."

In view of the Anlo customary law position Jackson J. ordered the first, second and fourth defendants to account to the plaintiffs in respect of the property. It was contended on appeal to the West African Court of Appeal that the nine children of the deceased were junior members of the family and that by native customary law, obviously the supposed Akan custom allegedly noted by Sarbah, no individual member or group of members could call upon the family head to account. In Vidal Tamakloe v. Chief Attipoe (supra) an unreported decision delivered on 22 June 1953 by Foster Sutton P., Coussey J.A. and Windsor Aubrey J. dealing with the appeal, the court rejected this contention and decided that:
(a) By Anlo customary law no one other than the nine children were entitled to any beneficial interest the property.
(b) That the management and control of the property was vested in the child elected by the family to succeed.
(c) That the true function of the first and second defendants as heads of the larger family was advisory and protective, i.e. to watch the interest of the children and if necessary to convene meetings in matters affecting the deceased's estate and that as they had no beneficial interest in the estate, they were liable to account for all their dealings with the property.
With regard to the fourth defendant, the successor, Coussey J.A. speaking for the court said that:
"By Anlo customary law all the children have an equal share in the property of the deceased ... Their voice decides the additional recompense that shall be made to the successor appointed in consideration of assuming personal liability for the debts of the deceased. But the fourth defendant says native customary law protects him from liability to account at the suit of a brother or sister who has an equal interest with him in property committed to his management as successor. Even if the native customary law were as stated by the defendant, I consider that to apply it to the present case would be contrary to public policy."
(The emphasis is mine.)
Note very well the approach of the court, per Coussey J.A., reminiscent of the subsequent "national aspiration" compatibility principle which is now the current measure of the validity of all our pre-revolution laws as is expoused in section 61 of P.N.D.C.L. 42.
[p.695]
I now revert to the Ga customary cases. About a year after the West African Court of Appeal decision in Mary Vanderpuye v. Botchway (supra) the court decided the case of Wellington v. Papafio (1952) 14 W.A.C.A. 49. The facts of the case are not necessary. The court purported to throw doubt on the correctness of the customary law as was stated by the Ga native court in Mary Vanderpuye v. Botchway (supra) and relied as authority for this stand on the West African Court of Appeal decision in the said case which was set aside by the Privy Council on 23 April 1956 in Vanderpuye v. Botchway (supra). Of course on the, date of the decision in the Wellington case, the court could not possibly have been aware of this because the Privy Council had not yet handed down its opinion, but that opinion casts doubts on the authentic character of the West African Court of Appeal pronouncements in the Vanderpuye case which were, inter alia, the bases of the decision in the Wellington case although probably the actual decision in the Wellington case may very well be supported on other grounds.

Barely a year later the court came to grips once again with the immunity rule in an Akan case: Fynn v. Gardiner (supra). In that case, one Amelia Harrison who was adjudged to have acquired a house at Commercial Street, Cape Coast died intestate leaving a daughter—the defendant. The plaintiffs were the children of the sister of the deceased and they sued the defendant the head of family for (1) a declaration that they were joint owners with her; and (2) an account of the rent. The native court gave judgment for the plaintiffs and this was

reversed by the Land Court. On further appeal to the West African Court of Appeal, the judgment of the Land Court was set aside and the claim for declaration was granted, on the authority of Sarbah that when a person died intestate, property held by him as sole owner and possessor relapses in the next generation "into a state of joint tenancy." The court however deprecated the order for account made by the native court and Foster Sutton J. reading the judgment of the court with the concurrence of the other members: Coussey J.A. and Korsah J., said:

"... in our opinion, the native court erred in ordering an account. It is well a settled principle of native law and custom that junior members of a family cannot call upon the head of the family for an account."

(The emphasis is mine.)

It is remarkable that Korsah J. (as he then was) who delivered the earlier judgment of the court in Abude v. Onano (supra), where the so-called immunity rule was very widely stated concurred in the narrow **[p.696]** statement of the principle confining it to junior members in accordance with the correct Sarbah statement and the true Pappoe v. Kweku ratio. It seems to me therefore that all the authorities which have relied on the wider statement in Abude v. Onano had in the circumstances ignored the rank of the plaintiff member of the family, thus blurring the senior/junior dichotomy of Sarbah in the family set up and must therefore be considered wrong.

Three years after this case, at the Land Court in Accra, van Lare J. (as he then was) decided the Ga case of Katai v. Katai and Abodin (1956) 1 W.A.L.R. 151. It was a claim by the plaintiffs, who were the children of a Ga man who died intestate, against the defendants, the other children of the deceased, for an account of rents of a house, the self-acquired property of the deceased. The children were issues of a six-cloth marriage who had taken possession of the house and arranged among themselves that the defendants should manage the house and collect the rent accruing therefrom for and on behalf of all the children. The action was brought by the aggrieved plaintiffs to compel the defendants to render accounts. The head of family who was the niece of the deceased subsequently joined the suit as co-defendant. van Lare J. (as he then was) dismissed the action and entered judgment for the defendants. The ratio decidendi deducible from his judgment would seem to be:

(1) The plaintiffs as children were not competent to maintain an action because the head of family alone could sue and be sued as representative respecting claims on the family possessions and that Laryea v. U.T.C. (1931) D.Ct. '29-'31, 122 at 125 is authority for the proposition that the head of family in whom the property vests in trust for the family is the proper person to bring action with respect to the family property.

(2) The plaintiffs' action was misconceived because "the head of a family is not liable to account" on the apparent authority of the statement of Gardiner Smith Ag. J. in Pappoe v. Kweku (supra) that "an action of accounting is unknown to native law."

The rights of Ga six-cloth children as had been stated in the dubious West African Court of Appeal cases of Mary Vanderpuye v. Botchway (supra) and Wellington v. Papafio (supra) were restated although their authority was, as I have already pointed out, eroded by the subsequent decision of the Privy Council in their 1956 opinion in Vanderpuye v. Botchway (supra), which unfortunately had admittedly not then been decided by the time van Lare J. (as he then was) delivered his judgment. It seems to me that the ratio of Katai v. Katai case **[p.697]** (supra) is unsatisfactory since the correctness of the proposition that the head of family is not the only person who can sue in respect of the family property was not impugned in any of the courts that decided the Vanderpuye v. Botchway case (supra) as it ascended the courts from the native court right through to the Privy Council. In fact, the right of children of six-cloth marriage to sue in appropriate circumstances would seem to have been specifically conceded in the said Vanderpuye case (supra) in all the courts. In the circumstances the inherent proposition sponsored apparently by the van Lare ratio that the successor of an intestate

cannot sue the family head for account is faulted by the decision of Wiredu J. (as he then was) in Annan v. Kwogyirem (supra).
Furthermore the bald statement of Gardiner Smith Ag. J. that an action of accounting is unknown to native law is with respect clearly erroneous. Presumably he thought the action of accounting is peculiar to the English common law. I have already considered the customary law remedy of accounting when I referred to the unreported decision in Karaba v. Quansimah (supra). If reported cases are necessary to buttress the principle, then Quassua v. Ward (1845) Sar. F.C.L. 117, the very first case reported in Sarbah's Law Report of Decided Cases (3rd ed.),—DeGraft v. Mensah (1871) Sar. F.C.L. 125 and Sackie v. Agawa (1873) Sar. F.C.L. 126 demonstrate that "an action of accounting" is not foreign to our customary jurisprudence. The three customary law cases I have cited were decided long before the Supreme Court was established in 1876. The last two were decided before the time of Chalmers, the Judicial Assessor, and in the last case the principle was clearly stated at 126 that:
"On a discontinuation of marriage, accounts are gone into between the husband and wife as to their separate expenses, and a balance is struck, which becomes payable by the one on which it lies."
It is interesting that in the Katai v. Katai case (supra) the assessor dissented from the judgment and gave as his view that the action properly lay against the co-defendant as head of the family to account to the plaintiff because in his view as reported at 157:
"the co-defendant has utterly failed in her duties according to Native Custom and as she can be removed from office for lack of management, she is accountable in the circumstance to the plaintiffs and must therefore give account of her stewardship."
I think Katai v. Katai (supra) was decided per incuriam for its ratio contradicts the applicable Ga customary law.
[p.698]
Heyman v. Attipoe (supra) is an Anlo case and was an appeal from a decision of the Anlo Native Court in favour of the defendant in an action for a declaration of title to land, an order for possession and for an account. It is not necessary to refer to the facts. Ollennu J. (as he then was), relying on Abude v. Onano (supra) and apparently on pronouncements of the courts on the Akan line of cases, laid down the law applicable to this Anlo case without any reference whatsoever to the very important and relevant Anlo case of Vidal Tamakloe v. Chief Attipoe (supra) in which the West African Court of Appeal had made authoritative pronouncements on the Anlo customary law involved.
Ollennu J. (as he then was) said at 88:
"By native custom a member of a family cannot sue the head of family for accounts. The authorities are many on the point; One of them is Abude and Others v. Onano and Others. The plaintiff's claim for account must therefore fail.

Again, by native custom the head of family is the proper person to have charge of and control of the family land for and on behalf of the family. A member of the family cannot maintain an action against him for recovery of general family land in the possession of the head. The only instance in which he can maintain an action for recovery of possession against the head is when the head wrongfully takes possession of a portion of the family land which the individual member or a branch of the family has reduced by one of the customary methods, into his possession, i.e. land over which the individual member or branch of the family has established a usufructuary title."

In so far as Anlo customary law was overlooked and the unsatisfactory ratio in Abude v. Onano (supra) was resorted to in the case, I think Heyman v. Attipoe (supra) which is one of the cases specifically relied upon by the Court of Appeal in formulating its general immunity rule must be considered, with respect, to have been decided upon erroneous principles of law.

In the subsequent case of Borketey Osonoware v. Nii Odai Ayiku II (supra) a Ga case decided by the same judge on 27 July 1962, he emphasised and offered a rationale for his view, still relying on the unfortunate Abude v. Onano (supra) ratio when he said:
"By customary law as laid down in Abude v. Onano ... while ... a head of family continues in office he cannot be sued in Court for accounts of . . . family funds which he controls; one of the reasons for this rule of customary law is that the funds are the property of the stool or the family; and the proper person to sue in respect of them is the head ... of family ... Therefore if it is **[p.699]** sought to get the holder in his individual capacity to account, he must first be removed from office; having been removed from office he becomes liable in his individual capacity to hand over the property of the . . . family which he held [over] to his successor ... It is then and only then that he may be sued ... to account for the ... family property."
I think this view of the law is faulted by many cases which demonstrate that under Ga customary law while a head of family is in office, he can be sued for account depending on the circumstances and the status of the plaintiff. There are also numerous cases which also show that other persons apart from the family head can under the appropriate circumstances sue to protect family property. There are decided cases against the Ollennu proposition of the Ga customary law on accountability, some of which I have already referred to in this judgment and which show that, that is not, with respect, a correct statement of the true Ga customary law on accountability.
I suspect that the Ollennu thesis that to sue the head of family he must be first removed is predicated on his interpretation of Sarbah's second paragraph where he said: "If the family therefore find the head of family misappropriating the family possession and squandering them the only remedy is to remove him and appoint another in his stead."' (The emphasis is mine.)
I have already canvassed in its context the meaning of this paragraph in this judgment by considering the linguistic significance of the place of the word "if" in juxtaposition to "therefore." It is the use of the words "the only remedy" that is in issue now and seems to be the reason for the Ollennu construction. Clearly the use of those words can, with respect, hardly justify the Ollennu meaning. Taking the head of family to court or recourse to any other action can hardly produce a remedy if the discretionary power of the family head is to be still inviolate; since the complaint of the family member is about the manner the head's power is being exercised, the family head's power being discretionary cannot under the customary law be controlled outside the domestic forum, if the continued misappropriation is to cease. I think if the misappropriation is definitely to cease, then Sarbah's formulation is unexceptionable: "The only remedy is to remove him."
I find support in this viewpoint by considering Sarbah's introductory remarks at 78 of his book: " . . . the head of the family has the moveable ancestral property in his absolute control; if, therefore, the family find he is misappropriating, wasting, or squandering the ancestral fund, it is in **[p.700]** their interest to remove him at once and appoint another in his stead."
(The emphasis is mine.) I do not think the Sarbah statement pre-empts in any way the right of a member, particularly a senior member, in appropriate circumstances to sue the head of family for account.
The last case is Annan v. Kwogyirem (supra). It is the fifth case cited by the Court of Appeal to support the so-called immunity rule. The facts are not necessary. It is an excellent judgment but clearly inapposite because far from supporting the rule, its ratio decidendi was a concession to a right in the customary successor, as such successor, to sue the head for account. It rightly confined the Sarbah statement to "junior" members as Adumua Bossman J. (as he then was) had characteristically done in the unreported case of Fynn v. Koom, High Court, Cape Coast, 20 February 1960, unreported.
It is noteworthy also that in Annan v. Kwogyirem (supra) the case of Pappoe v. Kweku (supra) was not even cited although the facts were to all intent and purposes almost on all fours. The

plaintiff in the Pappoe v. Kweku case (supra) was the only surviving brother of the full blood of the intestate and in contemplation of the customary law he would seem to be the customary successor. If indeed he was, then the case was indistinguishable from the Kwogyirem case (supra) in which the customary successor was held entitled to pursue an action for account. In my view if the ratio decidendi in Kwogyirem (supra) is right, and I think it is, then on the assumption that the plaintiff in Pappoe v. Kweku (supra) was the customary successor, then Pappoe v. Kweku will be considered to have been decided per incuriam. Of course, if the plaintiff was not a customary successor and was just an ordinary member of the family asking for account then the case is unexceptionable.

Annan v. Kwogyirem (supra) does show conclusively that there is in fact no such thing as a family head's immunity from suit in our customary laws. Indeed, a close study of the famous Sarbah statement at 90 of his book and the case law does reveal that in fact there is no peculiar unaccountability principle applicable to all family heads in our heterogeneous customary laws. What is alleged to be a customary law doctrine of unaccountability is nothing but a specie of a principle of universal application that a person who is not an accounting party is not amenable to a suit for accounts.

In the customary laws of most of our tribal communities, where family property is in the control and management of a head of family in trust for himself and other members, all those members who by custom **[p.701]** have power to give their consent or approval or be notified before a valid alienation of the family property can be made, can institute action for account, if disposition of family property are made or contemplated in violation of their customary law rights. In the Akan communities the senior members have this power whereas junior members do not have it and this is the reason why the Sarbah statement is confined to junior members. In the Anlo area it seems the head of family is generally a custodian of the family property in trust for the children and he has himself no interest in the property. In the circumstances the right of the beneficiaries to sue him for account accords with the principle that he is an accounting party.

With regard to the customary laws so far discussed it must be appreciated that among the Akans a man dying intestate and possessed of self-acquired property is not inherited by his children at all. They have thus no interest or share in his self-acquired property except a right to live in his house during good behaviour. This is because succession or the right to such property is traced exclusively in the female line through the mother of the intestate and her issues, namely uterine brothers and sisters and issues of such sisters. The Ga custom on the other hand is more complex. While in the Ga customary law succession is also traced through the female line in the same manner the question of the right of children of six-cloth marriage as distinct from those of two-cloth marriage living in the house during good behaviour does not arise at all. They live in the house as of right and they also inherit the property in conjunction with the heir and the property cannot be disposed of without their consent. The Anlo customary law however recognises the children as the only rightful heirs; they inherit the property equally and thus a head of family who is not one of the children is a trustee managing the property for the children exclusively and the property cannot be disposed of without the consent of the children.

Jackson J. in Tamakloe v. Attipoe (supra) at 384 exploded the idea which seems to run through the majority judgment, that the so-called immunity doctrine is a rule of "universal application" and that the case law "is a further illustration of the universality of the doctrine." In Tamakloe v. Attipoe (supra) at 384 he said:

> "Clearly in cases arising under Akan or Fanti law where the interests of the family are so diverse and unequal, and where the rights of the varying degrees of relationship have to be taken into account before the amount of support to which each member may be assessed then as has been held, no member can claim an account from the head of the family. His remedy can only be **[p.702]** obtained by the removal of the head and not until then is the head liable to account.

But in cases arising out of the Ga law and where the rights of children of a six-cloth marriage in a 'right of support in conjunction with the other members of the extended family is traced through the female, then it seems, upon the decision given in Vanderpuye & Ors. v. Botchway & Ors. that an account may be ordered and was so ordered by the learned Judge in that case. In that case the defendant, as head of the family had been in exclusive possession since 1935, without admitting them to a share in the rents and profits and they claimed a declaration of their share, an account of all the rents and profits of the estate since 1935 and payment to the plaintiffs of their share thereof and the learned Judge's decision 'that the children were entitled to all the rents and profits as would be shown by the defendant's account' was upheld by the West African Court of Appeal in a judgment delivered by Coussey, J. as recently as the 8th March, 1951. "

The Ada custom involved in Amekoo v. Amevor (supra) would seem to be a specie of the Ga six-cloth variety. Its ambit and scope is not necessary for a decision in this case; suffice it to remark that it clearly supports the accounting party principle I have enunciated in this judgment. Thus the only conclusion derivable from the study of all the cases is that a head of family becomes an accounting party to all those with the customary right of inheritance in respect of self-acquired property of a person dying intestate. The notion of unaccountability is as anathema to the customary law as it is against public policy and the spirit and letter of our old and new constitutional law and order.

I have shown that the rationale of the rule gratuitously offered by Mr. Justice Ollennu is with respect based on a misapprehension of the "only remedy" phrase used by Sarbah. Jiagge J.A.'s proffered justification for the rule adumbrated on by the Chief Justice is in my respectful opinion unfortunate. To consider appearing before a court of justice as apparently infra dignitatem is a concept which casts a slur on the honourable nature of our functions and undermines the integrity of the judicial process in a manner subversive of the judicial order prescribed in section 1 (1) of P.N.D.C.L. 42. The reluctance to appear becomes hypocritical when it is only invoked when the liability to render accounts is involved.

In the Ga case before us the plaintiffs are certainly not junior members, they are heads of two branches of the family and are therefore considered important and "senior" members of the family. Their statement of claim reveals shocking dealing with the family **[p.703]** property by the defendants which if not checked may end up with the dissipation of the family property; dealings which the defendants contrary to the customary law, have carried out without the consent of the plaintiffs who are senior members of the family. The extravagant defence put up on their behalf is, as I have already indicated, that no "member of the family however important or any group of members however large" can call on the first defendant to account, and that he "has absolute discretion in the disposal of family funds including land." The blatant submission is that "he can even pay family moneys into his personal account".

Under Ga customary law as the Ga cases reveal, the head of family cannot deal or dispose of the family property without the consent of the senior members of the family. The senior members of the family are trustees with the power of consenting to dealings with the family property. They have a customary law duty as such trustees to see that their power and that of the head are exercised in such a manner as, inter alia, to prevent the family property from being misappropriated, wasted or squandered. The head of family vis-à-vis the senior members is therefore an accounting party. It is said that there is a customary law rule that denies them access to the courts to enforce their right to protect the family possessions. In a court of equity such a rule will be considered a shield for flagrant breach of trust and I do not think a rule that countenances such a breach of trust so inconsistent with equitable principles can survive in a customary court of law as a customary rule. As Parker J. said in Johnson v. Clark [1908] 1 Ch. 303 at 311:

"... a custom to be valid must be such that, in the opinion of a trained lawyer, it is consistent, or, at any rate, not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system."

The alleged rule flaunted before us is certainly against public policy and undermines the integrity of the judicial process as is enshrined in section 1 (1) of P.N.D.C.L. 42. In the unreported case of Tamakloe v. Attipoe (supra) it will be recalled that as far back as 1953 when a defendant claimed to rely on this so-called rule, Coussey J.A. speaking for the court repudiated the claim and castigated the rule as contrary to public policy. He said: "If the native customary law were as stated by the defendant I consider that to apply it to the present case would be contrary to public policy."

The operation of such a rule will not be compatible with national aspirations inherent in the need to infuse probity and accountability into the public and private lives of the populace as well as the necessity to discourage corrupt practices and abuse of power whether discretionary **[p.704]** or mandatory as would seem to be prescribed by sections 1 (1)(c) and 61 of P.N.D.C.L. 42.

I am firmly of the considered opinion that there is in point of fact no such rule as can be legally and legitimately elicited from a consideration of any authoritative text-writers or any of the cases I have discussed in this judgment and I have not been made aware of any other cases or lawful authority sponsoring any such monstrous rule. If indeed for purpose of argument, there is such a rule and it has allegedly "crystallised and solidified into a rule of customary law" as the erroneous ratio of Abude v. Onano (supra); shows, and the majority judgment would seem to indicate, then it is not in consonance with the said provisions of P.N.D.C.L. 42 and consequently it will not debar the plaintiffs from instituting their action. In the result it will be a wrong rule and it will be right for us to depart from it as article 116 (3) of the Constitution, 1979 which has been saved by section 9 (1) of the Proclamation, 1981 enjoins us to do. The article, inter alia, reads: "The Supreme Court may ... depart from a previous decision when it appears right so to do."

In the circumstances, I share and adopt fully the view which the Chief Justice in his usually inimitable way so nobly expressed in his judgment where, recognising the outrageous consequences of the supposed rule, he reminded us of our responsibility when he said at 659, ante:

"We have constitutional authority to refuse to be bound by a precedent which injures the innocent, benefits the guilty and puts a premium on blatant breach of fiduciary duty. To do otherwise, would be an exhibition of judicial inertial wholly indefensible in our day and age."

So wholly indefensible indeed is the alleged rule of law, in contemporary Ghana, that speaking for myself, I will not be a part of any such decision that sponsors this so-called rule which perpetuates and probably will continue to perpetuate these evils which the Chief Justice so honourably deprecates.

In this respect, quite apart from a consideration of the true ambit of the doctrine of judicial precedent, it is quite obvious that by virtue of article 116 (3) of the Constitution, 1979 the legislature has given exclusively to the Supreme Court ample discretionary power to avoid and thus depart from judicial precedents when it appears right to do so.

In its traditional setting, it is not every pronouncement of an appellate or higher court that is binding on lower courts by virtue of the doctrine of judicial precedent. It is rather the ratio decidendi of the case logically and demonstrably supporting the decision that is so binding on **[p.705]** a subsequent lower court: see Harlley v. Ejura Farms (Ghana) Ltd. [1977] 2 G.L.R. 179 at 212; and Osborne v. Rowlett (1880) 13 Ch.D. 774 at 785 per Jessel M.R.

It is for this reason that in Asiedu v. The Republic [1967] G.L.R. 589, Amissah J.A. sitting as an additional judge of the High Court, refused to follow the decision of the Court of Appeal in Owusu v. The State [1967] G.L.R. 435, C.A. It is also for the same reason that while I was a High Court judge although I valued decisions of superior courts, I nonetheless refused to

follow such decisions of superior courts whenever I thought those decisions were wrong, if their ratios did not support the decision, in spite of the fact that "in our jurisprudence precedential value is attached to decisions rendered."

There are two schools of thought that emerge from a consideration of the immunity principle. Each school of thought has eminent jurists as its adherents. The school that saw nothing legally wrong with the liability of the head of family to account is made up of the following illustrious jurists: (1) Lord Oaksay, (2) Lord Tucker, (3) Lord Cohen; (4) Lord Keith of Avonholm, and (5) Mr. L. M. D. de Silva. They gave the Privy Council judgment restoring the decision of the Ga Native Court B which was given on 25 November 1947 in Vanderpuye v. Botchway (supra) to the effect that the head of family was amenable to account at the suit of the children of the intestate. Others are (6) Blackall P.; (7) Lewey J.A. with (8) Coussey J. (as he then was) who decided the case at the West African Court of Appeal. Furthermore, Coussey as a justice of appeal subsequently affirmed the accountability principle in Tamakloe v. Attipoe (supra) with (9) Foster Sutton P. and (10) Windsor Aubrey J.

Those who took the contrary view and supported the immunity principle, also illustrious jurists, are (1) Crampton Smyly C.J.; (2) Hall J.; and (3) Gardiner Smith Ag. J. in Pappoe v. Kweku (supra); (4) Harragin C.J., (5) Jucie-Smith C.J.; and (6) Korsah J. (as he then was) in Abude v. Onano (supra), (7) van Lare J. (as he then was) in Katai v. Katai (supra); (8) Ollennu J. (as he then was) in Heyman v. Attipoe, and (9) Adumua Bossman J. (as he then was) in Fynn v. Koo (supra).
Clearly whichever school of thought a judge is persuaded to follow, his decision will in effect be a repudiation of the views of many illustrious and eminent jurists in the opposing camp. Under such circumstances even an inferior court is free to choose one line of cases and ignore the other cases sponsored by other illustrious judges.
It appears to me that the discipline and beauty of the adjudicating process lie in the fact that a judge's decision is supposed to be founded on well considered and articulated reasons. It should not be capricious **[p.706]** nor demonstrably erroneous in law. If therefore the reason proffered by any judge do not support his decision, I am afraid the decision cannot be saved by considering his status however lofty it may be, and the experience of the judiciary in almost all the common law countries bear convincing testimony to this undoubtedly trite legal position. The jurisconsulti of Roman jurisprudence is not part of the common law principles applicable in this country.

I have taken great pains and devoted considerable time and energy in studying and investigating as fully as I can, the alleged customary law in this case, because I recall the advice of the great Sarbah in August 1896 when he said in his Fanti Customary Laws (3rd ed.), XII:
"…I am certain, that it is only by patient investigation and intelligent study, that the Customary Law can be well defined and consolidated. Customary Law and other Usages recorded by Bosman, as existing two centuries ago, have not altered to any extent up to the present day, although one knows that, as the mind of a community becomes enlightened, its legal convictions will change, and this will constitute a change in its Customary Law as that law is, from time to time, recognised and enforced in local tribunals."

Is this new theory of unaccountability post-dating the Supreme Court Ordinance an enlightened change reflected in the hearts and convictions of our people? I am unable to believe it, when I am a witness to the extraordinarily persistent convulsions in the body politic engendered by arrogant resistance to accountability in public and private life leading to remarkable and repeated structural and revolutionary changes in our attempts at creating an enlightened constitutional order responsive to modern civilisation. How can I believe it when

I am aware that all these painful and distressing experiences of the country are all the result of a concerted effort to dignify the principle of accountability and enshrine it as a norm to satisfy national aspirations requirement in accordance with the letter and spirit of a fundamental law that now rests in P.N.D.C.L., 42.

In view of the legal position as I see it, I am of the opinion that the judgment and order of the Court of Appeal should be vacated, the ruling of the High Court restored and the case ordered to take its normal course. In my judgment the appeal should be allowed with costs. I have a few last remarks which my conscience will not permit me to withhold and which therefore I wish respectfully to make. Since this is a dissenting judgment, these remarks of mine are of course clearly obiter and I therefore have no inhibitions whatsoever in making them **[p.707]** particularly as they represent my candid view of the subsisting legal and constitutional position. I wish to put on record that the judgment of this appellate Supreme Court which is sanctioning what in my view is a discreditable and dubious so-called doctrine of unaccountability is a three to two majority decision. If a subsequent Supreme Court differently constituted, as seems to happen often, were to consider the rule in a future case and three of the panel members are persuaded that the ratio sustaining the rule is not right, for any reason or for the reasons I have here advanced, then there will be no legal impediment to their upsetting the decision given here today.

Now, it is on account of this type of situation that in Hammond v. Odoi [1982-83] G.L.R. 1215 at 1246, S.C., I said of such decisions:

> "In my view, such decisions because they are fortuitous, need to be given considerable thought in order to eliminate, if it can be done, the lotto element of luck implicit in them and to rest the decisions on a sound ratio decidendi. Indeed cases of this sort are poor precedent for the lower courts and I think it is therefore desirable in the interests of the doctrine of judicial precedent and of certainty and consistency in the law that if possible members of the final appellate court do not participate in the decisions of the lower courts; on the contrary it is essential for the full complement of the court to handle appeals."

I must remark that this view of mine has nothing to do with the status of a panel member sitting either as of right or by invitation. My view has nothing to do with past politics or the sheer accident of judicial appointments, nor has it anything to do with the competence and integrity of any member of the judiciary sitting at the Supreme Court. I made those remarks when the full complement of the Supreme Court was seven and I thought empanelling five and leaving out two, even if it is done for good reasons, is conducive to a situation where consistency and certainty will elude the Supreme Court having regard to the constitutional mandate to depart from our decisions if to do so is right. The same situation will also develop if the membership for decision making shifts as seems to happen often.

For this reason I see nothing morally wrong or ethically unbecoming in expressing my opinion that the practice of the Supreme Court sitting with some of its actual members absent is with the greatest respect conducive to this deplorable state of affairs and should be discouraged. I intend no disrespect to any person or authority when I say that in all cases before the Supreme Court, it is my well considered conviction that the incumbent members have a constitutional obligation to sit unless any of them is incapacitated from sitting by reason of **[p.708]** ill-health, or is abroad or otherwise not available or for lawful reasons he excuses himself. This is the practice in the United States Supreme Court and with respect, the true constitutional position in this country. Indeed, since by law the composition of the Supreme Court is made up of a specified number of persons thereof, no person or authority has any right to constitute the Supreme Court for the determination of any case or appeal in such a

manner as in effect to supplant a Supreme Court judge from his membership of the Supreme Court in the said case or appeal. Of course if for determination of any particular case or appeal, the requisite quorum is not available from the existing members of the Supreme Court due to the absence of a member or members for the reasons I have indicated herein then to obtain a quorum it seems section 19 of P.N.D.C.L. 42 permits a Court of Appeal judge to be invited to provide the working quorum. That section is no authority for so to constitute the Supreme Court as to nullify the obligation of a Supreme Court judge to participate in the decision making process of the court.

In my respectful view, in the existing state of the law, a member of the Supreme Court cannot be deprived of his constitutional right to sit, nor can any person or authority claim the privilege of permitting him to sit by invitation. He is entitled to insist on sitting as of right for the determination of any case or appeal whatsoever that comes before the Supreme Court.

JUDGMENT OF FRANCOIS J.A.
I have been privileged to see beforehand the erudite judgments of my Lord the Chief Justice and my brother Sowah J.S.C. and must express regret that in such an important appeal as this, unanimity has not been possible. It is my further misfortune that my views on the matter and those of the learned Chief Justice are inexorably divergent. I derive comfort however from the fact that a solid phalanx of past and present members of the bench have had no hesitation in acclaiming the universality of the immunity rule to which I subscribe.

My main disagreement with the learned Chief Justice's opinion stems from his contention that two opposed lines of decisions exist which leaves the court an unfettered power to emblazon a new path aided by the torch of equity, and armed with the constitutional authority of the Constitution, 1979 to sever any attachment to hidebound decisions.

With respect, I think the immunity principle has been upheld throughout the cases and the judges, while affirming the doctrine, have been careful to distinguish where the principle did not apply. True, some textbook writers would wish a change in the law but that desire in itself is proof of their appreciation of the universality of the rule.
[p.709]
My stand then is one of respectful agreement with the opinion expressed by my brother Sowah J.S.C. That judgment sets out with admirable clarity the law on the family head's exemption from the legal process to account, and had it not been for the traditional requirement that separate opinions should be delivered where the lack of unanimity spans so wide a chasm, I would have been content to merely concur.

This appeal then exposes for critical examination the question of the head of family's immunity from court actions for accounts—the immunity principle as the learned Chief Justice so aptly terms it. It is necessary at the outset to dispel the notion that alliance with the protagonists of the doctrine betrays a callous disregard of the interest of the family and demonstrates a perverted delight in encouraging the dissipation of family assets. The argument invariably propounded is that the failure of judges to put legal brakes on the head's wrongdoing by the non-exercise of the power of scrutiny has encouraged breaches of the head's financial responsibilities, sometimes equated with a trustee's duty. These attacks which legal writers indulge in, invariably degenerate into charges that judges have displayed a cynical insensitivity to the plight of the lowly placed family member who would have been recognised as a cestui-que-trust in other jurisdictions and received aid from the courts. Such attacks have sometimes acquired regional and ethnic dimensions even to lengths that deny the doctrine any universal application or negate its existence in customary law altogether.

The traditional stand which is derived from the judge's own appreciation of the customary law, is rooted in a basic awareness that an examination of family accounts and an inquiry into a head's stewardship is best done in the domestic forum which, a family meeting provides; the inquiry itself being conducted by the head's peers. At such a meeting the cognoscenti of custom would be abler and better judges in the evaluation of reasonable expenditure, and fair disbursements of family assets in the maintenance, upkeep, and advancement of family interests. That caucus would be best equipped to fix a permissible level of expenditure for the due performance, of customary and ceremonial rites and functions. More importantly, that forum would protect the primacy that headship connotes and shield the institution from the onslaughts of disgruntled members, or at least keep the lid firmly shut on any disunity they may foment.
There is almost a constant refrain in the old cases that the immunity principle, is neither unreasonable nor against good conscience. I would have thought that judicial pronouncements concluding that a principle was sound and reasonable, encapsulated a considered examination of the matter and though one is entitled to differ on the merits of the claims to soundness or reasonableness, one does less than justice to judges to consider such decisions as per incuriam or shorn of **[p.710]** empathy for the indigenous family unity. An examination of the rationale of the doctrine is called for if only to demonstrate that the rule rather than the doubts cast on its viability by the trial judge, constitutes a more enlightened and reasonable approach to the quest for justice.

The facts which I turn to now, have been fully set out in the earlier judgments referred to. I shall consequently be as skeletal as possible. The parties to the appeal are all members of the Mantse Ankrah family which consists of three sub-branches, namely the Ankrah, Ayi and Okanta families. They have an overall head. The first and second plaintiffs sued as heads of the Ankrah and Ayi sections and the first defendant and the second, are sued as overall head and head of the Okanta branch, respectively. The writ claims an account of moneys received by the defendants and complains about their financial maladministration. The defence maintain that every act of the head had been in pursuance of explicit recommendations of the family at a family meeting to which the head had regularly accounted. The defence challenges as a matter of law, the competence of a suit for accounts against a family head. The writ and claim demonstrate a split right down the middle of this family which public ventilation in a legal suit could hardly do less than excoriate.

The issue over which a pronouncement is sought had its legal genesis from the researches of Sarbah. That learned scholar wrote of the head of family's liabilities in his Fanti Customary Laws (2nd ed.) at 90 as follows:
"If the family, therefore, find the head of the family misappropriating the family possessions and squandering them, the only remedy is to remove him and appoint another instead; and although no junior member can claim an account from the head of the family, or call for an appropriation to himself of any special portion of the family estate, or income therefrom arising, yet the Customary Law says they who are born and they who are still in the womb require means of support, wherefore the family lands and possessions must not be wasted or squandered."
This passage, simple as it appears, has been the subject of a variety of interpretations. Quot homines tot sententies. The passage clearly states that a junior member cannot claim "on account" or "call for an appropriation" of a share, "or income" from the estate. It must be noted that the preposition employed in relation to account, is "on" and not "an." There is a transparency of meaning if the significance of "on" is appreciated and the whole passage is read conjunctively. There is the clearest prohibition on the junior member to call for a moiety of the undivided family estate, or the allocation of a proportion of family funds as of right. The application of the ejusdem generis rule in that **[p.711]** collocation which sets out the

impropriety of the junior member seeking an aliquot share of the family estate, is with respect, the key to the passage. The difficulty, if any, is only one of linguistics, nothing more. Put another way, all family members have an interest in the family estate but this remains an undivided share. Consequently, a junior member cannot defy this absolute customary ban to supplicate a share of either income or estate. The passage continues with a warning to the head that his financial responsibilities extend beyond the living to the unborn so he should not waste the estate; the fact that a junior member cannot claim a share as of right should not make his share lapse into the kitty to be squandered by the head. There is an obvious warning against devastavit with the attendant sanction, "the only remedy", of removal.

Read in that light, it is easy to see where the trial judge erred. His view can be paraphrased as follows; Sarbah says junior members cannot sue for accounts. Since junior members are singled out and constitute the only category expressly prohibited, no impediment can attach to a suit instituted by senior members. The conclusion therefore, so goes the argument, is that since the plaintiffs are senior members, indeed branch elders, there can be no impropriety in their initiating a suit. I must reject this interpretation as a non sequitur and an unfortunate misreading of the context. This is manifestly clear in the opening lines of the passage from Sarbah where the head's immunity is unequivocally stated, and the only available remedy open to all is as equally clearly expressed. It then becomes a curious twist, born of fallacy and not logic, to deduce from Sarbah's statement that juniors cannot, but seniors can sue.
Leaving the consideration of the passage for a moment and taking an analogy from customary practice elsewhere, it is well known in customary law that stool occupants or chiefs are created by kingmakers who have the correlated power to depose them. The adage being that those who make chiefs have the sole right to unmake them. The junior members of the family do not create the head. It is the elders who do. Consequently it is the elders who may challenge his malfeasance and depose him if they find him wanting. Junior members can have no pretensions to a right to call their head to account under any circumstances, but they have the right to remove the head when they are satisfied he is squandering family funds. When he is deposed, he becomes a different creature altogether, an ex-head whose immunity has been withdrawn and is consequently amenable to a law suit for accounts.
In sum then, Sarbah's statement of the customary law rules out entirely any legal suit against a head for account while in office. It restricts inquiries to the family forum where the ultimate sanction of **[p.712]** deposition may be imposed for "misappropriation" and "squandering of family possessions. Borrowing again from the analogy of a chief's deposition, customary law allows complaints by juniors to elders or kingmakers as the case may be, who in turn set in train the inquiries contemplated for deposition. The juniors therefore are not left out in the cold without relief or remedy. They must channel their grievances through their elders who are constitutionally clothed to fight their cause.

There is nothing fundamentally wrong in restricting the venue of inquiry into the head's maladministration to the cloistered sanctuary of the domestic hearth. In such a family enclave, a general consensus is promoted and the steps necessary to be taken to resolve any questions, are agreed upon by the family as a whole. Factionalism which disgruntled and fractious members might indulge in or fan, can be suppressed by the collective weight of the family before irreversible damage by publicity is done. By this course, the dignity of the office of head and the unity of the family is preserved. This is important as the homogeneity of the family unit which in the past had been an overriding consideration and which is presently under siege with the uncritical imbibing of western culture and influences may be reserved. The flexing of muscle by minority elements in families as an expression of their dissatisfaction with their head's performance, is a modern phenomenon marching in step with misplaced ideas of liberation. This incontinent clamour by dissentient elements in the family which would press family disputes into the open, virtually exposing the family's dirty linen to the public

gaze, is universally decried and the case law reflects the customary abhorrence of subjecting the head of family to the hurly-burly indignity and publicity of court litigation. It recognises that in some aspects of human conduct better results are achieved in the informal atmosphere of a family forum. It is this wisdom that informs the customary law and blazes a beacon through the old decisions. Thus in the locus classicus on the head's immunity Abude v. Onano (1946) 12 W.A.C.A. 102 at 104, the West African Court of Appeal held that:
"It is an accepted principle of Native Customary Law that neither a chief nor the head of a family can be sued for account either of state or family funds ... No individual member or even a section of the community is entitled to institute an action for account."
The court further stated at 104-105: "This native law is in our opinion reasonable and not contrary to natural justice or good conscience." An important passage from that judgment shows the mischief which the native law in its supreme wisdom sought to avert. The court put it this way at 105:
[p.713]
"It is inconceivable that any rate payer or group of rate payers could maintain an action against the president and/or members of a local Council whenever the said rate payer or group of rate payers believed that the president and/or his councillors have misappropriated council's funds: the proper persons to enquire into complaints of individuals or sections of the people are their elected representatives who are entitled to take the matter to a council meeting where by its resolution the council may give necessary directions. If this were not so, it would be possible for a member of rate payers who are opposed to a particular regime to maintain many suits against the president and councillors merely for the purpose of ridiculing them or bringing their administration into disrepute, and thereby make it practically impossible for them to perform their duties."
(The emphasis is mine.)
Before we leave Abude v. Onano (supra) it is interesting to recall this significant statement from the judgment at 104:
"Counsel for appellants admitted before us that he could not quote one case which has been brought in the Supreme Court against a chief and/or his elders and councillors to render account of Stool funds or Divisional Council funds. . ."
The institutions of chieftaincy and head of family are so alike in their incidence of rights and duties that to assert that any reference in the Abude case (supra) to a family head is pure obiter as the trial judge did, displays a lack of appreciation of the native customary law.
The passage in Sarbah quoted above has received scholarly attention. Ollennu J. (as he then was) in an article in the Journal of African Law (1971) Vol. 15, No. 2 at 152-153 expresses the view cogently, that unlike a beneficiary of a fund or a cestui que trust who is entitled to an ascertained share of the trust property, a member of a family has only a general undivided life interest in the family estate and so under customary law cannot seek an order for payment to him of any sums due from the family estate. The family member has no cause of action against the family head as he has no ascertained share upon which he can litigate in his own right as against the general communal right. This lack of a locus standi differs from the trust situation where a cestui que trust would be entitled to an order for payment of amounts found to be due upon the taking of accounts. The trust principle translated to the family set up would mean apportioning a share of the family estate which is as contrary to customary law at the attempt to equate the quasi-fiduciary relations of a head of family with a trust.
[p.714]
Again I am indebted to that indefatigable author, Ollennu J. (as he then was) for the following customary principle from his book Customary Land Law in Ghana (1962) at 139:
"But although the head of the family, while head, and the occupant of the stool, while still such occupant, cannot be sued for account of stool or family funds, that does not mean however that the stool or family have no remedy against the said occupant of the stool or head of family in his individual capacity when he misappropriates stool or family property.

The remedy of the stool or family is firstly to remove the said occupant of the stool, or the said head of the family from office. The moment he is deposed, he is no longer the lawful representative of the stool or the family and he becomes liable to hand over and account to his successor or the person or persons entitled by customary law to have custody and control of the stool property. The new occupant or the new head of the family or any individual or group of individuals authorised in that behalf by customary law, can then call upon him to hand over and to make full and proper account of all stool or family funds and other property which came into his possession during his term of office. In short, therefore, while the occupant of the stool or head of family, cannot be sued for accounts, because that is tantamount to a claim by the stool against itself or by the family against itself, the ex-occupant of the stool or an ex-head of the family may be sued for accounts."

One discerns in the opinion of the learned Chief Justice a leaning to the school of thought that the immunity principle is an incidence purely of Akan customary practice imbedded in the customary milieux of that ethnic group only. I regret another parting of the ways. With respect, the case law rather suggests that the principle has been applied without protest by various judges of various ethnic hues and I express no apology for dilating on this at length.

Dr. Kludze whom the learned Chief Justice cites, is an enthusiastic protagonist of the non-universality view. Dr. Kludze, however writes from the standpoint of the "Northern Ewe speaking people of Ghana" only, and not on behalf of all Ewes. What is more important a number of Ewe cases have exemplified the principle. Thus Jackson J. in Tamakloe v. Attipoe (1951) D.C. (Land) '48-'57, 378 echoed the refrain of immunity of a claim on "account against the head. However after his removal he would be liable to account." Katai v. Katai (1956) 1 W.A.L.R. 151 is another interesting illustration of this point. The facts must be stated briefly thus: Children who were entitled to rents accruing from an estate sued for their entitlements. The head of family was joined as **[p.715]** co-defendant in the suit. On the basis that the head only was entitled to sue and be sued on behalf of the family, the action was dismissed. But the point of interest was the observation of van Lare J. (as he then was), a distinguished jurist who hailed from Ewe land. He said at 156:

"I am disposed to think that upon the head of the family being joined as a co-defendant in the case the plaintiffs should have dropped their action; but they did not. Their statement of claim was filed as against the co-defendant as well claiming accounts and for an Order against her to pay to the plaintiffs what may be found due to them. On the authorities the head of family is not liable to account; that being so the plaintiffs' action, which has been fought to this bitter end, is in my view misconceived."

(The emphasis is mine.) In the course of his judgment, van Lare J. (as he then was) quoted from Pappoe v. Kweku (1924) F.C. '23-'25, 158 the following passage at 161:

"The appellant does not attempt to assert that Ga law imposes on the head of the family an obligation to account which is unknown to Fanti law . . . [I]t is a general principle native law ... that an action of accounting [against the successor] is unknown to native law."

(The emphasis is mine.)

Interesting also is the opinion of the assessor who was assisting in the determination of the Katai case (supra). He was a Mr. Codjoe who stated the view that is canvassed by those who do not accept the immunity principle. He said at 151:

" . . . the action properly lies against the co-defendant as head of the family to account to the plaintiffs because the co-defendant has utterly failed in her duties according to Native Custom and as she can be removed from office for lack of management she is accountable in the circumstance to the plaintiffs and must therefore give account of her stewardship."

van Lare J. (as he then was) was very curt with this attempt to subvert the known customary law. He said at 157:

"I am unable to accept the opinion expressed by the assessor. The Courts should not by any subtlety of reasoning or by any sense of morality attempt to weaken the well-established doctrines of the law which have long been acted on by the public and their advisers."
(The emphasis is mine.)
[p.716]
These sentiments have been echoed by Jiagge and Wiredu JJ.A. in the Court of Appeal judgment. We add our voices to the mounting diapason.
A few other examples may be quoted to show the universality of the doctrine. Amoabimaa v. Okyir [1965] G.L.R. 59, S.C. which confirms the principle, comprised a Supreme Court bench totally composed of judges from the Ga area. In Fynn v. Koom, High Court, 20 February 1960, unreported, the great Ga jurist and researcher, Bossman J. (as he then was) said:
"The latter proposition that the head of the family cannot be called to render accounts by junior members of the family has received so much judicial recognition as to be quite common learning now."
In Etuah v. Richardson (1948) D.C. (Land) '48-'51, 64 at 67 Quist J., a judge from the Ga area, stated his view on this question. He said at 67:
"This principle of the Native Customary Law has been pronounced by the Courts to be reasonable, and not contrary to natural justice, or good conscience; and they have given effect to it in many cases. One or two of the cases in which the principle has been applied may be mentioned. Sappor v. Amartey [(1913) Ren. 787] where it was held that a member of the family has [sic] no locus standi to bring an action for trespass against the head of the family who has [sic] resisted an attempt on the part of the plaintiff to appropriate to his exclusive use as an aliquot part of the common land. Pappoe v. Kweku [F.C. '23-'25, 158] in respect of which the following note appear in Griffith's Digest, at 4. 'Defendant being head of family took out administration of the estate of a deceased member: Held, that he was not liable to give an account of his administration to another member of the family, who was only a beneficiary, in respect of his membership.'"
The decision of the Full Court in Villars v. Baffoe (1909) Ren. 549 is to the same effect.
In Heyman v. Attipoe (1957) 3 W.A.L.R. 86 at 88 Ollennu J. (as he then was) whose roots are firmly imbedded in the Ga region, emphasised the point in a case that affected Ewes. He said: "By native custom a member of a family cannot sue the head of the family for accounts. The authorities are many on that point." In that judgment, Ollennu J. (as he then was) quoted a concession by a former Chief Justice whose legal pre-eminence cannot be doubted. He said: "Mr. Akufo-Addo, learned counsel for the plaintiff, conceded that the claim for an account against the defendant, the head of the family is not main- **[p.717]** tainable, according to native custom." The two beneficiaries of Mr. Akufo-Addo's concession were the head of family in the case, an Ewe, and his lawyer, the learned president of this bench, the Chief Justice. That was of course many, many years ago when the president was in the heyday of his professional career as a lawyer. Many a stream has passed under the bridge since then and the ardour of youth has yielded to the maturity of age, but I would have thought the result would have been more conservatism not less. I record this because scouring the report, I discern no disclaimer or dissent from the proposition of a head's immunity to account.

The criticism of Bannerman J. (as he then was) quoted by the learned Chief Justice seems a lone voice considering the number of his brethren who had no qualms in accepting the principle as universal. In any event, if Bannerman J. (as he then was) felt the principle had been applied per incuriam he could have rejected it. He felt bound because he could not resist the force of precedent. It is too late in the day to put a parochial complexion to the doctrine. Angu v. Attah (1916) F.C. '24-'28, 43 is authority for the proposition that customary law which has by frequent proof and consequent adoption by the courts become notorious, is automatically absorbed in the common law (see the last holding of the report).
It is in this sense that Ollennu J. (as he then was) could write in [1971] J.A.L. 132 at 160:

"Judicial decisions have established common customs within the Republic with respect to land tenure, succession and family law. It must be stated categorically that the common custom in these subjects declared by the superior courts as in other subjects form part of the Ghana Common Law as defined in section 17 of the Interpretation Act 1960."
The learned author further opined at 161 that: "The definition of customary law as rules of law applicable to particular communities in Ghana is inconsistent with the concept of the common law." (The emphasis is mine.)
Sarbah in the early chapters of his invaluable book, Fanti Customary Laws gives the reason for the universal application of the immunity rule. At 2 the author quotes the observations of earlier foreign writers:
"The language of the country is undoubtedly Fanti—this is the language spoken for general purposes and in every day transactions;—and it is a fact worthy of notice that Fanti is the lingua Franca of the Gold Coast and adjacent countries."
[p.718]
From similar sources he had traced Fanti links spreading throughout the whole country from "Assinee to the River Volta ... and beyond Ashanti"; no wonder the custom and traditions of the Fanti Akan had received wide acceptance.
Edmund Bannerman, a great solicitor of Ga extraction had co-operated with white judges in settling the customs of the people of the Gold Coast by proffering information on their questionnaires. Sarbah wrote at 109 of his book: "Bannerman's opinion relates specially to the Accra district but it will be noticed that the Accra customary laws differ very little from what have been explained here-in."
Turning to the case law once more, Nelson v. Nelson (1932) 1 W.A.C.A. 215 is a further illustration of the universality of the doctrine. The headnotes read.
"Some of the children of a deceased native brought an action for an account against a brother of theirs who had been appointed by the deceased, on his death bed, to look after their interests in his estate. Held that an action for an account lay against him as he was not the head of a family as that term is understood in native customary law, but a caretaker for his brothers and sisters."
(The emphasis is mine.) Nelson v. Nelson (supra) illustrates the principle that the head of family is not accountable in court. Michelin J. by ordering a brother to account to his brothers and sisters was very careful to state: "this is not the case of an action by a junior member of a family against the head of a family." It is clear that the learned judge appreciated the customary law that, such an action could not lie. The parties here also were Gas. For other examples in case law which are innumerable: see Ruttmern v. Ruttmern (1937) 3 W.A.C.A. 178 at 180 and Vanderpuye v. Botchway (1943) 13 W.A.C.A. 166.
The basic point which Fynn v. Gardiner (1953) 14 W.A.C.A. 260 establishes is that the order for accounts is not available against the head of family. In that case the president of the West African Court of Appeal stated at 261:
"We indicated, during the course of the arguments, that, in our opinion, the Native Court erred in ordering an account. It is a well settled principle of native law and custom that junior members of a family cannot call upon the head of the family for an account. Their remedy is to depose him and appoint another in his stead."
I turn now to the observation of Coussey J.A. in Tamakloe v. Attipoe, West African Court of Appeal, 22 June 1953, unreported, which was commented upon by the learned Chief Justice. My respectful view is that Coussey J.A. drew a distinction between those whose status **[p.719]** as proper family heads in the customary sense brought them under the immunity rule, and those who were merely fiduciary stakeholders. He emphasised the point that the head's immunity arose from the fact that he was also a beneficiary and as the heads in the Attipoe case (supra) had no beneficial interest in the estate of the deceased and their function was purely advisory and protective, they could not call in aid the customary immunity rule.

The great jurist, Ollennu J. (as he then was) explains that since the head also enjoys a part of the family estate he cannot while occupying at one and the same time the position of beneficiary and trustee, be amenable to a suit for accounts since he would be filling the contradictory roles of plaintiff and defendant simultaneously.

A lot of learning has gone into equating the trust concept with patriarchal obligations of the head of family. But the unique nature and amplitude of the head's powers and responsibilities make the trust doctrine of Anglo-American jurisprudence totally inapposite to the Ghanaian situation. It has already been noted that for the due performance of his multifarious duties the head has unparalleled discretionary powers, especially in the dispensation of largess which is necessary to ensure the advancement of members of the family in education, marriage, bereavements and the observance of festivals and customary rites. He bestrides the living and the dead like an awesome colossus communicating with the ancestors with rum—an almost daily occurrence with libations which turn into rivulets at festival time. The family would not think that wasteful, but a regular court might well think it ill-advised, extravagant or unnecessary. A perfect example is what has occurred in this present suit where doubts are cast on the legitimacy of expenditure for a Homowo festival even though there had been no previous protests.

When Sarbah says "the head of a family holds the family possessions in trust for himself and the members of the family", he is stating the factual position of a joint proprietary interest of head and family member. The use of the term "trust" in the context is certainly not in the wide connotation of western jurisprudence. Anyone combining in his person the two offices of executor and trustee under a will, may well be a beneficiary as well as administrator of the deceased's estate. But it will be of specific property, and specific shares. The distinction is important.

It is urged that situations sometimes arise where the principle of immunity must give way to less staid customary rules for the attainment of justice. Since customary law is flexible and promotes what is reasonable, the doctrine enshrined in Kwan v. Nyieni [1959] G.L.R. 67 must be pressed into service to enable an affected member of the family to sue the head for accounts to prevent the despoliation of the estate. So **[p.720]** runs the argument. Granted that Kwan v. Nyieni (supra) is the ultimate resort for family members denuded of the requisite locus standi to initiate suits to protect family property, the record in the present appeal shows that there were no exigencies that called for the application of the rule. I agree with the observation of Wiredu J.A. at 864 of the Court of Appeal decision that nothing was:

"pleaded by the plaintiffs to justify, the [High Court] seising itself with jurisdiction since the action on the pleadings is a straightforward case for an account against a head of family in respect of family funds in his hands. The pleadings of the plaintiffs fall short of creating an exception to the general rule which is now well-settled that generally the head of family cannot be sued for accounts. This principle of our customary law cannot be easily ignored by the court merely because it is being urged on them to do so."

I discern echoes of Sarbah in Wiredu J.A.'s conclusion which I respectfully applaud, that the courts should not "arrogate to themselves decisions which customary law and the common law have for centuries reposed in the families themselves."

A careful examination of the pleadings which have been fully set out in the judgments of the Court of Appeal, has failed to reveal any averment that the head had been summoned to a meeting purposely called to inquire into accounts and he had refused to attend—see Abakah v. Ambradu [1963] 1 G.L.R. 456, S.C. and Sappor v. Amartey (1913) 2 Ren. 787 at 788 where these mandatory requirements of the customary law are stated. If these issues had been raised in the claim, factual answers thereto would have been given and a clear issue on the applicability of the Kwan v. Nyieni (supra) rule would have arisen for determination. Thus in Botchway v. Solomon, Divisional Court, Accra 7 December 1935, unreported, where the head had defied his family and refused several calls to attend meetings, he was duly removed with the court's post facto blessing.

What however the pleadings disclosed in this case is the plaintiffs' obstructionism in the family. They may well have enjoyed no mandate from the principal members of their branch family and if the learned trial judge had not been too obsessed with a thesis to throw doubt on the established law, he would have ordered the joinder sought to determine the capacity or authority of the plaintiffs, which was as necessary and as preliminary an issue in the determination of their locus standi as the viability of the claim itself.

Many writers and judges have essayed to proffer a rationale for the immunity rule. Dr. S. K. B. Asante in his book, Property Law and Social **[p.721]** Goals in Ghana 1844-1966, bases the doctrine on the "ultimate accountability to ancestral spirits", and the punctilious accord of respect for the family head which customary law demands. The first justification should not be pooh-poohed as infantile. The family head like a chief is not only the paterfamilias of the living. But also of the dead and the unborn at any given time, during his occupancy of office. In so far as that principle has potency in the indigenous Ghanaian society today, I see no reason why its concept as a sanction to ensure strict accountability should be decried. One might as well condemn as obsolete the practice of communicating with the ancestral dead with libations and offerings at festivals. Indeed, the persisting manifestations of an attempt to keep alive links with dead ancestors should inform any fair minded and objective observer that to the indigenous Ghanaian the dead ancestors are around, to be respected, fed and obeyed. The fact that western culture debunks these concepts is no reason why we should set them at nought when evaluating known and current tradition and practice. It is not what one believes in, but what prevails; that is the customary law.

Dr. Asante offers this second reason at 115 of his book for the immunity rule that: "It was most unbecoming to arraign the head before a public tribunal…."; with the attendant mischief which Korsah J. (as he then was) saw in Abude v. Onano (supra). The same sentiment was expressed by Dr. Danquah that: "The head of a family in Ghana enjoys a general immunity from anything savouring of a public inquisition into his stewardship."

It is consequently wrong to think the body of authority from decided cases to textbook writers sing in concert for the application of the trust concept to the head of family's duties. The contrary seems discernible. Whatever their discipline, the wealth of material and scholarship from both sides of this intellectual divide, has made it clear that the immunity principle exists, and financial questions can be determined by the family itself at its cloistered meeting.

Turning to the Court of Appeal's judgment once again, Jiagge J.A. in a short supporting opinion synthesised the claim to immunity. In sum, the unity of the family which the institution of family nurtures and promotes would be eroded if the principle did not exist. The dignity of the head must be ensured. His discretion to manage estate funds for the benefit of the family must not be abridged by opening the floodgates to disgruntled members to bring frivolous actions. The learned judge blew a clarion blast that the courts should firmly resist all pressures to equate headship with a trustee's liability, She concluded (supra) at 866: "Taking action against the head of family while he is still the head, derogates from his authority as head and customary law rightly prohibits this."

[p.722]

Wiredu J.A. likened the head's immunity to the immunity a Republican President enjoys. I think the principle extends further than that. Any person placed in the position of head, be he president, headmaster or judge, who is hauled up before the court on any trumped up charge would soon find his authority eroded and his credibility reduced to ashes. The pity is that he may merely be the pawn of mischief makers and the butt of disgruntled fanatics.

Professor Allott reminds us in his Essays in African Law that on the whole a system of law reflects a way of life; it represents an adjustment to life in a particular environment. If then the principle of the non-accountability of the head before the courts has been accepted by hallowed practice and it now no longer meets the changing circumstances of a developing nation, then the answer is a change by legislation or decree and not pre-emption by judge-made reform. Law reform by judges in areas where the law is well-settled and known and

families have regulated their affairs by it, should rarely be undertaken. Though one agrees with Dr. Allott that changing social norms demand corresponding changes in the law, this should be in the province of the law givers. We need constantly to be reminded of Jeremy Bentham's warning that judges should not make new laws.

It appears from the reference to the powers of the Supreme Court in the learned Chief Justice's opinion, that the Supreme Court is being invited to shake off its stupor and legislate to make the head of family amenable to the equitable jurisdiction of the courts. If this is the call then I raise my voice in protest against an unconcealed venture into the arena of law making. It would be a naked usurpation of the legislative function. According to Lord Diplock (in his address to Commonwealth Law Association, Scotland, 1977) since 1966 the House of Lords has been empowered to reverse its own decisions yet, it has voluntarily placed curbs on its new found freedom. He put it this way: "Since 1966 the House of Lords has ceased to treat itself as inexorably bound by its own previous decisions; but it still remains extremely reluctant to depart from them." One should take a cue from these words of wisdom. And as Lord Devlin explained in Sample of Law Making (1962) "Statute is more powerful and flexible instrument for the alteration of the law than any that a judge can wield."

There must be a curb on the law reforming proclivities of our creative judges. A fortiori where a new law on the subject is already on the draftsman's desk, the courts have no business to pre-empt the law maker. If for nothing else, constitutional propriety forbids the exercise: see Eleko v. Officer Administering the Government of Nigeria [1931] A.C. 662.

These reasons compel me to uphold the decision of the Court of Appeal and urge the dismissal of this appeal.

[p.723]

JUDGMENT OF MENSA BOISON J.A.

I am of the opinion the judgment of the Court of Appeal should be affirmed. The facts which raise the point of law in this appeal have been fully and impeccably set out in the judgment of His Lordship the Chief Justice, whose judgment I have had the privilege of reading beforehand and from which I am obliged to dissent.

I do not intend to repeat them.

The criticism that Sarbah's statement of the law was terse and unelaborated is not without some justification. But the learned author might well be excused as he seemed to have regarded what he observed as the custom among the Fantis to be of acknowledged acceptance.

That must have been the like fate that befell the learned judge, Ollennu J. (as he then was) in the case of Heyman v. Attipoe (1957) 3 W.A.L.R. 86. There, the plaintiff, representing a branch of a wider family, sued the defendant as head of the wider family at the Anlo Native Court for a declaration that a certain land which their common ancestress had died intestate possessed of, was the property of the wider family.

The defendant, however, claimed that the common ancestress in her lifetime had disposed of that land to her daughter, Nyanya, and that Nyanya having died intestate possessed of it, the land became the sole property of the direct descendants of Nyanya, which was constituted by the defendant's branch of the family. The plaintiff further claimed possession of the land and an order for an account.

It was held by the learned judge that the trial native court having found that the ancestress had died intestate possessed of the land, the plaintiff was entitled to the declaration he sought; but that the defendant, being also the head of the wider group of family as well, was by customary law the proper person to control the family land. Finally the learned judge held, somewhat axiomatically, at 88 that: "By native custom a member of a family cannot sue the head of family for accounts"—relying on Abude v. Onano (1948) 12 W.A.C.A. 102.

The judgment does not set out argument of counsel, but at 88 it is stated "Mr. Akufo-Addo, learned counsel for the plaintiff conceded that the claim for an account against the defendant, the head of family, is not maintainable according to native custom." There is nothing to

indicate that the eminent counsel for the defendant demurred to that view of the law. In those circumstances the learned judge must have taken the point of law as self-evident, and required no explanation. The view that the learned judge uncritically applied Sarbah's statement of the customary law among the Fantis to an Anlo family; is in my respectful view irrelevant in this appeal, which relates to a Ga family.

Be that as it may, the case of Heyman v. Attipoe (supra) would seem to decide that in general, actions by a member of family lie **[p.724]** against the head of family, save as to the excepted cases; notably an action for an account. The exception is said to be absurd in view of weighty legal pronouncements and respectable authorities that the head of family holds family funds or other property in trust for the family. Consequently to exempt him from the obligation to account by court action is at variance with customary notions of trust.

In my respectful view, the employment of terms well known to equity lawyers to express the nature and working of concepts as pertain to our indigenous family system may not always give happy results. To start with it may be helpful to observe that the word "family", is not synonymous with clan or tribe. A family in its true meaning is, in my opinion, a land owning unit bound by lineage from a common ancestry.

In his book The Truth About The West African Land Question (1913), the learned author, Casely Hayford of the Inner Temple, barrister-at-law and of the Gold Coast Bar, at 56 explained the nature of family property in relation to the head of family in these terms:

"...But in the Customary Law, we find no trace of individual ownership. What the head of family acquires today in his own individual right will in the next generation be quite indistinguishable from the general ancestral property of which he was trustee. Even during his lifetime the person on the stool scarcely makes a difference in his own mind between what he received as family property and what he adds thereto by his exertions… Both what came to the head of the family and what he has made, pass at his death, to his uterine brother, cousin or nephew as the case may be, who being the only possible and legitimate successor to the stoolholder the latter gladly regards as the trustee in one sense and one of the beneficiaries in another sense of all after his death."

A mystic union of personality with resultant admixture of property which is unknown to the English law of trusts; but which might well explain the non-accountability of such head of family.

Indeed a caution was given by the same learned author we have just quoted above at 53 that: A successor in the English system has sole control and ownership. In the customary law, he is co-owner and has no such control. He continues:

"…Nor is the successor a trustee in the sense of equity jurisprudence. The rights of the Chief in respect of land is not separable from those of his people who have a co-joint right in the property as well as a joint control. A chief has no such control, but must, immediately upon realisation, share the proceeds with the people. The trustee is owner for the time being, exercising the **[p.725]** rights of ownership for the cestui que trust. In customary law this is not so, since the people never at any time divest themselves of their rights and active exercise thereof in favour of the trustee . . . Hence it is important to note that the English Law of Trusts does apply to Gold Coast Land Tenure. And the term, 'trustee' where it occurs in this summary must be taken with that qualification."

The above statement of the customary position of the chief, it seems, equally applies to the head of family and the property he holds on behalf of the family. But more pointedly I think the case of Abude v. Onano (supra) did give full consideration to the question whether funds of such nature in the hands or control of a head of family constitute "trust funds." The facts of that case are well known and need not be rehearsed. It suffices to say that the money deposited at the savings bank was patently stool funds in the control of the Mantse and the nominated elders of the La stool. Its character did not change by the device adopted to avoid the funds being absorbed into the Ga stool treasury accounts.

At 105 of the judgment, the court in dismissing any notions of "trust" proceeded as follows:

"The first defendant-respondent is described in the Writ as 'La Mantse' but the remaining defendant-respondents are described as 'trustees of the La Benevolent Society', and from this description it would seem as if the claim is in respect of trust funds of a benevolent society in the accepted sense of the term. This, however, is not the case; because the pleadings and evidence adduced by both sides clearly prove that the money deposited in the Post Office Savings Bank, and in respect of which the claim is made, is part of La Stool funds or La Council funds controlled by the Divisional Council of the La Division of the Ga State ... the money so deposited remained part of Stool funds subject to Native Customary Law, and to the control of the La Divisional Council. It follows that neither the first defendant-respondent nor the remaining defendants-respondents could be sued in the Supreme Court in respect of said Stool funds."

It would seem, therefore, that illustrations from cases where the courts have found "trusteeship" are strictly inapplicable to the position of the head of family as such.

In my respectful opinion, the instances cited in support of a recognition of "the fiduciary", are really capacities of agents or ad hoc administrators or in the nature of receivers and managers. Referring to only one such instance in Ansah-Addo v. Asante [1972] 2 G.L.R. 400, the leader of a syndicate of farmers has no lineage of ancestry with the **[p.726]** other members, nor does his farm necessarily become family property of the others should he die intestate, possessed of it.

It may be noted that the immunity from accounting is only as to resorting to court actions. For in Abude v. Onano (supra) the court was satisfied that there was a viable domestic jurisdiction under customary law, with drastic penalties, to investigate cases of misappropriation of stool funds by stool holders or stool elders. The jurisdiction of the divisional council or the Ga State Council with sanction of deposition from the stool or removal of an elder from office, was considered "reasonable and not contrary to natural justice and good consciences."

No doubt, no system of human institution can be perfect. The wily will always make room for advantage, and the faddist will not be wanting of defects. But so long as the system is reasonable and not contrary to natural justice and good conscience and serves the community as a whole, it is enough. In all probability such domestic jurisdiction (conceivably up to the divisional state council) is available in the present case.

The criticism that the immunity of the head of family is irrational, would seem again to have been answered in the Abude case (supra). At 105 where the court considered the necessity for resort to the domestic jurisdiction, it observed:

"…the proper persons to enquire into complaints of individuals or sections of the people are their elected representatives who are entitled to take the matter to a council meeting where by its resolution the council may give necessary directions. If this were not so, it would be possible for a number of rate payers who are opposed to a particular régime to maintain many suits against the president and councillors merely for the purpose of ridiculing them or bringing their administration into disrepute, and thereby make it practically impossible for them to perform their duties."

It is for the reasons given above that I am unable to share the views advocated in the learned judgment of the president of the court.

DECISION

Appeal dismissed.

L.K.A.

ELECTION AND DEPOSITION OF A HEAD OF FAMILY

June 29, 1956.

WELBECK *v.* M. CAPTAN LTD. AND HAMMOND.

Supreme Court of the Gold Coast, Eastern Judicial Division, Divisional Court, Accra
Smith Ag.J.

Until 1942 Mr. Hammond, the co-defendant, was the head of the family. For reasons involving finance and alleged squandering of moneys, Mr. Hammond was relieved of his office and the plaintiff Mr. Welbeck With one Thompson (now dead) were elected caretakers and administrators of the Kreshie family by a family resolution dated July 4, 1942. This was confirmed by the judgment dated January 18, 1945, of the Tribunal of the Paramount Chief of the Ga State. In this judgment it is set out how the head of the Kreshie family is appointed and I quote at this stage the relevant passage:
"The members of the family are chosen from two ancestors, namely Nyan Abodiamo and Kreshie, so that the descendants of these two ancestors put together bear a common name, known as 'Kreshie Family,' the head of which can only be properly appointed by descendants of Nyan Abodiamo and Nah Kreshie."

In 1945 after this judgment these caretakers leased two family properties, D. 775 /2, Janet's House, Accra, and D. 774/2, Maxwell House, to Mr. Karam -the leases being assigned to M. Captan Ltd.the defendants in this action.
In 1946 the co-defendant and a Mr. O. D. Hammond claimed to have been made joint heads of the family by another family resolution dated February 7, 1946. This at once led to litigation, and in some way or other two suits arose. In suit No. 1175/47 the Ga Native Court "B" on October 7, 1948, gave judgment in favour of Mr. Welbeck and Mr. Thompson on a claim by Mr. Hammond and Mr. O. D. Hammond that they were the appointed joint heads of the Kreshie family of Accra. In suit No. 1350/48 the Ga Native Court " B " held that A. H. Hammond arid O. D. Hammond were duly appointed by the members of the family in accordance with custom. The judgment in this case was as follows:-

JUDGMENT:-
"The court is satisfied on the evidence that the plaintiffs were duly appointed by the members of the family in accordance with custom, and that the object of the appointment of the second plaintiff to act jointly with first plaintiff was because of the first plaintiff's old age.
"The defendants and co-defendants were summoned on three occasions to the family meeting, the object of which, was to appoint a Head. They could have attended and objected to the"' appointment of anybody they did not like, but failed to avail themselves of the opportunity offered them.
.. Judgment is therefore given for the plaintiffs. No order as to costs."
On appeal the Magistrate held that the meeting in February, 1946, was not constituted by representative members of the family. On appeal from the Magistrate, Coussey J. in *Hammond and Another* v. *Thompson and Others* , dismissed the appeal for a different reason, namely, that the matter was res judicata by virtue of the decision of October 7, 1948 (Suit 1175/47) from which there had been no appeal. Except for this Coussey J. seems to me to indicate that on the merits he was rather more favourably inelined to the Ga Native Court" B " judgment in the Suit 1350/48.

Following this judgment of October In, 1951, the plaintiff's son Nii Okai Kasablofo II by letter dated October 30, 1951, was invited to attend a meeting on November 1, 1951, to appoint a head of family. He refused but his father, the plaintiff, attended. A further meeting was held in the absence of the plaintiff and his son on November 4, 1951, at which a resolution was passed appointing Mr. Hammond bead of the family. The question is whether this meeting was a representative meeting of the members of the family, which could validly appoint Mr. Hammond head of the family.

I have referred to Suit No. 1350/48 before the Ga Native Court B and the reason for dismissing the appeal. In his judgment of October 13, 1951, dismissing the appeal Coussey J. also indicated that he would perhaps have come to the same conclusion as the Native Court on the facts, as it was unreasonable for a member of the family deliberately to avoid attending a meeting and thus hold up the making of an appointment. Mr. Bossman, however, argued that there must be a move to reconciliation and pacification of the rival elements of a family before a meeting can be held to make an appointment. He cited the decision of Quashie-Idun (then acting judge) in *Ankrah* v. *Allotey and Others*. I think that case is distinguishable in that it only goes so far as to lay down that where two opposing sections of a family have subsequently become reconciled, a meeting of one or other of such opposing sections cannot appoint or remove a head of family. Such an act can only be done by the united family.

It seems to me that following the judgment of the Native Court in Suit 1350/48 and that of Coussey J. it is open to principal members of a family, to appoint a head in the absence of a principal who refuses to attend a meeting after invitation.) The plaintiff and his son in this case refused to attend the meeting although invited. According to the evidence before me "most members of the female and male sides of the family attended .... The interest dealt with was the Kreshie family." There was no dissension. So far as I have evidence the signatories to the document of resolution of November 4, 1951, are representatives of both sides of the family. In view of the evidence on this point for the co-defendant-particu!arly that of Emmanuel Borquaye-it was I think for the plaintiff to show, if such was the case, that the meeting was not representative and that members were absent whose presence was indispensable.
I have not taken into account the proceedings at the arbitration before the Gbese Division council. I would dismiss this action by the plaintiff and give judgment for defendant and co-defendant with costs.
Judgment for the defendants.

QUAGRAINE v. EDU [1966] GLR 406-421
HIGH COURT, CAPE COAST
31 MAY 1966
ARCHER J.

The plaintiff as the customary successor of the late James Brodie Apprey, claims from the defendant £G500 damages for trespass committed by the defendant who posted notices on seven houses forming part of the property the plaintiff succeeded to on Apprey's death. The form of notice attached to the writ of summons reads:
"The public are hereby informed that as from the date hereof no payment of rents in respect of the estates of James Brodie Apprey and Joseph Edward Biney, deceased, may be made to Mr. Kobina Abaka Quagraine, his agents or servants.

The said Kobina Abaka Quagraine has been removed as successor to late James Brodie Apprey, Cape Coast, and whoever overlooks this notice [warning] does so at his or her own risks.
Ebusua Panyin Kow Edu, Head of Deshina Family of Anyanmaim, for himself and on behalf of all families. Dated 17th August, 1964."

The plaintiff also claims a perpetual injunction restraining the defendant, his agents or servants or both from having anything whatsoever to do with the lands with the houses thereon described in the writ. The facts of the case are straightforward. One Joseph Edward Biney, a wealthy man on his death appointed one James Brodie Apprey his sole heir and administrator. Accordingly, on a true construction of the will in exhibit C, Apprey became the

beneficial devisee of certain real properties in addition to other properties bequeathed to him by Biney. Apprey therefore enjoyed these properties absolutely in his own right. Apprey, however, died intestate and in accordance with Fante customary law, the estate of Apprey became family property. It is not in dispute that the present plaintiff was appointed customary successor to Apprey and he has, since the death of Apprey, been controlling these properties.

In November 1964, the defendant claiming to be the head of the Deshina family of Anyanmaim posted notices warning the entire world against paying any rents to the plaintiff in respect of the properties left by Apprey on the ground that the plaintiff had been removed as customary successor to Apprey. The plaintiff maintains that he is still the customary successor and has not been removed by his head of family and denies further that he comes from Anyanmaim. In his evidence, the plaintiff stated that after the death of his senior and uterine brother, Apprey, on 17 November 1951 and after the funeral rites in January 1952, his mother conferred with the head of family, one Kwesi Wiah, and appointed him successor to his brother Apprey and thereupon he became the head of his brother's immediate family of the Deshina family of Gura-Anamoa, Saltpond and Anomabo. The mother of the plaintiff was one Aba Tomo who had five sons all of whom, including James Brodie Apprey, are dead except the plaintiff and his other brother Kofi Tawiah also known as King Brodie Quarshie. The plaintiff rightly maintains that according to Fante customary law, the immediate family of James Brodie Apprey are his mother, his brothers and sisters, if any. Moreover the head of his wider family is now Kobina Dodu who is the head of the Gura-Anamoa, Saltpond and Anomabo Deshina family. According to the plaintiff, the defendant is not a member of his immediate family and does not come from the Gura-Anamoa, Saltpond, and Anomabo Deshina family but the defendant comes from Anyanmaim and he does not share any funeral debts with the plaintiff's immediate or wider family.

The court also heard the evidence of Kobina Dodu, whom the plaintiff claims to be the head of his wider family. Kobina Dodu was emphatic that he had never seen the defendant at their family and funeral meetings and that he did not know him. Next, the Omanhene of Anomabo also confirmed that to his knowledge, the plaintiff comes from the Deshina family of Anomabo and GuraAnamoa. But the most interesting and fascinating piece of evidence which the court heard was that of James Brodie King Quarshie also known as Kofi Tawiah. This witness, a brother of the plaintiff and a son of Aba Tomo, admitted in cross-examination that he was once Omanhene of Anyanmaim under the stool name of Nana Ampadu Kwame II. He agreed that his mother Aba Tomo was queenmother of Anyanmaim during his reign. This witness said his family came from the Deshina family of Anomabo and that the head of his family was Kobina Dodu. Furthermore, he knew the defendant at Anyanmaim but he was not the head of his family.

Then Mr. Yorke alias Nyarku the defendant's third witness, stated in examination-in-chief:
"The members of the family from Anyanmaim (about ten) attended the meeting. The Cape Coast section also attended and Agona. About 30 members of the Cape Coast branch attended. About six senior members of the family attended the meeting. Nyame Ayeh was the head of the Cape Coast branch. Nkrumah and his elders came from Agona. No other branches of the family attended the meeting."

The question I have asked is whether this family meeting was fully representative? I did not have the benefit of the testimony of Chief Tandoh of Cape Coast and I was not told whether he was alive or dead. No members from the Gura-Anamoa, Saltpond and Anomabo branches were present yet the meeting proceeded although the head of those three branches of the family, Kobina Dodu, was bereaved that day. Was it reasonable to proceed with the meeting at all? The plaintiff's brother was in the witness-box and it was never suggested to him that

he was informed of this meeting although, as a uterine brother and a member of the plaintiff's immediate family, he was interested in the beneficial enjoyment of the estate. Griffith C.J. in Yerenchi v. Akuffo said that, "native custom generally consist of the performance of the reasonable in the special circumstances of the case." In the present case, it was alleged that Kweku Nkrumah was sent to call the plaintiff who refused to come. Assuming that is true, was it reasonable to proceed with the meeting forthwith? In Welbeck v. M. Captan Ltd. and Hammond, it was held that although the absence of principal members from a family meeting may render nugatory decisions taken at such a meeting, yet this will not be so if the members concerned have been invited to the meeting but for reasons of their own have not attended. Secondly, where a member of a family seeks to avoid a decision taken at a family meeting on the grounds that the meeting was not representative or that indispensable principals were not in attendance, the burden of proof is upon him to establish the non-representative character of the meeting or that the attendance of absent members was essential to the validity of the proceedings.

The impression I gathered from the evidence for the defendant was that Nyame Ayeh was the head of all these members in the domestic household including Mr. Yorke. There is no doubt that the will of Biney did not impose any legal obligations on Apprey so far as the domestic household is concerned. The members of the domestic household belonged to the family of Biney and they and their descendants of female members are entitled to be appointed successors to deceased members of Biney's family in preference to children of male members of the family of Biney. See In re de Graft-Johnson (Decd.); de Graft-Johnson v. de Graft-Johnson and Ambah v. Libra. The domestic household of Biney do not belong to the immediate family of Apprey because Apprey did express such a wish. It would appear that this household of Biney formed the majority of those who attended the meeting convened to remove the plaintiff as customary successor. I find therefore that the meeting was not fully representative of all the branches of the Deshina family. Moreover, there is no evidence that any member of the plaintiff's immediate family were invited to be present. The whole dispute arose in my opinion, because the plaintiff was demanding rents from the domestic household of Biney and in fact, it was Mr. Yorke who in answer to questions by the court revealed what properties had been sold and what gold bangles had been sold when in fact the domestic household had no interest. None of the alleged ten members who came from Anyanmaim came to court to testify. The family branches at Gura-Anamoa, Saltpond and Anomabo were also not present when it was obvious that Aba Tomo must have near blood relations there.

It is also settled law that where one branch of the family is in dispute with another branch, the law will not permit one branch or faction alone by themselves to appoint a head for the whole family or to remove the head of the whole family. Such an appointment can only be made by the united family and so the two factions must be reconciled before a head can be validly elected: see Ankrah v. Allotey. This principle also applies to the removal of a head or a successor. A council of the whole family must meet specifically to deal with the complaints concerning the administration of the family property:
see Mould v. Agoli and also Botchway v. Solomon. In the latter case, Yates J. said:
"The family meeting was convened four times, and the defendant (Solomon) refused to attend; he was further summoned before the James Town Manche and refused to attend — in fact the defendant had denied the family — and I therefore hold that he was properly removed, . . ."
My view is that in order to clothe customary usage with sanctity and respect, it is incumbent on those who perform these rites to ensure that custom is not performed haphazardly, recklessly and hurriedly. In the present suit, it is alleged that a meeting was convened in the plaintiff's house and he refused to come down from his apartment upstairs. Immediately afterwards, charges were read in his absence and he was deposed. In my opinion, the family

could have taken further steps, the principal elders could have gone upstairs to see him in view of the fact that he was blind. The estate is not a small one, and the family could have approached prominent personalities to assist in the matter seeing that there was disagreement between the plaintiff and Biney's domestic household. No complaint was made to the branch families of Gura-Anamoa, Saltpond, and Anomabo that a meeting had been convened and the plaintiff had refused to attend. No representations were made either to the Omanhene of Anyanmaim or the Omanhene of Anomabo with regard to the plaintiff's refusal.

I am aware, of course, that in such gatherings, tempers are bound to soar high and some elders tend to behave indiscreetly but it is important that sanity should prevail — the elders should do what is reasonable in the circumstances. And in this respect, I wish to quote what Barrett Lennard J. said in Sappor v. Amartey:
"Now it seems to me that the majority of a family can depose a head whom they dislike, and that under ordinary circumstance no Court ought to interfere with this domestic discipline. Assuming however, that the head of a family can carry a majority of it with him, and his intentions are entirely selfish and unjust, I have no doubt whatever that, upon a proper writ being drawn and a proper case made, a Court of justice can afford relief."
I have weighed the cumulative effects of one group of severally inconclusive items against the cumulative effects of another group of severally inconclusive items and I have decided to make the following findings out of the exercise:
(1) That the plaintiff is still customary successor of the late J. B. Apprey as the family meeting which attempted to remove the plaintiff was not valid at customary law in view of the fact that the meeting was not fully representative of the whole wider family.
(2) That the late Apprey's immediate family, now headed by this plaintiff, i.e. his mother, uterine brothers and sisters and the issue of such sisters are entitled to the immediate beneficial enjoyment of the estate.
(3) That the wider family now headed by the defendant have no right whatsoever to the immediate beneficial enjoyment of this estate as their rights have been postponed until Apprey's immediate family should be extinct. The wider family have only a spes successionis.
(4) That as the defendant as head of the wider Deshina family has a duty to preserve the family property, he did not commit any trespass when he posted the notices on the houses because he bona fide believed that he had the right to do so.

(5) That the defendant as head of the wider family has to watch the interest of not only the immediate family but also the wider family and it would be contrary to customary law to grant a perpetual injunction restraining him forever from protecting these properties. The plaintiff is in full control of these properties as head of the immediate family and a perpetual injunction if granted would be in vain since the whole family with the defendant as head can for good cause shown remove the plaintiff from office.
Finally, I may remark that although the plaintiff is educated, he is blind and none of the defendants witnesses alleged that he was incapable of discharging his duties on account of his loss of sight. It is therefore my hope that the plaintiff and the defendant representing the wider family will be reconciled and a satisfactory solution found in order to carry out the hope and desire of the late Biney with regard to his domestic household now resident in the same house as the plaintiff.

Action dismissed.

ABAKAH AND OTHERS v. AMBRADU [1963] 1 GLR 456-464
IN THE SUPREME COURT
20TH MAY, 1963
VAN LARE, MILLS-ODOI AND AKUFO-ADDO JJ.S.C.

MILLS-ODOI J.S.C.
The defendant had held office as the recognised head of the Ewan Kweku Anona family at Sekondi since 1939. Some elders of the family being dissatisfied with the manner in which the defendant was managing family property authorised Kwao Aidu, the second plaintiff, to write to the defendant requesting him to attend a family meeting to be held on the 9th July, 1961, and there to render account of all rents collected by him in respect of certain family property. The defendant replied to this letter, and, inter alia, challenged the authority of Kwao Aidu to call upon him to account, whereupon Kwao Aidu on behalf of the family wrote a second letter to the defendant attaching a copy of charges preferred against the defendant for irregularities allegedly committed by him in his management of the family property.

On the 9th July, 1961, the meeting was held as arranged before five arbitrators chosen by the plaintiffs. The defendant attended but left without answering the charges because, as he alleged, the meeting was not properly constituted. Another meeting was arranged for the 16th July, 1961, but on that date the defendant was absent: he was attending the funeral of a member of the family. The meeting nevertheless continued, the charges against the defendant were gone into and found proved, and the defendant was removed from office and replaced by the first plaintiff.

The defendant was informed of these proceedings by a letter dated the 20th July, 1961, and requested to hand over to the family all family documents. The defendant refused to comply with the terms of the letter and the plaintiffs sued him in the High Court claiming an injunction restraining him from further dealing with family property and delivery to the family of all family documents in his possession. The High Court dismissed the plaintiffs' claim holding, inter alia, that the family meeting of the 16th July, 1961, was not properly constituted in that some principal members whose presence was indispensable were not present and were not notified of the meeting, and further that on the authority of Lartey v. Mensah (1958) 3 W.A. L.R. 410 the letter informing the defendant of the convening of a family meeting was defective in that it did not inform him that the main purpose of the meeting was to depose him as head of the family. The plaintiffs appealed to the Supreme Court.

The main ground of appeal argued by learned counsel for the appellants in this court is that: "The passage of the judgment quoted from Lartey v. Mensah 3 W.A.L.R. 410 deals with notices convening a family meeting for the purpose of appointing or electing a new head of family. That principle of customary law will not necessarily apply to all cases where a head of family is to be deposed for misconduct and gross mismanagement."
Dealing first with learned counsel's submission that the meeting held on the 16th July, 1961, was properly constituted and therefore the learned trial judge's finding that four elders of the family were absent at that meeting because they were not notified, I would refer to the principle of customary law enunciated by Sarbah in his Fanti National Constitution (1906 ed.), p. 42:

> "The right of removing a ruler belongs to the people immediately connected with the stool; in the case of the head of a family the right is in the senior members, and the act of the majority is binding on the rest."

Applying this principle to the instant case, the right of removing the defendant from office was vested in the principal heads of the family and the act of the majority would be binding on the rest. The crucial matter for consideration therefore is whether the meeting of the 16th July, 1961, was attended by all or by a majority of the principal heads.
It is clear from the evidence of the defendant that the family meeting which was held on the 9th July, 1961, was not properly constituted according to custom i.e., that the meeting was not representative and that some principal members, whose presence was indispensable, were absent. His evidence challenging the constitution of that meeting reads as follows:

"On the 9th July, 1961, I attended the meeting with my friend Mr. Dadzie and I found that the majority of the sectional heads of the family from the villages did not attend. It was the sectional heads of the family who appointed and installed me as head of the family. There are eight sectional heads of the family and only three of them attended the meeting on the 9th July, 1961. It is the duty of the sectional heads of the family who are to investigate charges against a member of the family including the head of the family. When I saw only three sectional heads of the family had attended the meeting on the 9th July, 1961, I asked where were the other five sectional heads of the family and the second plaintiff said that they did not attend. As a result I told them that they should adjourn the meeting so that all the sectional heads could attend."

The three sectional heads recognised by the defendant as being present at the meeting on the 9th July, 1961, were the first, second and third plaintiffs. He did not acknowledge the fourth and fifth plaintiffs as sectional heads. He regarded them as members of the family. The remaining five principal members of the family were Ekra Kwamina of Enno, Kwesi Mensah of Sekondi, Gyame Kakraba of Mpintsin, Kwabena Wu of Ketan and Kwesi Nworokow of Nkroful. Apart from Kwesi Nworokow all these sectional heads gave evidence in the court below on behalf of the defendant and testified that they were not summoned to attend any family meeting either on the 9th July, 1961, or on the 16th July, 1961, and that in fact they never attended any meeting on these dates. At the trial their status as sectional heads was not called in question by the plaintiffs.

Ntaah Esson, an independent witness called by the plaintiffs to substantiate their claim, gave evidence admitting that Ekra Kwamina was not present at the family meetings on both occasions. He stated, inter alia, as follows:

"Ekra Kwamina is the elder of our family living at Enno. Ekra Kwamina never came with me to the family meeting on the 9th July, 1961. Ekra Kwamina did not attend the family meeting . . . because he sent me to represent him at the meeting . . . On the 16th July, 1961, Ekra Kwamina sent me to represent him at the family meeting and I attended. Ekra Kwamina said they were sharing a family debt for the funeral expenses of Ekua at Enno so he could not attend."

It became apparent from the evidence of Ekra Kwamina that he did not ask the plaintiffs' witness, Ntaah Esson, to represent him at any family meeting, neither was he (Ekra Kwamina) aware of any family meeting either on the 9th July, 1961, or on the 16th July, 1961. At the trial court he deposed that:

"I know Ntaah Esson who lives at Enno. I did not know of any family meeting to be held on the 9th July, 1961. I was busy with the funeral. I saw Ntaah Esson on the 9th July, 1961. He was with us throughout the whole day at the funeral. I did not send Ntaah Esson anywhere. I never instructed Ntaah Esson to represent me at any meeting on the 9th July, 1961, or on the 16th July, 1961.

Still convinced that the meeting on 16th July, 1961, was not property constituted, and in order to be more certain of his conviction, the defendant summoned a family meeting shortly after his alleged deposition and four of the sectional heads who attended that meeting, viz., Ekra Kwamina (sectional head of Enno), Kwasi Mensah (sectional head for Sofokrom), Gyame Kakraba (sectional head for Mpintsin) and Kwabena Wu (sectional head for Ketan) told him that they were not summoned to attend any family meeting on the 16th July, 1961, and in fact they were not present at that meeting. It is not surprising therefore that the learned trial judge held that "Ekra Kwamina, Kwasi Mensah, Kwame Tonto and Kwabena Wu . . . are elders of the family and they were not notified of meeting on the 9th and 16th July, 1961," which finding is amply supported by evidence.

I am of the opinion that in the instant case the defendant was removed from office without notice of the meeting to all the sectional heads of the Ewan Kweku Anona family. The act of

the sectional heads who were present at the meeting on the 16th July, 1961, cannot therefore be binding on the rest; and unless it was acquiesced in by the rest, it is ineffective.

Learned counsel for the appellants has urged vehemently and forcefully before this court that the defendant was not at Enno village on the 16th July, 1961, for the funeral ceremony of Ekua, a deceased member of the family, and that his absence at the meeting on the 16th July, 1961, constituted grave disrespect for the other sectional heads of the family who were entitled to remove him in his absence. In support of this submission, Mr. Hayfron-Benjamin referred to Sarbah's Fanti Customary Laws (1st ed.), p. 35, which reads as follows:
"Where the penin [father or head of family] suffers from any mental incapacity, or enters upon a course of conduct which, unchecked, may end in the ruin of the family, or persistently disregards the interests of the family, he can be removed without notice by a majority of the other members of the family, and a new person substituted for him.

Before considering the forcefulness of learned counsel's argument on this matter, one crucial and pertinent question is: Was the defendant bound to be at Enno at all for the funeral of Ekua? The answer to this question is given by Sarbah in his Fanti Customary Laws at p. 36:
"On the decease of a member, all persons who are members of the family take part in making the funeral custom and contribute in defraying its expenses, for which they are primarily liable . . . It is usual for the local senior member of the clan, with the head of the family of the deceased, to preside over the funeral custom, to receive the expression of condolence from sympathising neighbours, and to accept funeral donations."
It would seem that the two principal members of the family who were required by custom to be present at Ekua's funeral were the head of the family and the local senior member of the clan, i.e., the defendant and Ekra Kwamina respectively. That the defendant was bound by custom to be present at Enno on the 16th July, 1961, and to participate in the celebration of Ekua's funeral was also borne out by the evidence of Nana Bray VIII, the second plaintiff, who under cross-examination by learned counsel for the defendant at the trial deposed as follows:
"On the 16th July, 1961 [meaning the 9th July, 1961] Ekua of Enno, a member of the family died before the meeting was held on 16th July, 1961, at 9 a.m. and all the members of the family knew of her death before the meeting on the 16th July, 1961. Ekua died about three weeks prior to the 16th July, 1961, and the final funeral celebrations were to take place on the 16th July, 1961, at about 2 p.m. at Enno. Enno is about six miles from Sekondi . . . The head of the family [who was then the defendant] had to be present at Enno on the 16th July, 1961."

It is in conformity with the observance of custom that the defendant by virtue of his position as head of family had to attend the funeral at Enno on the 16th July, 1961, and the fact that he was actually present at Enno on this date came out clearly from his evidence at the trial which stood unchallenged. It reads:
"On the 16th July, 1961, I did not attend the meeting because I as head of the family had to attend the final funeral ceremony when the members of the family were to share the funeral debt. I left for Enno at 5.30 a.m. None of the plaintiffs attended the funeral ceremony. The funeral ceremony finished at 5 p.m. and I returned to my house in Sekondi."
The defendant's absence at the family meeting on the 16th July, 1961, therefore was not without justification.

Turning now to Mr. Hayfron-Benjamin's submission that a head of family could be removed, on certain grounds, in his absence and without notice, it would seem that such a removal would be invalid and ineffective unless it was made by a majority of the family and on notice not only to all the principal members but also to the head of the family who would be affected thereby.

The head of family occupies a very important position in the family. He has control over the family properties and over all the members of the family and the issue of such members. He is vested with authority to manage and direct the affairs of the family. As such, he is the natural guardian of every member within the family. His position vis-a-vis a ruler is analogous to that of the pater familias in Roman law—see Sarbah's Fanti Customary Laws (1st ed.), pp. 34-35. It will be out of tune therefore to accept the proposition that a person of such standing in the family could be removed from office without notice. I am of the opinion that such a view will be contrary to natural justice, equity and good conscience.

According to custom the head of a family is appointed by the principal members of the family. They are also cloaked with authority to depose him, but the deposition will be invalid unless a complaint is lodged against him and he is summoned to answer it . The complaint must show what offences the head of family has committed against the family in order to afford him an opportunity to meet them. If the complaint is proved he may be removed by a majority of the principal members of the family present at the meeting.

But where the head of family who is summoned by the principal members of the family to attend a family meeting to answer the complaint against him fails to attend the hearing, and does not give good reason for his absence, he may be removed. It is of great importance also that all the principal members of the family should be invited to the meeting because any decision taken is by the majority of the principal members attending the meeting.

In the instant case, and as Dr. Danquah, learned counsel for the defendant, rightly submitted in reply, the defendant who failed to attend the family meeting at the 16th July, 1961, gave a good reason for his absence, viz., that at that crucial moment he was at Enno, a village about six miles from the meeting place at Sekondi, performing an important family function, which he was bound to do by virtue of his position as head of family. Even if the explanation which the defendant gave for his absence at the family meeting at the 16th July, 1961, was found to be unsatisfactory, which was not so in this case, I have already expressed my opinion that that family meeting was not properly constituted, and was therefore invalid.

As already stated, the main ground of appeal argued by learned counsel for the plaintiffs in this court is that the case of Lartey v. Mensah upon which the learned trial judge based his judgment deals only with notice convening a family meeting for the appointment of a head of a family; the procedure, Mr. Hayfron-Benjamin then submitted, is different when a head of family is to be deposed. It therefore becomes necessary at this stage to set out in detail that part of the judgment which has been made the subject of criticism. It reads thus:

"According to native custom the head of a family is appointed at a meeting of all the accredited elders of the family summoned for that purpose. The meeting at which an appointment is to be made should be convened for that purpose and notice of it should be given to all members of the family entitled, by custom, to participate in the appointment. If then some elders stay away from the meeting, those who do attend can make an appointment in the absence of the former. Where notice given to the members of the family shows that some particular business is to be transacted at a meeting, for example the settlement of disputes, and a head is appointed at that particular meeting, that appointment of a head is null and void, prior notice of the appointment not having been given to all concerned. A member of the family may not be interested in the settlement of disputes between other members of the family but he has by custom an inherent right to a say in the appointment of the head; and it is unjust that some only of the members of the family should appoint the head when others have not had an opportunity of being heard on the matter."

After the learned trial judge had held that the witnesses for the defendant were elders of the family and that they were not summoned to attend the meetings on the 9th and 16th July, 1961, he went on to apply the law enunciated by Ollennu J. (as he then was) in Lartey v. Mensah (supra) to the instant case as follows:
"Moreover the meeting was summoned for the 9th July, 1961, and adjourned to the 16th July, 1961, but there is no evidence that notices were sent out informing the members of the family that the main purpose of the meeting was to depose the defendant as head of the family. Furthermore the letter, exhibit A [meaning exhibit E], did not inform the defendant that the purpose of the meeting was to depose him as head of the family. The main purpose of the meeting according to exhibit E was for the defendant to answer the charges levelled against him. It was only if the charges were proved against the defendant that he could properly be removed as head of the family."

The learned trial judge fell into grave error when he held that exhibit E should have stated that the main purpose of the meeting which the defendant and the members of the family were summoned to attend on the 9th July, 1961, (which was adjourned to the 16th July, 1961) was to depose the defendant as head of family, for, as he himself stated in the latter part of his judgment, "it was only if the charges were proved against the defendant that he could properly be removed from office as head of family."
Learned counsel for the appellant submitted, and rightly so in my view, that it is not necessary to state in the notice that the meeting is being convened for the purpose of deposing the head of family, because nobody would know whether the head would be removed until the charges preferred against him were proved. It is worthy of note that Lartey v. Mensah (supra) applies only to cases where the head of family is to be appointed. In the case of the appointment of head of family, the headship must as a matter of course first become vacant to the knowledge of the family. The appointment is then made at a meeting of the council of the family, consisting of such of the elders or principal members as accept the invitation to the meeting. However, if notice of the meeting was given to all the principal members who are entitled to be invited to it, an appointment made at the meeting would be valid and effective notwithstanding the absence of some of the principal members from the meeting.

The judgment of the learned trial judge was based on wrong application of the law in Lartey v. Mensah (supra) which cannot be supported. But a court of appeal is entitled to uphold a judgment, if proper grounds exist on the record to justify the judgment, even though it cannot be supported for the reasons given by the court which gave it. I have already stated that the meeting which was convened by the family on the 16th July, 1961, and which purported to depose the defendant was not properly constituted in accordance with custom in that notice of the meeting was not given to all the principal members of the family. The decision taken at that meeting alleging that the defendant had been deposed as head of the Ewan Kweku Anona family is therefore rendered nugatory.
Appeal dismissed.

BANAHENE v. ADINKRA AND OTHERS [1976] 1 GLR 346–354
COURT OF APPEAL, ACCRA
24 FEBRUARY 1976
APALOO, ANIN AND FRANCOIS JJ.A.

ANIN J.A.
This is the second appeal in a succession suit originally heard and determined in favour of the plaintiff-appellant herein (called in this judgment simply the plaintiff) in the Akim Oda District Court Grade II . The defendants-respondents herein (referred to in this judgment simply as the defendants) were successful in their appeal before the Cape Coast High Court, which

reversed the trial magistrate's decision and dismissed the plaintiff's claim. It is from this judgment of the Cape Coast High Court that the plaintiff has now appealed to this court.

The plaintiff, suing as customary successor to the late Kwadwo Asante of Ayirebi, claimed against the defendants jointly and severally an order of declaration of title to, and recovery of possession of, three specified farms alleged to be the properties of his late uncle Kwadwo Asante whom he had succeeded. Even though the parties were represented by learned counsel at the trial court, the action was heard in a summary way and no pleadings were ordered.
It was common ground between the parties that the three disputed farms were ancestral family properties inherited by the late Kwadwo Asante from deceased ancestors upon his appointment as successor and head of the Bretuo family, to which both parties belonged. The main controversy was whether or not the plaintiff had been duly appointed customary successor to the late Kwadwo Asante who died on 23 December 1971.

At the hearing of the case before the district magistrate, the plaintiff was represented by his uncle Nsonowah, who had been authorised by his absent nephew under a power of attorney to testify for and on his behalf. In his evidence, Kofi Nsonowah disclosed that after Asante's death, his family met and elected as his successor the plaintiff, who duly accepted the appointment by rendering customary thanks with the sum of ¢9.60 and a full bottle of schnapps. Among the principal members of the Bretuo family who participated in the election meeting were Asare Duodu, the plaintiff's first witness, Asaboro, Kofi Berkoe and Kwadwo Kwenin, the defendants' first witness; while the Gyasehene Nana Kwabena Antwi, the plaintiff's second witness of the Aduana clan, presided over the election meeting.

The defendants denied that Banahene was appointed successor to the late Asante. According to their spokesman, Yaw Adinkra the first defendant, who gave evidence for himself and on behalf of the other defendants, "I do not know the one who succeeded Asante. It is not correct that Banahene succeeded to the property. I am now in charge of the whole property left by Asante." He explained that the disputed farms were ancestral family properties which were inherited by Asante (deceased) from seven ancestors upon his appointment as successor and head of family about ten years before his death. He further revealed that in the lifetime of Asante, he and the other defendants "were working on the lands in question."

The rule is that where the evidence of one party on an issue in a suit is corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good reason (which must appear on the face of the judgment) the court found the corroborated version incredible or impossible: see the dictum of Ollennu J. (as he then was) in Tsrifo V v. Dua VIII [1959] G.L.R. 63 at pp. 64–65 as applied in such cases as Osei Yaw v. Domfeh [1965] G.L.R. 418 at p. 423, S.C.; Asante v. Bogyabi [1966] G.L.R. 232 at pp. 240–241, S.C. and In re Ohene (Decd.); Adiyia v. Kyere [1975] 2 G.L.R. 89 at p. 98, C.A.
In the present case the plaintiff's evidence that he was appointed customary successor to the late Asante at a family meeting attended by the principals of his Bretuo family and the Gyasehene, and that he duly rendered necessary customary thanks for his election was corroborated to the hilt by the defendants' own witness, Kwadwo Kwenin, who was also present at the family meeting. The defendants' denial of these facts was bare and uncorroborated. The other witness called by them, Kwabena Adom, only retailed hearsay information: "I heard from somewhere that the land in dispute had been given to the plaintiff. Beyond that I know no more." The trial magistrate who had the advantage —denied to the appellate High Court judge and us—of hearing the parties and their witnesses and

assessing their demeanour and credibility accepted as truthful the plaintiff's testimony on the main issue of his appointment as successor corroborated as it was by the defendants' star witness. In my opinion these primary findings of fact made by the trial magistrate were wholly warranted by the evidence on record and by the application of the above-cited rule of evidence on the effect of the corroboration of a party's case by a witness called by the opposing party.

On the contrary the reasons advanced by the learned judge in rejecting the magistrate's findings are with respect erroneous. In the first place, the learned judge posited five so-called vital issues of his own some of which were either irrelevant or else tendentious. He seemed to be moulding a new case for the parties and to be settling new issues which were not canvassed before the trial court. For example he stated as a third issue the question "Had the defendants been in possession for some years even during the lifetime of Kojo Asante himself, the last ebusuapanyin?" In my view, this question is irrelevant to the central issue, whether the plaintiff was in fact appointed successor after the death of Asante. Assuming for purposes of argument only the defendants' possession of the disputed farms at a time prior to Asante's death, it is nevertheless indisputable that the prerogative to appoint a successor to the deceased Asante vests in his family; and the eligibility of a candidate for the succession is not dependent upon his prior possession of the estate during his ancestor's lifetime. If the issue of possession be deemed relevant for the claim of recovery of possession, then the evidence on record shows that the defendants were merely invited "to work on the farms"; they were not in possession on their own account as beneficial owners.
The farms in question were ancestral family properties; consequently, it was the successor (in the absence of a head of family) who was entitled to their custody, management and administration for and on behalf of the immediate family group in this matrilineal society. It was the successor who was entitled to either appoint or dismiss at will a caretaker for the farms; and the defendants had no prescriptive right under the customary law or otherwise for insisting on being retained as caretakers. In any event, by challenging the plaintiff's title as successor, they had disqualified themselves for being considered by him as possible caretakers.

The last two "vital" issues of the learned judge were respectively (1) was there a family meeting properly convened for the expressed purpose of appointing a successor to the late Asante; and (2) who convened the said meeting as the current ebusuapanyin, Kwadwo Asante himself, was dead? No doubt, if pleadings had been ordered and filed in the present case, issues such as these might well have been raised by astute counsel, depending of course on instructions received from their clients and admissions made by them. Be that as it may, the evidence in fact adduced by the plaintiff's side was about the due holding of a family meeting attended by all the principal members and presided over by the Gyasehene; the election of the plaintiff as successor; and his acceptance of the office signified by his rendering of customary thanks; and all these pieces of material evidence were corroborated by the defendants' own witness. That being so, the extra details insisted upon by the learned judge did not, in my respectful view, remain to be resolved by the court on the evidence as a whole. They were an unnecessary elaboration of a simple factual question of who had been appointed successor to the late Asante.

Furthermore, in my respectful opinion, the learned judge erred by applying the decision in Re Dua Agyeman (Decd.); Sarpong v. Agyeman [1962] 2 G.L.R. 138 to the facts of the present case and by holding that the Gyasehene had intermeddled in the family business of the Bretuo family to which he did not belong. The material facts in the two cases could not be more dissimilar. The evidence in the present case establishes that the Bretuo family permitted the Gyasehene to participate in their family meeting. He was not a meddlesome interloper; and no misconduct was alleged against him. On the contrary, in Re Dua Agyeman (supra) the

learned trial judge found as a fact that the appointment of the defendant as successor to the deceased was a pious farce; since it was done by a body, convened by the Krontihene of Mampong (a stranger to the family), which comprised for the most part stool elders and strangers to the family concerned, who had not the slightest semblance of right to take unto themselves what was the plaintiff's business. The learned judge did not lay down any rule that a properly constituted family meeting for the purpose of electing a successor to a deceased member of the family cannot be presided over by a respected elder or dignitary, who is a non-member of the family, if duly invited by the family concerned. Indeed, as can be seen from the quotation from Ollennu's Principles of Customary Land Law in Ghana at pp. 148–149 relied upon by the trial magistrate, such a course of action is permissible under the customary law:

> "The meeting for the appointment of the head of the family may be convened by the most senior member of the family, male or female, by two or more elders or principal members of the family or even by any respectable member of the community, an elder or chief of the quarter, or town, upon the request of members of the family."

(The emphasis is mine.)

I would respectfully add in this connection that it is not only reasonable but also prudent and desirable in cases of internal dissension in the family for such a meeting convened for the purpose of electing a successor to be chaired by a neutral person of standing in the local community who is acceptable to all sides. His wisdom, tact and experience may be in great demand at such a meeting; and in the event of later litigation about what transpired at the meeting, his independent evidence should prove invaluable. In the premises, I hold that the learned judge's conclusion that "the authority of the Gyasehene to meddle in the family affairs of the parties was not well established," was erroneous and unwarranted in law and on the facts.

Another ground stated by the learned judge for overruling the magistrate was that "the onus incumbent on the plaintiff to establish that he has in accordance with customary law been validly appointed successor was not well discharged." Learned counsel for the appellant submitted that "the judge was wrong in shifting the onus probandi on the plaintiff; since it was the defendants who were challenging the fact of appointment of the plaintiff as successor." It was held in the headnote to the case of Welbeck v. Captan (M.) Ltd. and Hammond (1956) 2 W.A.L.R. 47 at p. 48 that:

"(iv) Where a member of a family seeks to avoid a decision taken at a family meeting on the grounds that the meeting was not representative or that indispensable principals were not in attendance, the burden of proof is upon him to establish the non-representative character of the meeting or that the attendance of absent members was essential to the validity of the proceedings."

In the present case, the true legal position about the incidence of the burden of proof appears to be as follows: The plaintiff shouldered the general onus probandi on his claim to have been duly elected successor at a family meeting; while the first defendant, who raised the negative averment of ignorance of whom had been appointed successor as an answer to the plaintiff, shouldered the shifting or provisional burden of satisfying the court on this particular issue raised by him or else run the risk of non-persuasion of the court on the issue. In the event, the defendant's own witness corroborated the plaintiff's testimony in all essential details, while the defendant's bare denial and averment of ignorance received no support from any quarter. On the totality of evidence in this case, the balance of probability tilted heavily in favour of the plaintiff, whose testimony was corroborated by the defendant's main witness; and I see no justification for the learned judge's conclusion that the onus incumbent on him had not been well discharged.

For the defendants, learned counsel submitted that, even if it be conceded that the evidence warranted the trial magistrate's conclusion that the plaintiff was duly appointed successor, nevertheless, he ought not to succeed on his claim for ejectment of the defendants from the ancestral farms which had long been in their possession. As members of the Bretuo family, he contended, they were as much entitled to remain in possession of the farms as any other member. He relied on the case of Quartey v. Quartey (1951) D.C. (Land) '48-'51, 401 where the plaintiff, a senior member of the wider family, had lived in family premises and collected rents from the tenants for a long time. Owing to her failure to pay the rates, the premises were sold, and other members of the family instituted action to recover them. They were successful, and now disputed her right to remain in control of them. It was there held by Jackson J. that the appellant could only be removed from her position by a family meeting at which misconduct on her part was established, and at which she was entitled to be heard. The courts would interfere with the family's decision only when there had been a complete denial of justice. Since it had not been proved that there had been such a meeting, she could not be dispossessed.

In my opinion, the present case is distinguishable on the facts from Quartey v. Quartey (supra). In the present case, the defendants were not in possession of the disputed farms in their right as family members; and there was no evidence that they enjoyed the proceeds accruing therefrom. Their status appears to be that of mere caretakers "working on" the farms on undisclosed terms. By contrast, Madam Helena Oyoe Quartey in the case cited was found to be in possession as a beneficial owner letting out rooms in the premises to tenants, and pocketing the accruing rent with the consent of the family.

In the present case, moreover, a successor duly appointed by the whole family at a regular family meeting was being challenged and obstructed in the discharge of his customary duties by the defendants, dissenting junior members, who did not even recognise him as successor, but rather claimed ancestral family farms as their own separate property. For instance in an affidavit sworn to on 25 March 1972, the first defendant, spokesman for all the defendants, deposed "That we have no other place to farm for a living apart from the farms we own on the land. That it would be inequitable to restrain us from going on our farms which we have occupied for so long seeing that the land is owned by our family." (The emphasis is mine.) On the undisputed evidence, the three disputed farms were ancestral family properties which remained continuously in the possession of Kwadwo Asante (deceased) qua successor and family head until his death about four months prior to the hearing of the action; and the defendants had been merely invited to work on them. There was no evidence on the record that the defendants were in beneficial enjoyment of the farms in their own right during Asante's reign as successor and family head. That being so, I fail to see how they can successfully dispute the plaintiff's vested right and duty under the customary law to administer, control and manage these ancestral family properties by virtue of his position as successor to Asante (deceased).

For the above reasons, I would allow this appeal.
JUDGMENT OF APALOO J.A.
I agree.
JUDGMENT OF FRANCIOS J.A.
I also agree.

DECISION
Appeal allowed.

ALLOTEY AND OTHERS v. QUARCOO [1981] GLR 208-218
COURT OF APPEAL, ACCRA
22 JANUARY 1981

ANIN J.S.C., EDUSEI AND MENSA BOISON JJ.A.

ANIN J.S.C.

Since the death of Dr. C. E. Reindorf on 11 April 1968, the Onamrokor Adain family of Gbese, Accra, has been embroiled in protracted internecine litigation concerning his successor as head of family. The first suit entitled B. A. Quarcoo v. Manye Adorkor Allotey and Messrs. C.F.C. ended in a judgment incorporating an amicable settlement promoted by the La Mantse and Mr. Justice Nii Amaa Ollennu and filed in the court below on 23 December 1974. Under the terms of settlement, the plaintiff and the first defendant who incidentally fill the same roles in the present suit, were appointed joint family heads and it was also agreed that accredited representatives of the six constituent branches of the family should constitute elders and councillors to assist the joint heads in their administration of the family and its properties. The six elders who were selected by their respective branches of the family are the second plaintiff-non-respondent (now deceased) and the second, third, fourth, fifth and sixth defendants-appellants in the present action—the second in the series, commenced by a writ of summons filed on 3 June 1976. The reliefs claimed therein were: (a) a declaration that the first plaintiff is still the joint head of the Onamrokor Adain family and that he has not been constitutionally and customarily deposed, and (b) an injunction restraining the defendants from dealing with the family lands until the determination of the suit.

In the amended statement of claim, the plaintiffs first referred to the earlier suit and settlement reached and the formation of the council of elders as briefly recounted above. It was next stated that the defendants herein invited the first plaintiff to a family meeting to answer five specified charges preferred against him, i.e. mismanagement of family property; failure to account for family moneys collected by him; unauthorised sale of family lands; refusal to co-operate with family council; and lack of respect and consideration for the other joint head, Manye Adorkor Allotey, as well as the elders of the family constituting the family council. These charges were allegedly answered by the first plaintiff in a letter dated 20 February 1976. It was further stated in paragraph 10 of the statement of claim that the plaintiffs attended the proposed family meeting on 21 February 1976 and that "the first plaintiff answered all the specific charges and therefore the meeting came to an end." (The emphasis is mine.) However, by a poster dated 23 February 1976 he is alleged to have been deposed as joint head of family. Finally, the statement of claim made counter allegations of improper sale and irregular conveyances of family lands against the defendants during the pendency of the first suit.

In an amended defence, it was the first averred that at the family meeting held on 21 February 1976, the plaintiff "was lawfully, constitutionally and in full accordance with the relevant customary law and practice deposed as a joint head of the family," whereby he lost his place on the family council and the first defendant was left as the sole head of family. Next, objection was taken to the plaintiffs' attempt to invest the court with jurisdiction—which it lacked—either to hear charges preferred for the deposition of a family head or to pronounce on the merits of such charges or to evaluate any evidence adduced for the purpose. In short, it was contended, the court has no jurisdiction, whether original or appellate, to inquire into the m\erits of the matters raised in the amended statement of claim which touched on the substantive merits of the deposition charges duly brought against the first plaintiff before the only competent body, i.e. the Onamrokor Adain family. In paragraph 10 of the amended defence it was averred that:

"The plaintiff contemptuously withdraw from and walked out of, the said meeting before its conclusion and that after the plaintiff's said withdrawal, the meeting, which was a full assembly of the family, unanimously decided and resolved that the first plaintiff be deposed from the position of joint head of the family with immediate effect, whereafter the meeting came to an end."

In our judgment, these criticisms are well founded and justified. The eight new issues introduced by the learned judge and adjudicated upon by him in favour of the plaintiff considerably widened the area of controversy and resulted in the infringement of the fundamental rule laid down in such cases as Dam v. Addo [1962] 2 G.L.R. 200, S.C. that a court must not substitute a case proprio motu nor accept a case contrary to, or inconsistent with, that which the party himself has put forward, whether he be the plaintiff or the defendant. In the present case, the plaintiff's upon whom the burden lay of alleging and proving particulars of impropriety of the family meeting, neglected to do so and failed to disclose any specific grounds in support of his claim that his deposition as joint family head was uncustomary and unconstitutional. The opposing party took elaborate care to expose and attack the plaintiff's defective pleading and even twice moved for the striking out of the writ and claim for disclosing no reasonable cause of action. By his ruling on the motion, the learned judge himself acknowledged the correctness of most of the criticism levelled at the plaintiff's pleadings and confined the trial of the action to the solitary factual issue set out above. The parties had therefore every right to expect that the judgment would be confined to that one issue. Instead, the appellants have had the misfortune of being adjudged on new issues not previously pleaded by their adversary; and have in the event been condemned without an opportunity being afforded them to adduce evidence to meet the new issues stated in the judgment.

As Lord Normand said in Esso Petroleum Co., Ltd. v. Southport Corporation [1956] A.C. 218 at pp. 238-239, H.L. a case of negligence in which the majority of the Court of Appeal raised the issue of inevitable accident for the first time:
"The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. In fact the evidence in the case was concerned only with the negligence alleged ... To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

Apart from the learned judge's error in adjudicating on facts not pleaded by the respondent, the rule that the burden of alleging and proving specific grounds of invalidity of either the appointment or removal of a family head at a family meeting rests with the family member seeking to avoid a decision reached at a family meeting laid down in Welbeck v. M. Captan Ltd. (1956) 2 W.A.L.R. 47, seems to have been infringed in this case; the plaintiff's pleadings did not disclose any specific grounds of invalidity but the learned judge attempted to supply the omission in his judgment by considering such novel issues as the voting procedure adopted at the meeting, the appropriateness of the question put to vote and the manner in which the votes were carried.
Even though the learned judge correctly recognised the court's lack of jurisdiction to pronounce on the merits of the decision of the family to depose its head at a fully representative meeting and after due notice of the meeting and the charges given beforehand, since, both the common law and customary law have for centuries reposed that jurisdiction in the families themselves, yet he included the "propriety of the alleged deposition" in the issues for determination. And in his insistence upon the non-violation of any fundamental principle of the administration of justice, especially the rules of natural justice, he stated the limited supervisory role of the courts in family elections and depositions a shade too broadly;

for it is not the infringement of any fundamental principle or rule of natural justice or the breach of every procedural step that suffices to invoke the court's jurisdiction. As Jackson J. held in Quartey v. Quartey (1951) D.C. (Land) '48-'51, 401, the courts would interfere with the family's decision only when there has been a complete denial of justice or a substantial denial of justice. In the words of Jackson J. at p. 403:
"It is not within the competence of the Courts to arrogate to themselves decisions which customary law has for so many centuries reposed in the families themselves, and it is an interference in the subject's rights which they rightly resent, and which aid is sought only when there has been that complete denial of justice."
(the emphasis is ours)
In this case the propriety of the decision reached, not having been pleaded, was not an issue for the court to adjudicate upon. In any event, it is within the domestic jurisdiction of the family to decide on what they regard as good grounds for deposing their head of family, and unless there is clear proof of substantial departure from the tenets of natural justice, the courts will not interfere. There must be a substantial denial of natural justice before the court will strike the family decision down. If it was part of the plaintiffs' case that there was a substantial or complete denial of natural justice, he should have averred the same with particulars in his pleading: see Quartey v. Quartey (supra) and Amon v. Wesleyan Methodist Missionary Society (1929) D.Ct. '28-'29,7 where it was held that where a minister has been expelled from a missionary society the court would not interfere to re-instate him or to recoup him for his losses if it is clear that the procedure laid down in the rules of the society has been followed and that no principle of justice has been violated. As Sawrey-Coomson J. observed in the course of his judgment:

"such a meeting of the executive council [of the society] has its prescribed procedure and as long as on a broad view of it, that council does not depart seriously from that procedure, although the more meticulous practice and procedure found in a court of justice are not necessarily followed, no exception will be taken to its findings."
Turning to the solitary factual issue set down for trial, learned counsel for the defendants contended that the judgment of the court below was totally against the weight of evidence and that the learned judge erred in holding that the family meeting at which the plaintiff was removed as head did not come to a conclusion required by law especially since the account of the plaintiff's own witnesses showed the contrary. It would be recalled that the main controversy between the parties was whether or not the family meeting of 21 February 1976 came to an end. In his evidence, the first plaintiff gave the following account of what transpired at the said meeting:

> "When I attended the meeting, it was opened, then the charges were read over to me. I answered all the charges orally. At that time I had also prepared a written reply so I handed a copy to the secretary and another one to the second plaintiff who is now dead. The answers I gave orally were not considered at all. After handing over the reply to the secretary, one Alex Quarcoo asked me a question about quarry money and I replied that all moneys collected were paid into court during the first trial. During the cross-examination on my evidence certain words were used which provoked me and my followers. This led to a situation which made us leave the meeting. What actually happened was that I told the meeting that the quarry money after the trial and settlement of the case was being collected by my elder brother who happened to be present. He admitted having collected the moneys but said he had not been called to account to the family. When he said this, one Victor Quarcoo got up and said 'you thieves what about the lands you have been selling?' When he said this another brother of mine got up and said we were not thieves and accused the defendants for being responsible for the sale of lands. At this stage Victor and Alex Quarcoo got up with a view to fight us. They were followed by the others with them. The meeting developed into an uproar so amidst the

confusion we all dispersed. Since then no other meeting was called. About an hour after arriving at my residence a leg of a sheep was sent to me. I did not take it because the messengers could not tell me who had sent them. I therefore left for my father's house and on my return I came to find the leg of the sheep lying in the yard of my house. When I rejected it at first the messengers returned the leg of the sheep. When I came to find it lying in the yard I went back to my father's house and informed my brothers who came to collect the leg and threw it in front of the house from where it was brought. A week after this, notices were sent out to advertise that I had been deposed. On seeing the notices I brought this action for the declaration sought in my writ of summons."

Under cross-examination, the first plaintiff admitted that "when we were leaving the meeting, Mr. Amarteifio (i.e. the second defendant) invited us back but we did not believe the honesty of his intentions. Even the first defendant invited us but we knew it was all a camouflage." The plaintiffs' first witness, Mr. Samuel Allotey Otoo Sackey, who hails from his own branch of the family, corroborated his account up to the point of the plaintiffs' withdrawal. This witness stayed behind and saw the meeting continue to an end, after the family spokesman, the second defendant, had invited the members to consider the charges and answers of the first plaintiff and then called "on those who feel the charges have been proved against the plaintiff and wish him removed as co-head of family to raise their hands." After a positive vote against the plaintiff, a bottle of gin was produced and sheep was also produced; at which point the witness left the meeting. In answer to the court, Mr. Sackey said that "at the stage when the plaintiff and his followers left I found no reason to leave. There were other followers of the plaintiff who remained with me after the plaintiff had left." And he gave the names of two such followers of the plaintiff as Captain Michael Tetteh Quarcoo and J. O. Lamptey Mills.

The last named also testified for the plaintiff and corroborated his account of the uproar in the course of proceedings after an accusation of theft had been made by one of his uncles and a counter-accusation had been made by another uncle, both of whom almost came to blows. The decision of the family to remove the first plaintiff as joint head had been taken "after things had died down." And this was followed by the pouring of libation and slaughtering of a sheep. He confirmed that as the plaintiff and his followers were leaving, they were persuaded not to leave. Mr. Lamptey Mills' evidence was important because he confirmed that after his uncles had been calmed down, "the meeting continued thereafter and that while the plaintiff and some of his followers left, he personally saw no reason to leave." In answer to the court, he emphasised that before he left, the charges had been preferred against the plaintiff and answers given by him; he was aware of the attitude of members of the family towards what happened and he knew of the decision taken, after the second defendant had proposed that the plaintiff should be removed by vote.

The overwhelming impression one gets from reading the evidence of the plaintiff 's own witnesses as well as the testimony of the second defendant is that the meeting came to a decisive conclusion that first plaintiff should be removed as joint family head; that the hold-up or social disorder caused by the heated exchange between the two septuagenarians, Ahele Tufo and Victor Quarcoo, was only short-lived and did not result in bringing the meeting to an end; that the plaintiff acted perhaps hastily in withdrawing from the meeting since neither his own followers nor witnesses nor indeed any person came to any physical harm; and since no assault or battery was directed at the plaintiff personally. One could compare what transpired in this case with a temporary hold-up in a football match when two or more players suddenly flare up and hold up the game for a few minutes while steps are quickly taken by the referee, officials and even spectators, to placate the irate players and restore order for the game to resume. In this family contest, the final whistle or conclusion came with the taking of the vote to remove the first plaintiff as joint family head, accompanied by the symbolic and evidentially significant customary pouring of libation and slaughtering of sheep

to seal the act of removal. Whether those definitive steps ought to have been taken in all the circumstances of the case, and whether they were even properly taken or not, are in our opinion extraneous matters in this case, having regard to the sole factual issue set down for trial and the want of pleading on these issues. We accordingly express no opinion on these extraneous matters in this litigation.

Before concluding, it is only proper to mention that learned counsel for the plaintiff was also of the view that, after the withdrawal of the plaintiff following the social disorder, the meeting continued in fact, albeit with a different agenda. He submitted therefore that he was unable to support the finding of the learned judge to the contrary. Appeal allowed.

February 5, 1958.
HERVIE *v.* TAMAKLOE AND OTHERS [1958] 3 WALR 410.
High Court, Eastern Judicial Division, Land Court(Ollennu J.

OLLENNU J.

The plaintiff's claim is for damages for trespass to two creeks, Avilor and Aviloklue, and for an injunction. He pleaded that he is the head of the Avu family in the male line; that by a judgment of this court delivered on December 21, 1958, by Coussey J., as he then was, descendants in the male line of the Avu family were held to be the proper persons to manage and control the two creeks for and on behalf of themselves and of all other members of the family. The cause of action, he alleged, was entry upon the creeks without his leave and licence by the defendants, who he says are not members of the Avu family.

The defendants denied the plaintiff's claim to membership of the Avu family in the male line and to the headship of the family. They admitted entry upon the creeks but averred that such entry was in exercise of their right, the first defendant as head of the family, and the other defendants as members of the family.

The decision of Coussey J. of December 21, 1948, and its effect as alleged by the plaintiff was admitted by the defendants. There are therefore only two issues in controversy between the parties, namely: (I) whether the plaintiff is a descendant of Avu in the male line right through; and what is most important, (2) whether he is the head of the .Avu family. For the plaintiff to succeed he has to prove each of those issues.

The plaintiff gave evidence on his behalf and deposed that his father was one Alakpogo, son of Avu's son Lotu, and therefore that he was a descendant of Avu in the direct male line. His witness, Awuku Wuse Yao, on the other hand, deposed that the plaintiff's father Alakpogo was a brother of Avu. Again, his witness, Awuku Alakpogo, his paternal half-brother, in his evidence-in-chief gave the genealogical tree of their father Alakpogo as follows: "Avu's son begat Alakpogo's mother Atiakpi whose father was Glimeo."
The defendants admitted that the plaintiff's mother Tswerkowo was a member of the Avu family.

Upon such evidence it is imposssible to hold the plaintiff to be a direct descendant of Avu right through in the male line.

To contradict the plaintiff, on the evidence of who his father was, the defendants put in evidence a record of evidence that he, the plaintiff, had given in the Native Court B of Bator Dufor in 1953, in another suit that the plaintiff had instituted against the first defendant in this case and against eight others. In that evidence the plaintiff in answer to the question " Who begat you? " replied as follows: "I was begotten by one Kofi Gah, a native of Volo." The plaintiff denied giving that piece of evidence; but the first defendant also asserted that he was

present in the Native Court, heard the evidence given by the plaintiff, and that what appears in the record of proceedings tendered in evidence is exactly what the plaintiff said on that occasion.

I accept it as a fact that the plaintiff gave that evidence and that it is true. I believe that it is with the purpose of deceiving this court to procure judgment in his favour in this case that the plaintiff now says that his father was Alakpogo.

On the second issue, namely the headship of the Avu family, I have the bare assertion of the plaintiff and his two witnesses that he is the head of the Avu family. How he came to be the head, neither he nor any of his witnesses was able to tell the court. The only significant piece of evidence which they each gave was that the plaintiff is the Mankralo of Bator. There is no evidence that a Mankralo of Bator is automatically the acknowledged head of the Avu family. By native custom a person does not automatically become head of a family as of right. He must either be appointed-elected-by the principal elders of the family when the post becomes vacant by any means, or he must be acclaimed and acknowledged as such by the said principal members of the family, for example, by the principal members supporting acts he performs as head. In the appointment of the head the family is not tied down to choose any particular person; they are entitled to appoint any eligible person in the family; thus in the non-Akan areas, such as Bator, where the family consists principally of descendants in the male line, the family can, if in their opinion there is no suitable candidate among the descendants in the direct male line, appoint a descendant in the female line; the principle is the same as that applicable to the appointment of a successor to a deceased person; see the case of *Makata* v. *Ahorli and Others*, a case of appointment of a successor.
Thus, although the plaintiff is not a descendant in the direct male line, he could nevertheless have succeeded in this suit if he had been able to prove that the principal elders of the family had appointed or acclaimed him as head of the family in accordance with native custom. But there is no such evidence. Therefore the plaintiff must fail on the second issue also.
The defendants have not counterclaimed for any declaration, and consequently I cannot make any declaration in their favour. All I can do is to dismiss the plaintiff's claim and enter judgment for the defendants. The plaintiff's claim is accordingly dismissed, and judgment is entered for the defendants.

TAGOE v. IDUN [1987-88] 1 GLR 583-589
COURT OF APPEAL, ACCRA
26 NOVEMBER 1987
ABBAN, WUAKU AND AMPIAH JJ.A.

WUAKU J.A.

In about January 1971 the plaintiff who is the respondent before this court bargained with the late Emmanuel Okai Tagoe to purchase from the said E. O. Tagoe his house No. B. 598, Nii Okai Koi Street, Kaneshie, Accra. The purchase price in those days was for ¢3,000. There was a dispute whether or not the ¢3,000 was to be paid in a lump sum. There is however evidence that on 15 February 1971 and 20 May 1971, the amounts of ¢400 and ¢1,100 were respectively paid to the late E. O. Tagoe who accepted them and gave receipts covering the said payments: see exhibits A and B. The plaintiff said that she attempted making a further payment of ¢1,000 but found the late E. O. Tagoe too ill at the time to receive the payment, and not long thereafter he died on 18 September 1971.

On hearing of the death, the plaintiff went to see one Mr. Hammond whom she described as a relation of the deceased. As a result of what Mr. Hammond had told her, the plaintiff accompanied by one Mr. Otoo attended the laying in state of the deceased and there, as custom demands, presented a bottle of schnapps to the deceased's relatives to inform them about the transaction between her and the deceased. Present at the laying in state was Mr. Hammond. According to the plaintiff the elders agreed to accept the bottle of schnapps, but were prevented by two young men. The two young men were the sons of the deceased vendor. These two young men later promised to refund the amounts paid by the plaintiff. They defaulted, so the plaintiff complained to the Gbese Mantse. Before the Gbese Mantse the two young men asked for time to pay and were given up to 8 February 1972. The plaintiff says that on 8 February 1972, the two young men brought ¢400, with a promise to refund the balance by monthly instalments of ¢40; this she refused to accept and therefore resorted to this action.

The plaintiff says that she has brought the action against the defendant, a paternal half-brother to the deceased E. O. Tagoe, because at the laying in state, the defendant sat at the head of the table with the other relatives of the deceased and had by his conduct put himself forward as the head of the family. By her writ of summons she claims:

"(1) Specific performance of a verbal contract made in or about February 1971 for the absolute sale or assignment to the plaintiff of the defendant's late father Emmanuel Okai Tagoe's house No. B. 598, Nii Okai Koi Street, Kaneshie Estate, Accra (The emphasis is mine.)

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In paragraph (1) of the statement of claim, the defendant was described as the head and lawful representative of the late Emmanuel Okai Tagoe's family of Asere division, Accra and was sued as such.

In paragraph (5) of the statement of claim the plaintiff pleaded as follows:

"(5) On 18 September 1971 the said deceased died intestate and at a meeting of the said family (to which he had belonged) held at Gbese Mantse's palace under the chairmanship of Nii Okai Pesemaku III, Gbese Mantse, the plaintiff and the defendant assisted by witnesses in accordance with the applicable Ga Mashie custom presented a bottle of liquor and introduced herself to the said family as a debtor of the said deceased with respect to the balance of the said price of the said house."

The defendant filed six additional issues and were all agreed upon for trial. Issue 1 of the said additional issues is this:

"(a) Whether the defendant not being the head of the late Emmanuel Okai Tagoe's family can be sued in respect of a claim against the said Emmanuel Okai Tagoe, deceased."

At the hearing of the summons for directions the court recorded this statement from the defendant.

"The defendant is saying that he cannot be sued because he is not the head of family and that he had been brought to court wrongly. They are to find the proper person."

Throughout the proceedings the defendant had maintained his stand that he was not the head of family and therefore not the person to be sued. The plaintiff was thus put on her guard. The circuit judge who tried the case held a different view and gave judgment for the plaintiff. Against the judgment the defendant has appealed to this court.

Of the several grounds of appeal filed, grounds 1 and 2 were argued together. Those two grounds dealt with the question whether the defendant was the head of the deceased vendor's family and therefore the proper person to be sued,

The undisputed fact is that house No. B. 598 at Nii Okai koi Street, Kaneshie, was the self-acquired property of E. O. Tagoe and that, E. O. Tagoe died intestate. E. O. Tagoe had not before his death properly disposed of the house. It has consequently become the property of the family to which the late E. O. Tagoe belonged. On the admitted facts that he belonged to the area called or known as Accra or Ga Mashie, his family at death was that of his mother (see Amarfio v. Ayorkor (1954) 14 W.A.C.A. 554.). In Accra town, the family for purposes of succession means the maternal family. The children of male members do not form part of the family (see Akele v. Cofie [1961] 1 G.L.R. 334, a judgment of Ollennu J. (as he then was).

Accra or Ga Mashie custom has attained the status of law and requires no proof that successorship is matrilineal: see Ollennu, The Law of Testate and Intestate Succession in Ghana (1966 ed.), p. 183 et. seq. and the authorities therein cited.

The plaintiff had sued the defendant as the head of family. This was denied. The onus of proof was therefore on the plaintiff to prove the affirmative. Paragraph (5) of the statement of claim shows that when the plaintiff introduced herself to the family of the deceased, it was at the palace of the Gbese Mantse. It was the Gbese Mantse, Nii Okai Pesemaku III, who acted as the chairman when the plaintiff introduced herself (with liquor) as a debtor to the deceased vendor. The plaintiff and the defendant assisted by witnesses presented the liquor. Nowhere was it stated that the defendant acted as the head by accompanying the plaintiff to present the bottle of schnapps to the Gbese Mantse. The plaintiff is bound by her pleadings.

As stated earlier on in this judgment; by Accra or Ga Mashie custom, Emmanuel Okai Tagoe and Ayi Tagoe were not privies in blood. It therefore follows that even if Ayi Tagoe had made any admission at all, that admission would not be binding on Emmanuel Okai Tagoe's interest in the house. To act as a spokesman at a memorial service for a deceased relative and to officiate with the consent of the members of the deceased's family, does not make one become head of family as it is popularly understood and known to the customary law. Where headship is alleged and it is denied, there must be strict proof of it. It is not unusual that on occasions like wake-keepings and memorial services, persons other than heads of family do act to give prestige to the occasion. Such persons cannot be described as heads of family.

The family interest in property which is expected to be protected by a head of family or a member as enunciated in the decision of Kwan v. Nyieni (supra) is not the same as the interests which a spokesman protects at a wake-keeping or memorial service. Evidence that a person officiated at a wake-keeping or memorial service as a spokesman, as described by the learned judge, would not necessarily make such person head of family.

With regard to the substitution by the deceased vendor's sons for the deceased defendant, it is quite clear that the sons do not belong to their father's family. The sons cannot become their father's successor so as to be clothed with any authority to dispose of the house. Moreover since they were substituted for the original defendant, they would be defending or prosecuting the appeal in the same capacity in which the defendant was sued, and the defences that were available to the defendant, would be equally available to them. In my opinion the substitution would not alter the defence to the advantage of the plaintiff. Kwan v. Nyieni (supra) is no authority that a plaintiff is at liberty to sue anybody whom he or she thinks is the head of family because the one officiously so appears to be. The plaintiff must look for the substantive head failing that, he or she must took for an accredited elder of the family. The plaintiff failed to show positively that the defendant Ayi Tagoe was the head of the late E. O. Tagoe's family and therefore the proper person to be sued.

Arguments were limited to the status of the defendant. That issue is sufficient to dispose of the appeal. Other several points were raised in the appeal but not argued. I will not deal with them either. In the result I would allow the appeal, set aside the judgment of the court below and in its place, dismiss the plaintiff's claim and enter judgment in favour of the defendant.ABBAN J.A.

Appeal allowed.

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CASES

AYER v. KUMORDZIE [1964] GLR 622-627
IN THE HIGH COURT, ACCRA
20 NOVEMBER 1964

BOISON J.

The plaintiff by her writ of summons claimed the return of her goods wrongfully detained by the defendant and £G500 damages for wrongful detention or in the alternative, £G2,500 damages. The goods referred to in the statement of claim as the said chattels "are lots 1, 2, 3, attached to the statement of claim." The agreed issues were:
"(a) Whether or not the plaintiff is the owner of and entitled to the possession of the chattels the subject-matter of the suit.
(b) Whether the plaintiff and the defendant lived and cohabited as concubines or under customary law and whether the defendant under any customary law is entitled to detain or impound the plaintiff's chattels under the circumstances.

(c) Whether or not the defendant has any claim or any right at all over properties bought by him, to the plaintiff during their stay together.
(d) Whether or not the plaintiff has suffered loss and damages by the wrongful detention of her properties by the defendant."
The case of the plaintiff was that she has been a hair-dresser and seamstress by profession from 1952 to April 1964. In 1961, she was staying with her mother, the second witness for the plaintiff, before she came to stay together with the defendant. She brought the cloths, sewing machine and working tools along with her and during her stay with defendant, she has been buying new cloths and customers have been bringing their materials to be made into dresses. The articles in lot 1 attached to their writ of summons are those she brought from her mother's house to the defendant's as well as articles she has bought herself during her stay with the defendant. In lot 2 some of the articles belong to herself, others belong to her customers who had brought them to the plaintiff to make dresses for them. In lot 2, items 1, 2, 3 are articles bought by the defendant for her. As a hairdresser and seamstress she makes on the average £G5-£G6 per day, i.e. from Monday to Friday (i.e. £G25) and for Saturdays and Sundays she makes £G8 10s. per day, i.e. £G16—the total income per week would, therefore, appear to be about £G40. She, the plaintiff, became ill and left for her mother's house and thence to Ada and other villages for treatment. After the treatment she has been staying with her mother, the second witness for the plaintiff, and the defendant has constantly refused to give her articles aforementioned (lots 1 to 3) to her: the plaintiff says she does not want to continue her marriage with the defendant and stay with him.

The defendant's case substantially was that he is married to the plaintiff under customary law and that during their marriage he bought the articles in lots 1, 2, 3 for the plaintiff. He, as husband, is prepared to allow the plaintiff to have and use the articles on the condition that the plaintiff stays with him and continues the marriage.

It is important in this case, I think, to be clear as to what system of law is to be applied in determining the controversy between the parties and, in particular, the devolution of properties between them. The parties are married under customary law and are therefore husband and wife in the eyes of that law. The plaintiff and her mother admitted this. The relationship should therefore be measured and interpreted in the light of customary law and not by any other system of law. Time was when customary law was treated, rather in a most peculiar way, as a fact to be proved by expert evidence. By section 67 of the Courts Act this is not so now. Customary law is now deemed to be in the bosom of the judge.

From the evidence it is clear that the parties lived together as man and wife under customary law and not as concubines. Where parties are married under customary law and a spouse buys something for the other the customary law appertaining thereto, as I understand it, is as follows:
Where at the time of delivering of the property by one spouse to another spouse the spouse delivering the property declares his or her intention that the property is an outright gift to the other party, if the marriage is dissolved at the instance of either spouse the receiving spouse takes the property absolutely as his or her own; but in absence of such declaration of intention the customary law presumes that the property was bought for the use of the other spouse only on the condition and in so far as the marriage exists. If the marriage is dissolved the defaulting spouse pays the expenses of the marriage incurred to the other party and the defaulting party has to give up property bought for her or him to the other party. It is also a principle of customary law that the defaulting party at the dissolution of marriage pays to the other party the marriage expenses, and if this is not done the non-defaulting party has a right to restrain the property of the other spouse until the marriage expenses are paid by the party who is not prepared to go on with the marriage.

Having decided that the articles in lots 1 and 2 (except items 1, 2 and 11) belong to the plaintiff and articles in lot 3 belong to the defendant, I have to decide whether or not the plaintiff is entitled to possession of the articles. As far as lots 1 and 2 are concerned, the plaintiff was entitled to possession of them as having bought them and in respect of items 1, 2 and 11 of lot 2 as belonging to her customers. The defendant has no claim as such on the articles in lot 1 during their stay as man and wife under customary law. But, this is important, as soon as the plaintiff decided not to continue to marry the defendant, in the absence of any formal dissolution of the marriage which both the plaintiff and her mother admitted has not been done, the defendant became entitled, in the eyes of customary law, to restrain the articles of the plaintiff (not articles belonging to the plaintiff's customers) until his (defendant) marriage expenses were paid by the plaintiff or her relatives. The detention of the plaintiff's articles was therefore not wrongful.
Judgment for the plaintiff.

OWUSU v. NYARKO [1980] GLR 428-430
HIGH COURT, SEKONDI
5 JULY 1979
SARKODEE J.

The plaintiff-respondent (hereinafter referred to as the plaintiff) claimed against the defendant-appellant (hereinafter referred to as the defendant) one-third share of a cocoa farm she helped the defendant to cultivate whilst she lived with him for seven years as husband and wife during which three children were born to them. The plaintiff based her claim on customary law. Apart from the evidence of the plaintiff and that of her father as to the nature of the association between the plaintiff and the defendant, which evidence was strongly challenged in cross-examination, there was no independent testimony as to whether the defendant and the plaintiff contracted a valid customary law marriage or that they lived in concubinage.

That piece of evidence was vital to the respective interests of the parties in any properties they acquired during cohabitation. With regard to this therefore this court called Nana Kwaku Osei, the linguist of the Omanhene of Wasa-Amanfi Traditional Area, where the plaintiff comes from and where the land the subject-matter in dispute is situated. He said among the Wasa-Amanfi people who are Akans where there is a valid customary law marriage the wife on dissolution of the marriage is not entitled to a share of any farm she helped her husband to cultivate.

This is in line with the customary law position among the Akans for as a fundamental principle of customary law, a son or a wife is a dependant of a husband and that the family law required, indeed it is a responsibility, that a son should assist his father and a wife should work with or for her husband and the property acquired with such assistance is the individual property of the man: see Abebreseh v. Kaah [1976] 2 G.L.R. 46 at p. 52. On the other hand where the parties live in concubinage the woman on separation is entitled to one-third share of the farms she cultivated with the man. This evidence of the linguist corroborates that of the plaintiff's father.
In the instant case, the defendant did not satisfy the essential prerequisites of a valid customary law marriage as laid down by Ollennu J. (as he then was) in Re Sackitey's Caveat [1962] 1 G.L.R. 180. The plaintiff's father told the parties to go and live together as he realised the defendant was not in a position to perform the customary rites. There was no formal meeting of the families of the plaintiff and the defendant. In my view, a father telling a man and his daughter to go and live together without more does not satisfy the requirements of consent by the family of the woman and mere cohabitation is not enough.

There must be a clear and unequivocal act of consent by the two families concerned. There is no evidence in this case of the family of the man even knowing of the existence of the plaintiff. I hold therefore that the plaintiff and the defendant lived in concubinage. On separation and according to the custom of the locality the plaintiff was entitled to one-third share of the farm she helped the defendant to cultivate as claimed by her.

I do not believe the farms the plaintiff and the defendant cultivated belonged to the defendant's brother alone. The brother Kwasi Jardon admitted in cross-examination that the farm was divided into three parts and one part was given to the plaintiff, the other parts to the defendant's first wife and another. Subsequently, another part of the farm was given to her by the defendant's brother. The defendant certainly has a share otherwise I do not see the reason for giving his wives portion of the farms. I hold therefore that the plaintiff is entitled to her claim. She must have one-third share of the farms she helped the defendant to cultivate. The appeal fails and is accordingly dismissed. Costs assessed at ¢200.

DECISION
Appeal dismissed with costs.

QUARTEY v. MARTEY & ANOR. [1959] GLR 377-383
IN THE HIGH COURT, ACCRA
17TH NOVEMBER, 1959

OLLENNU J.

H.A. Martey and Evelyna Quartey were married under customary law some 25 years before the proceedings to which this report relates. In course of time Martey died, and his widow issued a writ of summons, directed to Okoh Martey and Anti Koshie, claiming
(1) an amount of £91 Os. 6d., balance of expenses incurred by her in connection with the funeral of her late husband;
(2) a one-third share in 70 cattle;
(3) a one-third share in a house at Official Town, Accra; and
(4) a one-third share in the sum of £1,305 8s. 6d., which stood to her late husband's credit at the time of his death.
As to the funeral expenses, the widow pleaded that she had incurred them at the request of the chief mourner who presided over the funeral, and with the full knowledge and consent of the family. As to the claim to the various one-third shares, the widow relied on two grounds, viz.,
(1) that a wife married according to customary law is entitled to a one-third share of the estate, real and personal, of her husband upon his death intestate, and
(2) that she had assisted her late husband financially during his lifetime, and had given active assistance to him in all jobs he did. The properties mentioned in the writ of summons were acquired by him with moneys which he had made from the jobs in which she had rendered him assistance. Where a woman so assists her husband in carrying on his business, she is entitled to a share in the proceeds of his work, or to a share of the property he acquires.

The defendants denied that the plaintiff was a wife of the deceased as alleged by her. They also denied knowledge of the plaintiff's authority to incur the expenses of £91 Os. 6d. on the funeral, or any other funeral expenses.

The evidence led by the plaintiff as to her marriage with the late H.A. Martey was not cross-examined upon, and there is evidence led by the defendants which shows that the late H. A. Martey lived with the plaintiff for over 25 years as man and wife, and that the family of the

deceased acknowledge the plaintiff as a wife of the deceased, married under the provisions of customary law.

There are various forms of valid marriage under customary law. The indispensable elements in all of them are the request of the man to live with the woman as man and wife, and consent thereto by the family of the woman (Asumah v. Khair. On the evidence before me I hold that the plaintiff was the lawful wife of the deceased, married according to customary law.
Again, by customary law it is a domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, e.g. farming or business. The proceeds of this joint effort of a man and his wife and/or children, and any property which the man acquires with such proceeds, are by customary law the individual property of the man. It is not the joint property of the man and the wife and/or the children. The right of the wife and the children is a right to maintenance and support from the husband and father.

Applying that principle, in the case of Okwabi v. Adonu (2 W.A.L.R 268), the West African Court of Appeal, confirming a judgment of the Land Court, held that it is a common feature of family life that a son will work with and for his father, and that therefore, in the absence of strong evidence to the contrary, no presumption will be raised that the property, obtained by the joint efforts of father and son and held by the father, is held by the father in trust for the son absolutely. On the same principle I must hold that, in the absence of strong evidence to the contrary, any property a man acquires with the assistance or joint effort of his wife, is the individual property of the husband, and not joint property of the husband and the wife. There is no evidence in this case which can raise a presumption that the properties acquired by the late H. A. Martey were the joint property of himself and his wife.

Counsel for the plaintiff submitted that, upon a man's death intestate, his widow, married according to customary law, is entitled in distribution to a one-third share of his self-acquired property, real and personal. This, he said, is the customary law. He led no evidence of such a custom, and was unable to refer the Court to any judicial decision in support of it. In my opinion, this submission is wholly untenable.
The customary law is, that upon a man's death intestate, his self-acquired property becomes family property, vested in his family, which will be the paternal family or the maternal family, depending upon the tribe to which the deceased belonged. Except in very rare circumstances a wife is not a member of that family. No member of the family has the inherent right to succeed the deceased; succession is a matter of appointment, or election, by the head and principal members of the family.

Nor has any member of the family an inherent right to a fixed share of the deceased's property in such a case. Therefore, even where the wife happens to be a member of her husband's family she will not be entitled to an ascertainable share of the property. The personal property is distributed among the children and other members of the family, the children getting the major share. But the real property, and certain classes of personal property, are not distributed or partitioned; they remain intact, and neither the successor nor any one member of the family can dispose of such property without the consent and concurrence of the head and principal members of the family.

By customary law the right of a widow is the right to maintenance and support by the family of her deceased husband. Her maintenance and support remain the responsibility of the head of the family until a certain stage of the funeral, when the family by custom appoints a member of the family to be her new husband. From then on, that customary husband becomes responsible for the widow. He may not in fact live with her as man and wife, but she is his wife de jure, and he is responsible to maintain her according to his own standard in life, as

he would maintain a wife married by himself originally. The widow may opt not to accept the customary husband, in which case the family's responsibility for her support and maintenance ceases; or the family may opt to give her a send-off, in which case, too, their responsibility would cease. In either case, special custom must be performed to effect the determination of the marriage of the woman into her late husband's family.

It follows that the only claim open to a widow of a marriage according to customary law is a claim for maintenance and support. This is based upon the principle that when the husband married the woman into his family, he undertook responsibility for her maintenance and support; which responsibility together with the enjoyment of his self-acquired property (if any), falls to the lot of his family. The widow can maintain an action for her support against the head of the family, against the successor to her husband (if one has been appointed according to custom), or against the customary husband. I hold, therefore, that the plaintiff's claim to a one-third share of the estate of her late husband is misconceived.

The funeral expenses of a deceased person are by customary law the responsibility of his family. The proper person to be sued in respect of funeral expenses is the head of the family, or the successor appointed by the family to take charge and control of the family property. Upon the plaintiff's own evidence the defendants are not the heads of the family; moreover, there is no evidence that any of them has been appointed successor to the deceased. The plaintiff has therefore sued the wrong persons for those expenses, and her claim must for that reason also fail.

ABEBRESEH v. KAAH AND OTHERS [1976] 2 GLR 46-62
HIGH COURT, SEKONDI
5 FEBRUARY 1976

SARKODEE J.

The plaintiff, a trader in textiles, meat and general goods, is the widow of one James Benjamin Aidoo who died intestate on 8 November 1969. She and the deceased were married under the customary law for about 36 years during which they had ten children, seven of whom are alive. The second co-defendant, Albert Evans Dapaah, is the customary successor of the deceased and grantee of letters of administration of the deceased's estate. He was a maternal cousin of the deceased. During his lifetime the deceased lived exclusively with his wife and children at Awaso, in the Sefwi Anwiaso district, first in rented quarters and later, about 1959 or 1960, in house No. J/I-182, Awaso, the subject-matter in dispute. The plaintiff and her children, four of whom are minors, continued to live and are still living in the said house.

However, some time in January 1974, the defendant Opanyin Kwasi Kaah gave the plaintiff notice to quit the house in the following terms: "This is to notify you that you would be required to quit the above-mentioned compound house, which is mine, by the end of this very month (January, 1974)." Unknown to the plaintiff, Dapaah, her husband's customary successor, had sold the house to the first co-defendant, Benjamin Kwabena Nkrumah who bought it in the name of his nephew, Opanyin Kwasi Kaah.

It was this sale which triggered off this action in which the plaintiff seeks a declaration as follows:
"(1) Declaration of title to the landed property known as house No. J/I-182, Awaso; or in the alternative,
(2) A declaration that the plaintiff and her children of the marriage between her and the late husband James Benjamin William Aidoo are entitled to remain in the said house."
The plaintiff says that she and her late husband purchased the parcel of land on which the house was built with moneys provided jointly by them and that she supervised the construction

and bought part of the materials. Also she engaged and paid for the labour used in building the house with her own money. It was therefore submitted on her behalf that she and her husband were joint owners of the house and that on the death of her husband she became the sole owner of the property. That on the death intestate of her husband the house did not fall into the estate of the deceased so as to be family property and the subject-matter of inheritance by her husband's customary successor. Alternatively, she says that by virtue of her position as the widow of the deceased under customary law she and her children are entitled to remain in the house put up by her husband.

By custom property which a man (either in a matrilineal or patrilineal community) acquires with the assistance of his children does not become joint property of that father and child or children; nor in the case of assistance from his wife the joint property of the man and his wife: see statement of Ollennu in Adjabeng v. Kwabla [1960] G.L.R. 37 at p. 41 where he stated the law as follows:
"By customary law, where a son or a ward works with his father or guardian and out of the proceeds of that joint labour the father or guardian acquired property, the son or ward does not become joint-owner of that property with the father or guardian ... Similarly, by customary law where a son or a ward assists his father or guardian with money and the father or guardian uses that money, or that money together with other monies of his own, to acquire property, the son or ward does not become joint-owner with the father or guardian of the property so acquired."
This rule takes its root from a fundamental principle of the customary law that a son or a wife is a dependant of a husband and that family life requires, indeed it is a responsibility, that a son should assist his father and wife should work with or for her husband and the property acquired with such assistance is the individual property of the man: see Quartey v. Martey [1959] G.L.R. 377 at p. 380. But it is the father's responsibility to maintain and support his children and wife. However, customary law recognises the right of a wife to have and hold her own property independently of her husband, which right she can enforce at law. Thus Sarbah in his Fanti Customary Laws (3rd ed.) (1968), at p. 39 said:

"While a husband is living with his wife, or is providing for and maintaining her, he is not liable for her contracts, debts, or liabilities, except for any medical expenses she may be put to for herself or child by him. For the wife, if freeborn or domestic of a different family, can acquire and hold property apart from the husband, and has her own family to fall back on."
This view was echoed by J. B. Danquah in his Akan Laws and Customs at pp. 191-192. He, in that case, added that the rule of succession bars the husband from the enjoyment of his wife's self-acquired property. When she dies her family takes all of it from her husband's control.
The plaintiff is a trader of long standing. Immediately before and during the time the building was under construction she held passbooks of United Africa Company Ltd. (U.A.C.), Societe Commerciale De L'Ouest Africain (S.C.O.A.) and other firms. She was a trader in textiles, pigs' feet and other goods. She got some of her supplies from Obuasi. It is not disputed she is a woman of means. Her husband was at first a tally clerk earning 1s. 6d. a day. At the time of building the house he had risen to the post of book-keeper. (His illiterate wife thought he was an accountant). He received 6s. a day. He could afford only the children's school fees whilst the plaintiff provided house-keeping money. In effect she fed the husband and the children. The wife contributed half the purchase price of the plot of land. When the plot was demarcated her husband wanted to suspend operations as he was not in a position to start building. His wife, however, gave the go-ahead, adding that she was prepared to advance money. The plaintiff had to feed the household because her husband at the time was supplied with cement by the British Aluminium Company (his employers), the cost of which was deducted at source from his wages. The plaintiff was the one who supplied sawn timber. She often sent her husband's nephew to buy it. When they ran short of cement she contributed out of her own

resources. She contributed other materials such as sand, stones and corrugated iron sheets. She was so anxious to have the building completed that she spent large sums of money on it.

Apart from this she and the children helped by carrying water to the site. Also she stayed there to supervise the labourers. The more attempts were made in cross-examination to show that she was not capable of providing the funds and materials the more she indicated that the whole family depended upon her. Very often her husband took large sums of money from her; which he repaid after a period. When he took small sums, she did not expect him to refund. She had occasion to advise her husband to stop taking advances on his wages and to ask her for money whenever he needed help.

It is true, the plaintiff was unable to state in terms of cash how much her contribution towards the building was. Her explanation was that she gave receipts of all purchases to her husband; her husband kept all the papers and she never expected any dispute or litigation. She never took account of her contribution. This is not surprising for the ordinary incidents of commerce have no application in the ordinary relations between husband and wife: see Rimmer v. Rimmer [1953] 1 Q.B. 63, C.A. I accept her explanation as reasonable. Her main interest, as she put it, lay in the fact that she and her husband were building for themselves and their children. Until the building was completed they had not seen and no member of her husband's family had visited them in that remote part of the country. I think the intention of the plaintiff and her husband was summed up by the statement of Beatrice, their eldest daughter, whose evidence corroborates that of her mother in a material particular. She said that her mother would not have contributed because she (her mother) was an Ashanti and as her father was also an Ashanti her mother knew that on her father's death his nephew would take the property from them. Beatrice is now 35 years and was old enough at the time to see everything. There is no doubt that both the plaintiff and her children intended from the very beginning to build for themselves. On the completion of the house, father, wife and children moved into it. The father went further to share the rooms amongst his children with the plaintiff. The result is that although Beatrice is now married and lives with her husband in another house she still keeps her room in the house. Her sisters who live outside Awaso stay in the house when they visit Awaso and it is their only house and the only one they have ever known.

There is no doubt in my mind and I find that the plaintiff was a woman of considerable means. There is sufficient evidence before me from which I can safely hold that the plaintiff made substantial contribution towards the building of the house. It will be repugnant to natural justice, equity and good conscience to hold otherwise: see Larbi v. Cato [1959] G.L.R. 35. I am satisfied that the husband and the wife by their joint effort contributed to acquire the house which they intended to use for themselves and their children. It has been stated that the customary law does not admit of joint ownership by persons who are not related by blood. But at the same time there is no positive rule of customary law which prohibits the creation of joint interests in property between persons not connected by blood: see per Hayfron-Benjamin J. (as he then was) in Yeboah v. Yeboah [1974] 2 G.L.R. 114 at p. 121; also Amissah-Abadoo v. Abadoo [1947] 1 G.L.R. 110 at p. 123. Will it be right to say in the face of all the evidence before me that the intention of the husband and the wife was other than to create joint interests? Will it be right to say that a wife who had her own property and who made sacrifices and such massive contribution towards the construction of a house is to be deprived of the fruits of her labour, and to stamp what she did as mere assistance to her husband and hold that she has no claim to the building? Surely, good conscience alone will not permit that.

Taking the evidence as a whole I am of the view that the part played by the plaintiff in the construction of house No. J/I-182, Awaso, was more than mere assistance given by a wife

married under the customary law to her husband. She in her own right actively participated and contributed in no small way towards the completion of the house. My humble view is that Quartey v. Martey (supra) does not apply to this case. The wife in the instant case made direct payments intended solely for the construction to the husband. She supplied building materials. This has been corroborated by the plaintiff's second witness, Addae. Despite suggestions in cross-examination that he was not a member of the late Aidoo's family, I think that his connection with the Aidoo family was so close and intimate as to enable him to say exactly what took place during the construction. During that period the husband stopped giving house-keeping money. It was obvious he was not in a position to feed his family for there is no doubt that what he had left out of his wages after deductions for cement taken on credit was too small having regard to his wages which were about £G9 a month. His wife, therefore took up this responsibility; and what greater sacrifice can a wife, especially a customary law wife make! Ollennu in his book on The Law of Testate and Intestate Succession in Ghana at p. 225 said this of the husband's responsibility to provide support and accommodation for his wife and children:
"So great is the importance which customary law attaches to a man's liability to maintain his wife, that his failure to maintain her is one of the very few grounds upon which a wife may obtain divorce against her husband by customary law. The liability of the husband to maintain and provide accommodation for his wife devolves upon his family or successor, a responsibility which can only determine upon death of the wife or upon the determination of the marriage in a lawful manner."

Secondly, in the Quartey case (supra) the wife admitted that her husband was in charge of a cocoa farm at Pramkese and that he could have built the house from the proceeds of that farm. Aidoo had no such independent source of income. If he had, Dapaah would certainly have said so. Aidoo depended solely on his wages and could not have conceived the idea of putting up a house but for two reasons. First, the strong desire to make adequate provision for his wife and children during his lifetime and secondly, and perhaps the more important, reliance on the firm promise of contribution from his wife who as has been conceded was a trader in a big way.
It is one thing to say a child or a wife assists a husband in carrying out the duties of his station in life and another thing to say the child or wife advances large sums of money or building materials to the husband or father to build a house for his wife and children. In the latter case, unless there is a clear intention on the part of the wife or child to make gifts of the moneys and things donated for the husband or father it will be contrary to natural justice and good conscience in this day and age particularly having regard to the present day economic situation to hold that what the child or wife did was mere assistance to his or her father or her husband, and that the plaintiff contributed large sums and materials to enable her husband to put up a building which she knew, as an Ashanti and a person in the matrilineal community, would be for his own family. I do not think that the plaintiff would so easily overlook the fact that on the death intestate of her husband his self-acquired property would become her husband's family property and that she as a stranger to the family would be entitled only to mere maintenance by the family during widowhood; the fact that in certain circumstances, she may be allowed to stay in her husband's house notwithstanding. I think the desire to make provision for their children was uppermost in the minds of the plaintiff and her husband: It should be noted that even after her husband's death it was the plaintiff who paid rates on the house. It will not lie in the mouth of Dapaah to say that it was he that permitted her to pay the rates when receipts were issued in her name. I accept the plaintiff's evidence that she made a substantial contribution to the building of the house and I hold that her intention was to hold the property jointly with her husband. Indeed, apart from suggestions in cross-examination which were denied, the "denial of the fact is the only evidence in the case unless evidence is led by other witnesses to the contrary": see Kugblenu v. The Republic, Court of

Appeal, 5 September 1969, unreported; digested in (1969) C.C. 160. There was no positive evidence of a contrary intention. No witness was called to challenge the plaintiff, not even Dapaah for he was not at Awaso when the construction started and throughout the period when the house was being built.

It seems also that throughout their 36 years' stay at Awaso no member of Aidoo's family visited him. None of them in my view is in a position to testify as to how the house was built. The plaintiff's evidence therefore stands uncontradicted. I hold that the house No. J/I-182, Awaso, was owned jointly by the plaintiff and her husband. It did not become family property and the whole did not vest in Dapaah, Aidoo's customary successor. If any part should vest in him it would be Aidoo's interest in the house in which Aidoo's widow and children are entitled to a possessory life interest: see Amissah-Abadoo v. Abadoo [1974] 1 G.L.R. 110. However, the plaintiff and her husband are subject to customary law which does not appear to recognise the right of survivorship as in the case of joint-tenants under English law. I am therefore bound to hold, much to my regret, that the plaintiff will be entitled to only her own share in the property.

Finally, I hold that the plaintiff is entitled to the declaration she is seeking. She and her late husband contributed to build house No. J/I- 182, Awaso. It is the joint property of herself and her husband. The purported sale was null and void. Even if I were to hold that the house was the self-acquired property of the deceased, the plaintiff and her children have a possessory life interest in it and are entitled to remain in it. The second co-defendant could not dispose of the property to over-reach that life interest.
DECISION
Judgment for the plaintiff. Declaration accordingly.

CLERK v. CLERK [1968] GLR 353-361
HIGH COURT, ACCRA
2 APRIL 1968
CAMBELL J.

The plaintiff in this case seeks relief by way of an order of perpetual injunction restraining the defendant from interfering with the occupation of house No.F.539/1, Osu, Christiansborg. Her claim for relief is based on two grounds, namely, that she contributed financially and assisted physically in the construction of the house thereby acquiring beneficial interest therein and secondly even if this is not so, she is entitled to remain in residence as it is the matrimonial home of the parties.

The parties were married under the Marriage Ordinance, Cap.127 (1951 Rev.), in 1929, and the marriage is still subsisting. In 1964 the defendant brought a petition for divorce against the plaintiff on the grounds of cruelty and or desertion, his petition was however dismissed on the merits on 23 December 1964 (reported in [1964] G.L.R.712). On 29 December 1964, the defendant addressed a letter to the plaintiff which was tendered in evidence as exhibit A pointing out to her that on completion of the building in question, the outstanding debt of £G1,550 was with a struggle on his part repaid, further that rates for the following year and other expenses totalling £G200 would have to be paid, also that the building would have to be so managed that he could reimburse his expenditure thereon and also the legal expenses of his unsuccessful petition for divorce. In consequence, he informed plaintiff that he had decided, in accordance with Accra Municipal Council plan approved on 14 December 1964, to have the house extended and improved for purpose of leasing and that therefore the sheds and oven in the backyard should be removed and all rooms in the house vacated. He further in the same letter informed her that spare accommodation had been provided for her at Anna

Lodge his ancestral home where he was living and further that he intended implementing his plans in January 1965. As a result of this letter the plaintiff issued a writ on 5 January 1965 claiming the relief mentioned, and in answer to her claim the defendant counterclaimed for a declaration of title and an order for recovery of possession against the plaintiff.

The plaintiff claims relief on the ground that she is beneficially entitled to the property by virtue of her financial contribution thereto and the physical assistance rendered during the construction of the same.

Her evidence which is substantially denied by the defendant is that she made contributions from her bakery business averaging £4 per month to the defendant at his request from May 1941 to December 1944, this was because the defendant after acquiring the land in 1940, suggested that they should build a home thereon, starting with an outhouse. She was invited to turn her bakery concern into a family bakery to provide funds for the construction, she did so and as stated, commenced contributing the profit on one cwt of the number of cwts used by her in her bakery to the defendant from May 1941. She said the outhouse was constructed in 1942 and took six months to complete, during construction she also provided food for two masons engaged thereon at an average of 15s. per day, she also maintained the family, expending an average of £1 per day which was provided largely from her bakery as the defendant gave only £2 per month for the family upkeep of ten persons, namely, the couple, four children and four maids. She said her bakery business yielded profits per month ranging from £39, £50 to £60. As regards her contribution to the main building she said she performed errands for the purchase of building materials in Accra, and for the raising of loans, she herself spent £45 on the carpenters, bought window panes and a lock costing in total £10 9s., supervised the workers on the site, gathered stones for the building and fed the workers, about eight in number, for about three months from October to December 1954 at a cost of approximately 30s. per day. She said her efforts were openly praised by the defendant at a house-warming party whereat the defendant asked the invitees to join him in thanking her for assisting in the completion of the building.

Considering the evidence of the plaintiff there can be no doubt that she has grossly exaggerated the financial assistance, if any, given by her towards the construction of the outhouse, she certainly could not have spent 15s. per day on two masons in 1942 when on her own admission she spent an average of £1 per day on her own family upkeep of ten persons; further her evidence of expenditure of approximately 30s. per day in 1954 on eight labourers highlights the flaw in her evidence with regard to the masons, if it cost 30s. per day in 1954 for providing food for eight labourers I cannot see how it could cost 15s. per day on two masons in 1942 when the cost of living would undoubtedly be considerably lower. Her evidence as to the upkeep of her family in or about 1942 is also very suspect because even to this day it is highly improbable that persons similarly circumstanced as her family could afford to, or would be spending at the rate indicated by her.

Her evidence as to the average profit made by her from her bakery seems highly improbable. Were she correct she certainly would have been able to provide loans to her husband thus obviating the necessity for negotiating outside loans for the building when it was started in 1954; further it would not have necessitated their waiting for a good twelve years before taking a decision to commence the main building. The defendant's evidence is equally far removed from the realities of the situation. It is very remarkable that he could have remembered a good 25 years afterwards the exact contribution made by the plaintiff towards the construction of the outhouse while at the same time showing such defective memory as to how much he earned in 1964. On the issue of the plaintiff's contribution towards the outhouse and later of the main building the defendant has not spoken the truth and I would

therefore reject his evidence. The plaintiff's evidence that she assisted financially in the building of the outhouse and the main building is the more probable but with this further finding that her contribution was very much lower than she would have the court believe. I therefore find that though she in fact assisted the defendant financially from her bakery business and also physically by supervising the workers the extent of her contribution is so indeterminate that I cannot without speculation make any finding as to whether her contribution was sufficiently substantial as to raise an equitable interest in the building in her favour and I will make no such findings.

Further, I must confess considerable doubt as to whether even if her contribution could have been particularised with certainty and was substantial this fact would necessarily make the parties tenants in common of the building so constructed from their joint efforts. Counsel for the plaintiff has invited me to hold that they are tenants in common because what was done in this case was the making of a continuing provision for their respective lives and that it would be inequitable for the defendant to assert exclusive ownership of the property in question. Learned counsel's argument is very intriguing and no doubt there are authorities in the English Law Reports which at first sight would appear to support his view. Cases like Rimmer v. Rimmer [1953]1 Q.B.63, C.A. and Fribance v. Fribance (No.2) [1957]1 All E.R.357, C.A. are authorities not only for counsel's submission but for the corollary principle that once the court is satisfied that both parties have a beneficial interest which is substantial and it is not possible or right to assume some more precise calculation of their shares then they must be held to hold the property as tenants in common in equal shares. However these cases were in exercise of the statutory powers expressly conferred on the court by section 17 of the Married Women's Property Act, 1882 (45 & 46 Vict., c.75), the intention of which is clear, namely, that in dealing with disputes between husband and wife, involving title to and possession of property the court must dispense "Palm Tree justice" meaning justice enshrined in orders which appear to be fair and just in the special circumstances of the case. This would arise whenever the parties had not themselves mutually agreed as to how their rights and interest in property acquired during the subsistence of [p.358] the marriage, should be determined in the event of a dissolution of the marriage not occasioned by death. This statutory provision is no doubt a salutary one because as was said by Evershed L.J. (as he then was) in Re Rogers' Question [1948]1 All E.R.328 at pp.328-329, C.A:

> "When two people are about to be married and are negotiating for a matrimonial home it does not naturally enter the head of either to enquire carefully, still less to agree, what should happen to the house if the marriage comes to grief. What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's findings, must be taken to have intended at the time of the transaction itself."

In exercising the powers conferred by this statutory provision the court is not disabled in dispensing justice by the absence of evidence showing a contract, gift or trust enforceable at law in favour of the spouse claiming a share in the matrimonial assets because as was said by Romer L.J. in Rimmer v. Rimmer (supra) at p. 76:

"cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property..."

The Married Women's Property Ordinance, Cap.131 (1951 Rev.), of Ghana though enacted in 1890 after the Married Women's Property Act, 1882, in England contains no such provision like section 17 of the United Kingdom Act, and the Marriage Ordinance, Cap.127, by section 48(1) deals only with proprietary rights of one spouse in the property of the other on the death intestate of the latter. The reasonable inference to be drawn is, in my opinion, that the legislature intended that during the lives of spouses their proprietary rights, if any, in each

other's property should be governed by the rules of customary law in the absence of a clear indication to the contrary. If this inference is well-founded, then the plaintiff would by customary law have acquired no beneficial interest in the property in question because by customary law, property acquired by a husband with the assistance of the cash and labour of his children and or his wife remains the individual property of the husband.

Ollennu's Customary Land Law in Ghana at pp. 39-40 is as follows:
"By customary law, the children or a wife being dependants of a man, family life requires that a son should work with and for his father, and a wife with and for her husband, and property acquired with such assistance is the individual property of the man"
Even assuming that my inference is not well-founded, the only other principle of law which would be applicable to the circumstances of the case would be the rule of the common law unaffected by the statutory provisions of the Married Women's Property Act, 1882, this principle derived from the maxim quicquid plantatur solo, solo cedit is that where a person, conscious of a defect in his title to land, nevertheless builds on the said land, he is debarred from asserting his own interest in the land as against the person in whom the title is vested, fraud and laches excepted. The fact that the relationship between the parties is one of husband and wife makes no difference to this rule. Further, where the funds of a married woman are utilised by a husband jointly with his own to acquire real property, in his own name, a lien on the property to the extent of the funds of the wife so used, arises in her favour only where she was not aware of the funds being so used and did not consent: see Halsbury's Laws of England (3rd ed.), Vol. 19 at p. 841 and Scales v. Baker (1859) 28 Beav. 91. It will thus be seen that at best a wife at common law acquires only a lien on real property of her husband's purchased with mixed funds, and this, only where she was not aware of her funds being so used and did not consent. It was never the case that even in such circumstances she thereby acquired a beneficial interest in the property as tenant in common. She now acquires this beneficial interest in England by virtue of section 17 of the Married Women's Property Act, 1882, which is not applicable in Ghana.

In the circumstances and for the reasons given I find that the plaintiff is neither by customary law nor by the rules of the common law entitled to any beneficial interest in house No.F.539/1, Osu, Christiansborg, the land of which was, on the admission of all parties, acquired by the defendant from his own funds and in his name exclusively.
The defendant though entitled to a declaration of title to house No. F.539/1, Osu, Christiansborg, is not entitled to an order of possession against the plaintiff which would have the effect of ejecting her from the premises. The defendant's claim for an order of possession is therefore dismissed.
The plaintiff on the evidence is entitled to relief by way of perpetual injunction against the defendant as claimed, on the ground that the property in dispute, being the matrimonial home albeit owned by the defendant, she is entitled like the defendant to reside therein and cannot be ejected therefrom by the defendant so long as the marriage subsists and even though the said defendant may be living elsewhere in de facto desertion of her.
Judgment is therefore entered for the plaintiff. Costs assessed at ¢50.00 for the plaintiff against the defendant.
DECISION
Judgment for the Plaintiff.
I rule therefore that the plaintiffs' action is not premature or misconceived in law. I rule further that this court has jurisdiction to entertain the plaintiffs' action. I will therefore dismiss the defendant's motion with costs assessed at N¢30.00.
DECISION
Motion dismissed.

IN RE KOFI ANTUBAM (DECD.); QUAICO v. FOSU AND ANOTHER [1965] GLR 138-145

HIGH COURT, ACCRA

11 MARCH 1965

ARCHER J

The plaintiff claims to be the head of family of the deceased who died intestate and the defendants claim to be the widows with children having been married to the deceased according to customary law. The first defendant is the mother of six children by the deceased and the second defendant is the mother of three children by the deceased. For the purpose of determining the questions, the court was of opinion that filing of affidavits by the parties was unsuitable and in order to throw light on the custom the court decided to take oral evidence if necessary if the parties were prepared to do so. The plaintiff brought the Acting Omanhene of the Wassaw Amanfi Traditional Area to give evidence as to customary succession to the estate of a male person who died intestate and leaves a widow, or widows with children. Section 67(1) of the Courts Act, 1960 provides that any question as to the existence or content of a rule of customary law is a question of law for the court and not a question of fact. After considering the submissions made by both learned counsel and consulting such reported cases and appropriate text books, I entertained no doubt as to the existence of customary law regulating intestate succession in a matrilineal system such as among the Akans. I did not therefore think it necessary to hold the inquiry laid down by subsection (3) of section 67 of the Courts Act, 1960, or to request the appropriate house of chiefs or traditional council to state its opinion.

As the questions posed for determination are questions of law, I proposed to deal with the first question: Whether the defendants and their children have an interest in the estate of the deceased who was an Akan. It was submitted by learned counsel for the plaintiff that the widows, and the children have no interest whatsoever in the estate of the deceased whose estate must devolve according to the matrilineal system of succession. On the death of the deceased the estate vests in the head of family until a successor is appointed by the family. The estate then vests in the successor who has to maintain the children whether or not there is sufficient estate to maintain them. The children are also entitled to live in the father's house so long as they behave themselves. The successor assumes the role of a father and if he does not look after the children, the children may complain only to the family who may replace the successor. Finally that the family become entitled to the estate absolutely.

Learned counsel for the defendants submitted that according to Akan custom, children cannot succeed their deceased father as successors but they have a life interest in the immovable property of the deceased father where the immovable is self-acquired and as such they are entitled to the income from the immovable property. It was further submitted that until the wives were released by the successor, the latter was under an obligation to maintain them. Learned counsel further argued that if there was no sufficient estate the successor was under no obligation to maintain the widows and the children. If the deceased left personalty, some of the personalty is usually given to the children and as such the children can claim some of the personalty from the head of family or the successor. Learned counsel referred to certain passages at pp.105 and 112 of Sarbah's Fanti Customary Laws (2nd ed.). There are no decided cases relating to succession in the Wassaw Fiase Traditional Area, although learned counsel for the plaintiff cited the case of Vanderpuye v. Botchway, a decision which relates to matrilineal succession amongst the Gas. That case seems to establish that according to Ga customary law the members of a family are traced through the maternal ancestor, and the family is a unit for the purpose of ownership. All members have a joint interest which is indivisible. The interests of the children of an owner of self-acquired property amounts to a right of support out of the estate, but this right does not operate to set aside the ordinary rule

of customary law that descent is through the female line. This case refers to a six-cloth marriage which enables children to inherit their father's property in conjunction with the successor or family. I consider this case peculiar to the Gas and not of much assistance in ascertaining matrilineal succession among the Akans who, to the best of my knowledge, have no six-cloth (or ten-cloth) marriages.

I shall therefore seek guidance from Sarbah's Fanti Customary Laws (2nd ed.). At p.50, we read: "On the death of the husband, his widows him surviving, and their children by him, are entitled to reside in any house built by him, and the children and their issue have a life interest in such house, subject to good behaviour."
It is stated at pp. 100-102 that:
"The whole family, consisting of males and females, constitutes a sort of corporation; some of the members being ... persons entitled to a portion of the property on partition (cutting Ekar), and others who are dependants, and are entitled to reside in the dwelling-house for life, such as sons and daughters, subject to good conduct and not disputing right of the family...
The owner of self-acquired real property dying intestate, is not succeeded by his sons, they being outside the line of inheritance, but by his mother and her issue according to seniority."
Then at p. 105, Sarbah goes on to draw a distinction:
"When a person such as A dies, having his own acquired property, moveable and immovable, he is not succeeded by his sons, free-born or domestic, whose only right is that of a life interest in the dwelling-house built by their father, the deceased, on a land not family property. For if the house be built on family land, the children have only right of occupation during good conduct. If any one living in the house of his father deny the right of the proper successor, or commit waste or injure the house, or encumber or sell it, he thereby forfeits his life interest. Such person must make the necessary repairs, and may quit if the successor requires it for himself as a residence."
Then finally at p.274 of Sarbah's book there are two paragraphs written by Mr. Justice Smith included in a report published by the then Gold Coast Government:
"10. Descent is traced through females. Property acquired by a man descends to his mother, then to his brothers and sisters by age. Failing this, to uncles and aunts, then to the eldest children of the eldest aunt, and so on. As males are preferred, a woman generally waives her right in favour of the next male successor, who is placed, with the consent of the family, on the stool, if any such exists, or otherwise takes charge of the property. The heir is superseded for just cause, such as drunkenness, extravagance, imbecility & c.
11. The son, in the Fanti country, does not inherit his father's property, but his father may nominate him his heir, and may by gift, verbal or otherwise, give to him his acquired property. Children are not considered members of the father's family, as far as having any right to his property. They belong to the mother's family, and inherit from the mother's side. Failing all blood relatives, the domestics of the house succeed by age ... males being also preferred to females."
The writer of this report at p. 274 of Sarbah's book makes it quite clear that different customs appear to obtain in different districts and that such knowledge as the writer possessed was derived from cases heard in the courts, when native experts were called to expound the law, and even then the experts did not always agree. However, he was satisfied that on the main points there appeared to be a certain consensus of opinion, in the direction of which the decision of the courts had generally proceeded.
It seems to me therefore that one can rely safely on Sarbah and the early decided cases cited by him and also on this report by the then Gold Coast Government which related to the Colony now known as Southern Ghana.

Since these pronouncements were made in the last quarter of the last century, customary law in Ghana has progressed and developed in accordance with the tempo of social, commercial and industrial progress. So far as land tenure is concerned, farming rights have been converted into building and residential rights, customs which appear to be repugnant to natural justice, equity and good conscience have been gradually extinguished by judicial decisions. The then legislature played a less effective role in these spontaneous developments engineered by public opinion. The courts have embraced these developments without adhering strictly to the original customary rigid rules. I have been reminded by learned counsel for the plaintiff that only Parliament can change the law and that it is not the function of the courts to make new law. Lord Denning in the preface to his book, The Changing Law, at p. vii, has stated that:
"The truth is that the law is often uncertain and it is continually being changed, or perhaps I should say developed, by the judges. In theory the Judges do not make law. They only expound it. But as no one knows what the law is until the Judges expound it, it follows that they make it."
Ghana is a developing state with remarkable social and economic transformations which render some of our customary rules antediluvian. If the customary law is to retain its place as the greatest adjunct to statutory law and the common law, it cannot remain stagnant whilst other aspects of the law are in constant motion. I may be accused of what Junius said of Lord Mansfield that "instead of those certain and positive rules by which the judgments of a Court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice." But it is my determination to deliver my judgment in the true spirit of the Ghana Constitution.

Article 42 (4) of the Constitution provides:
"The Supreme Court shall in principle be bound to follow its own previous decisions on questions of law, and the High Court shall be bound to follow previous decisions of the Supreme Court on such questions, but neither court shall be otherwise bound to follow the previous decisions of any court on questions of law."
This article appears to be my constitutional licence to submit if necessary customary law to judicial malleability. My conviction is that decisions of the Privy Council, the former West African Court of Appeal and the former Court of Appeal are no longer binding by the iron nexus of binding judicial precedent. Nevertheless the decisions of these courts have to be treated with the greatest respect.

Before I consider the available decided cases if any at all, I propose to stress that certain concepts, notions and conditions which prevailed when Sarbah wrote his book no longer prevail. For instance, the successor has to maintain the children as if they were his born children and also to marry the widows of the deceased. In other words the successor inherits the children and the widows as if they were inheritable chattels. Today women have attained a status equal to men with the right to decide for themselves their suitors or consorts in marriage and even to struggle to maintain their infant children during widowhood.

Again, widows surviving and their children by the deceased were entitled to reside in any house built by the deceased because of the rather limited accommodation available in those days when every one believed in sharing a small room or verandah in a family house. Accommodation was therefore of paramount necessity, hence the emphasis on right to residence. In modern Ghana the trend is to move away from family house into more commodious modern houses with hygienic amenities. It should therefore be proper for any widow or child who is offered accommodation in a family house to opt to live there or to live elsewhere and to sub-let his accommodation and receive the income accruing from his allocation.

Without committing any heresy, I am also prepared to take the plunge and to assert that the proposition that children are not considered members of the father's family is contrary to all biological principles, alien to well-known doctrines of all accredited religions and opposed to common sense. The logic of the customary rule is that because children are not considered members of the father's family, therefore they are completely excluded from any share of or right to his property. As I have already argued if the basis for this exclusion does not make sense then the exclusion itself cannot stand.

Having gone through this process of demolition of outdated concepts, I shall revert to Sarbah. I have already referred to his statement at p. 50 of his Fanti Customary Laws which describes the right of the widows surviving and their children by the deceased as one to reside in the house built by him, and the children and their issue have a life interest in such a house, subject to good behaviour. If one reads this statement carefully, one finds that Sarbah uses the words "life interest" in such a house, subject to good behaviour. This proviso in my view converts the life interest into a determinable interest on one condition. And by the word "interest" I take it to mean that Sarbah had in mind an interest enforceable at law. After all Sarbah was an eminent lawyer and jurist and must have chosen his words very carefully as he was writing a legal textbook. This means that if the widow chooses to remain a widow for the rest of her life, she is entitled to live in the husband's house during the period of widowhood. The same interest applies to the children and their issue. Since they have an interest by residence, they may be at liberty to reside elsewhere and to insist that any income accruing from portions of the house allotted to them should be paid to them as life tenants entitled to that income. The widows and the children have to be maintained by the head of family or the successor if one has been appointed. Maintenance does not mean eating from the same bowl of food, but adequate monetary allowance payable to the widow. In Quartey v. Martey, it was held inter alia that by customary law a widow is not entitled to a share in her husband's estate upon the death of the husband intestate. Her right is maintenance and support from the family. The judgment also went further to suggest that the widow may maintain an action for her maintenance and support against the head of the husband's family or against the successor.
There are no recent reported decisions on Akan customary law as such and I have therefore decided to revert to Sarbah whose work has been quoted in all courts in this country incessantly in support of propositions of customary law. Since Sarbah himself uses the words "life interest" I am prepared to hold that interest means an interest in the deceased husband's estate.
My answer to the question for determination will be as follows:
(1) That the defendants and their children have an interest in the estate of the said Kofi Antubam.
(2) (a)The defendants as widows have a right of residence during widowhood in any house built on land self-acquired by the deceased or to dwell on any land acquired by the deceased.
(b) The children and their issue also have a right to occupy as residence any house built on land self-acquired by the deceased during the lifetime subject to good behaviour.
(c) The interest of the widows and the children is equivalent to a determinable life tenancy which entitles them to a share of the income accruing from the houses in which they are entitled to reside.
(d) The widows and children are entitled to be maintained by the head of family or successor by the payment of adequate allowance to the widows during their widowhood and also to the children until they are capable of maintaining themselves. These payments may be periodical or amount to annuities.
(3) By Akan customary law, the self-acquired property of the deceased has become family property on his death intestate and the maternal family have become the successors to the

estate subject to the life interest of the deceased's children and the occupational rights of the widows during their widowhood in the house built by the deceased on self-acquired land.
(4) Since it seems that the widows and the children have an interest not only in the immovable property but have to be maintained as of right from the whole estate, they are akin to beneficiaries who derive some advantage or benefit from the whole estate. Their interest and rights to maintenance are subject to the life interest of each member of the maternal family in the whole estate vested in the successor. If that is the case, their interests are inextricably mixed up in the indivisible estate and accordingly they are entitled to shares in the estate if ultimately the whole estate is converted into money or partitioned. The widows and children do not inherit but they claim interests from the inheritors, that is the maternal family through the head of family or the successor.
The costs of each party shall be paid out of the estate by the administrator-general. Seventy-five guineas costs to each party.
DECISION
Judgment for the defendants.

IN RE ACKOM-MENSAH (DECD.); ACKOM-MENSAH v. ABOSOMPEM AND ANOTHER
[1973] 2 GLR 18-28
HIGH COURT, ACCRA
30 JANUARY 1973
HAYFRON-BENJAMIN J.

The late Mr. Ackom-Mensah, though subject to customary law, was a devout Christian and one who feared God. His was a Christian marriage under the Ordinance. He died in the Lord on 20 April 1972 at the Korle Bu Teaching Hospital and was survived by his wife and said six infant children. Both Ackom-Mensah and his widow are Fantes from Komenda, a coastal village.
The deceased it would seem was of very humble birth like many equally distinguished Ghanaians. His undoubted ability, hard work and integrity enabled him to rise to the top of his profession. The widow is also very well educated.
The members of the deceased's extended family are however less fortunate. They, especially the women among them, are largely illiterate. The sister of the deceased who is the customary successor and also the first defendant herein is a complete illiterate. The second defendant, the head of the deceased's family, seems to be equally illiterate.
The plaintiff in her affidavit accompanying the originating summons makes the point that the members of the family are clearly obstructing her in the performance of her duties as an administratrix. She states:
"(5). That since the letters of administration were granted to me, and I intended getting in the estate, the customary family of my late husband at Komenda have repeatedly obstructed my efforts to get in the said estate.
(6) That immediately after the death of my husband one J.E. Annan of Komenda, who is an education officer now stationed at Dunkwa-on-Offin and who is a distant relative of my late husband conspired with the Abusuafo and managed to seize and retain the keys to the locked doors of our matrimonial home (No.7/5, Komenda) from the caretaker, and thus refused me entry. It was through the intervention of the Komenda police that the keys were returned to me.
(7) That on or about 23 September 1972, I went down to Komenda to the said matrimonial home intending to sort out the property therein, but the defendants and some members of my late husband's family prevented me from doing so.
(8) That on or about 28 October 1972, a meeting between the defendants and me, including counsel on both sides, was held in Accra. It was decided among other things that the defendants and the rest of their family should not obstruct my entering the matrimonial home.

(9) That on or about 5 November 1972, I went again to Komenda and attempted to gain entry into the said house, but the defendants led by the said J.E. Annan again obstructed my entry into the matrimonial home. They demanded that unless I performed certain customary rites they would not allow me even to enter the matrimonial home. There were threats and intimidations and I was forced to leave Komenda without entering the said house.

(10) That all these obstructions over the said house led to a near riot in Komenda and presently the house is under police guard under the instructions of the Central Regional Commissioner."

In this case, the matrimonial home has not been admitted as forming part of the estate of the deceased. It may well have been the joint property of the deceased and his widow or the deceased might have built it as a gift for his children. The family have admitted that it was not family property in the deceased's lifetime. The third question therefore does not strictly arise. But if it is assumed that the matrimonial home belonged exclusively to the deceased as the defendants seem to say, the answer to the third question would be in the affirmative. Even under customary law, the children of the deceased are entitled to live in their father's house during good behaviour. I do not see how the Ordinance can be said to have deprived them of this right. The widow and children take two-thirds of the estate, and if the one-third which devolves in accordance with customary law includes the matrimonial home, the children's right to reside therein can be enforced. It seems to me therefore that the widow and the children are preferentially entitled to keep the matrimonial home as part of their share of the estate. Instances may be where the only assets in the estate comprise the matrimonial home. In such cases, the interest of the family is largely illusory. The widow and the children would be entitled to the legal estate in two-thirds of the house, and the children would be entitled to stay in the whole house. It would be almost impossible for the family to establish bad behaviour in the circumstances. The answer to the third question will therefore be in the affirmative.

There are certain items of property such as the father's guns, tools of trade etc. which even under customary law belong to the children exclusively. These go to the children and do not form part of the two-thirds share. The answer to the fourth question must also be in the affirmative.

This application would have been unnecessary if the defendants had shown the slightest respect or regard for the position of the applicant as an administratrix. In the circumstances they shall bear the costs of this application which I assess at ¢300.00.

DECISION

Declaration accordingly.

AMISSAH-ABADOO v. ABADOO [1974] GLR 110-132
HIGH COURT, CAPE COAST
12 NOVEMBER 1973

See Acquisition

AMISSAH-ABADOO v. DANIELS AND OTHERS 1979 GLR 509-518
HIGH COURT, CAPE COAST
12 JANUARY 1979

See Acquisition

HAYFORD v. MOSES [1980] GLR 757-764
HIGH COURT, SEKONDI
8 NOVEMBER 1979

SARKODEE J.

The plaintiff is the customary successor and the defendant, one of two widows of the late John Arthur who died intestate on 25 November 1971, possessed of a block of six flats, House No. 120A, West Block, Takoradi, which was his self-acquired property. After the death of her husband the defendant continued to reside and still resides in one of the flats in which she, her husband and children lived immediately before his death. Also she collected rents from tenants who occupied other flats in the building. On 13 March 1973 the plaintiff alone was granted letters of administration to the estate of the deceased. Armed with this and aided by other members of the deceased's family, he demanded all keys to the flats including the one occupied by the defendant. He also asked her to account for the rents she had collected. The defendant surrendered the keys to all the flats except the one she occupied but refused to render accounts. The plaintiff was not satisfied and in effect was determined to throw the defendant and her children out of the flat in which she and her husband had lived for many years. In April 1973 the plaintiff instituted this action claiming:

"(a) an order for the return of all keys to House No. 120A, West Block, Takoradi, to the plaintiff which said keys are with the defendant and which the defendant has refused to hand over despite repeated demands; and

(b) an order for accounts in respect of all moneys belonging to the estate which have come to the defendant since the death of late John Arthur and payment of same to the plaintiff who is the successor and administrator of the estate of the late John Arthur."

Whilst this suit was pending, the defendant, in view of the harassment she and her children were suffering from the hands of the plaintiff and her husband's family, and in particular fearing that the children who were then minors would not be maintained by her husband's successor, applied for and was granted letters of administration jointly with the plaintiff. Accordingly, she continued to collect rents out of which she maintained herself and her children. That was the situation until the court appointed a receiver and manager to the estate of John Arthur in July 1974.

The defendant says that the keys she holds are those to her flat. She explained that it was when the plaintiff refused to pay the school fees of her children and the out-goings such as electricity and water bills and rates in respect of the house that she in her capacity as one of the administrators acted and carried out those important duties. She says further that since November 1976 her children by the deceased have not been provided with maintenance. She, therefore, in her counterclaim asked the plaintiff as an administrator of her husband's estate to render accounts and for an order that the plaintiff out of the estate provides reasonable maintenance for the children.

When the plaintiff applied to the court for the grant of letters of administration, the defendant entered a caveat and subsequently made serious allegations set out in the ruling of Charles Crabbe J. (as he then was) delivered on 10 April 1974. As the parties could not reach agreement the court ordered the applicant to take out summons within two weeks. When that was done pleadings were ordered and issues agreed upon and the case was set down for trial. After various adjournments, the parties announced a settlement the terms of which were:

"(1) That letters of administration be granted to the plaintiff herein called Isaac Augustus Hayford.

(2) That the defendant shall be granted ¢50 a month from the estate for her maintenance.

(3) That the defendant and her three children by the deceased shall be granted a flat consisting of one half of a floor in House No. 120A, West Block, Takoradi, for her apartment.
(4) That the plaintiff shall be responsible for the payment of school fees and maintenance of the deceased's three children with the defendant.
(5) That rates and taxes and out-goings on House No. 120A, West Block, Takoradi, shall be borne by the estate."
Upon these terms the court made the order for the issue of letters of administration which was done on 13 March 1973. Despite this settlement, the plaintiff, one month later, sealed a writ to commence the present action demanding keys including those for the defendant's flat. On 9 July 1973 when the matter came up for hearing counsel for the plaintiff suggested an amicable settlement. The court then ordered certain investigations to be conducted which revealed that the defendant would not be occupying a complete flat with her children if she surrendered keys to the bedroom, the sitting hall and the kitchen. It was after this report that the parties [p.761] appeared before Charles Crabbe J. who after referring to section 77 of the Administration of Estates Act, 1961 (Act 63), the defendant was appointed administratrix in addition to the plaintiff.

It is not disputed that the property of an intestate does not, vest in the intestate's administrator until letters of administration have been granted to him. An executor de son tort is liable to be sued by the rightful representative. Also the defendant as a widow of the intestate, has at customary law a beneficial life interest in her husband's estate. In this regard, she has a right to protect the estate. There are cases where letters of administration in similar circumstances have been held to relate back to the death of the intestate so as to give validity to acts done before the letters of administration were granted, provided these acts were done in the interest and for the benefit of the deceased's estate: see Ingall v. Moran [1944] K.B. 160, C.A. In such cases the subsequent grant perfected the defendant's title and related back to the death of the deceased: see Chetty v. Chetty [1916] 1 A.C. 603, P.C. It was however held in Ingall v. Moran (supra) that the doctrine of relation back could be applied to representation which was incompetent when the writ was issued. The defendant would not have obtained the grant of letters of administration but for her interest in her husband's children. The court granted her power to administer the estate jointly with the plaintiff in accordance with section 77 of Act 63 to enable her protect the interests of her children who were then minors. Her duty was to see that the interest of those young ones was not trampled upon by their father's successor. I hold therefore that the defendant is not liable to account to the plaintiff. Even if I were to hold that the action was maintenable whatever the defendant did was in the interest of her late husband's estate. The subsequent grant perfected the defendant's title and related back to the death of the deceased.

The plaintiff claims from the defendant all the keys to House No. 120A, West Block, Takoradi. From his own evidence it seems the plaintiff was able to collect all the keys except those to the garage attached to the defendant's flat and the key to what has been described as the stranger's room. The plaintiff accepted as a condition to the defendant withdrawing the caveat that she and her children should continue to live in the flat. The garage and the stranger's room form part of the flat and were used as part of the whole flat and enjoyed with other amenities in the flat during the lifetime of the deceased. That apart, Charles Crabbe J. (as he then was) caused an inspection of the flat to be made and it became clear that it would be difficult for the defendant and her children to occupy only half of the flat. The defendant, her husband and her children lived in that flat for many years. The possessory life interest of the widow and her children is a right which is prior to any enjoyed by the customary successor or the widower's family: see Abebreseh v. Kaah [1976] 2 G.L.R. 46 at p. 61. It would be unreasonable to compel the defendant to surrender the keys. The right to occupy the flat as a whole should be respected by the successor and the deceased's family. She and her children

should not surrender the keys to the flat. Rather they should occupy the whole flat as she and her husband enjoyed during his lifetime.

The plaintiff by his appointment as customary successor became a representative of his family and a trustee or caretaker of the marriage. Under customary law, the death of either spouse or both does not determine the union of two families established by the marriage. Thus the husband's duty to provide accommodation and maintenance for his wife and children devolves upon his family or successor, a responsibility which can only determine upon the death of the wife or upon the determination of the marriage in a lawful manner: see Ollennu, The Law of Testate and Intestate Succession in Ghana chapter, 29. Where the successor fails or refuses to maintain the children of the deceased and their mother assumes that responsibility, she is entitled to sue the successor to recover any amount so spent. It was held in Manu v. Kuma [1963] 1 G.L.R. 464 at p. 469, S.C. that:
"A mother is, in the absence of the father or the father's successor, the natural guardian of her infant child, and is entitled to sue on their behalf for their maintenance or for any other relief. Therefore the defendant, successor to the father, having neglected the children proper the person to sue is the mother the plaintiff . . .; the plaintiff is therefore an agent of necessity of the defendant and is entitled at common law to be reimbursed as to the amount she was obliged to expend on her children."
The plaintiff as successor to the estate of John Arthur failed to educate and provide reasonable maintenance for his children. It therefore became the burden of their mother to discharge those responsibilities. As an agent of necessity she is entitled at common law to be reimbursed out of her husband's estate the amount she spent on the children. Apart from the common law, a mother has a right to claim from her husband or his successor expenses she may incur for maintaining and providing medical treatment for herself and her children. The defendant has been responsible for the maintenance of herself and her children since the death of her husband in 1971 and has been paying the children's school fees, the plaintiff having neglected to perform those duties. The plaintiff does not deny this but says that he failed to look after the children because the children of the defendant were hostile to him. But the undisputed fact is that the defendant and her children could not trust the plaintiff. It appears the very first time after the death of John Arthur when the plaintiff entered house No. 120A, West Block, Takoradi, that he went there solely to demand from the defendant keys for the flat and indeed threatened to eject the widow and her children out of the flat. It was the plaintiff's persistent demand for the keys and the widow and her children's determination to protect their rights as owners of the life interest in the deceased's self-acquired property that started the quarrels between him and the defendant and her children. The plaintiff cannot be heard to say he refused to maintain the children because of their attitude. They had to act in defence of their rights.
The defendant's eldest child has since been married but the other two, though over 21 years in each case, are undergoing full time education and ought therefore to be maintained out of their father's estate. The defendant estimates that the children spent about fifteen cedis a day. That amount was given before the present day rate of inflation. I would therefore raise that amount to twenty cedis a day. I order that this sum should be paid out of the estate to the defendant and her children for as long as she remains a widow and the children up to the age of 25 years each or cease full time education whichever is earlier. The successor shall pay the school fees of the children.

The defendant started to collect rents for the estate as soon as her husband died until the court appointed a receiver and manager. She admitted that she spent some moneys out of the rents for the children.
I do not therefore think she is entitled to be reimbursed for expenses she incurred.

The defendant is now an old woman and is deteriorating in health. There is no question that she could re-marry and it appears she has no intention of taking a formal divorce from her husband's family. It would, therefore, be unfair and against good conscience in such circumstances for the successor or the husband's family to divorce her formally and give her a send off. The defendant lived with the deceased husband for many years when he was a regional commissioner and no doubt ably played the part of a regional commissioner's wife. It would be inequitable to reduce the size of the flat as she enjoyed together with her family and make her share it with another family. That in my view would amount to a lowering of her standard of living. I do not therefore think that she would be asking for too much, and I accordingly direct that the life interest of the widow and her children should cover the entire flat as occupied by her and her husband during his lifetime including the garage, sitting hall, stranger's room and the kitchen together with its amenities.

DECISION
Judgment for the defendant.

MANU v. KUMA [1963] 1 GLR 464-471
IN THE SUPREME COURT
27TH MAY, 1963
VAN LARE, OLLENNU AND AKUFO-ADDO JJ.S.C.
Customary law—Maintenance—Duty of successor—Matrilineal society—Whether legal obligation upon successor to maintain and educate children of a deceased whom he succeeds—Locus standi of widow to bring action to recover amounts expended on children's maintenance and education.
Customary law—Husband and wife—Agency of necessity—Widow as agent of necessity of husband's successor.
Customary law—Maintenance—Continuing liability—Action by widow to recover from husband's successor money expended on education and maintenance of children—Whether ten years' delay defeats claim.
HEADNOTES
H. died in 1939. K. was appointed his customary successor. From 1939 until 1947, W., H.'s widow, maintained and educated H.'s children from the proceeds of three of H.'s farms to which she laid claim. In 1947 W. lost the farms to K. who refused to make any contribution towards the maintenance of H.'s children. This was so despite an arbitration award, confirmed by the West African Court of Appeal whereby K. became responsible to look after his predecessor's children.
[p.465]
W. assumed full responsibility for the education of her children and in 1958 when her task was completed and the children had left school she instituted proceedings against K. for £G2,500 being the amount she had spent on the four children during the period 1947-1958. She relied upon the arbitration award and K.'s general responsibility as a successor at customary law. K. admitted the arbitration but contended that it did not create an enforceable obligation upon him. He further contended that W. had no locus standi to bring the action. The High Court dismissed W.'s claim on the sole ground that she "has not adduced any direct evidence showing specific sums spent by her as shown in her particulars of claim." W. appealed.
Held, allowing the appeal:
(1) a successor under customary law is under a legally enforceable obligation to maintain and to educate the children of his predecessor to the extent of the property of the deceased which has come into his possession and his dealings therewith. This responsibility is different in its nature from a right of a child to succeed to or have a share in the estate of his deceased father.

(2) A mother is, in the absence of the father or the father's successor, the natural guardian of her infant child and she is entitled to sue on their behalf for their maintenance or any other relief. Where the claim is for expenses incurred by the mother in discharging a legal obligation to the children which the successor had neglected to discharge, the mother is an agent of necessity of the successor and is entitled to be reimbursed at common law. Furthermore, customary law recognises the right of a mother to claim from her husband or his successor expenses she may have incurred for maintenance and medical attention for herself or her child by him.
(3) In view of the uncontroverted fact that the plaintiff had educated and maintained the children, the trial court should have considered a reasonable award as contribution by the defendant in the discharge of that duty. In actions for maintenance of children it may not be necessary to claim a specific amount. What is reasonable depends upon the social, economic, religious and cultural standing of the deceased and the requirements of the social and economic development of the country.
(4) A delay of ten years is unreasonable, but delay under customary law does not operate to deny justice. However, maintenance of children being a continuing liability, the sooner any accrued liability is settled the better for all concerned.
CASES REFERRED TO
(1) Amarfio v. Ayorkor (1954) 14 W.A.C.A. 554
(2) Vanderpuye v. Botchway (1951) 13 W.A.C.A. 164
(3) Adjei v. Ripley (1956) 1 W.A.L.R. 62
NATURE OF PROCEEDINGS
APPEAL from a judgment of Mr. Commissioner Dwira delivered in the High Court, Kumasi, on the 16th June, 1960. dismissing the plaintiff's claim for £G2,500 being money expended by her on the education and maintenance of her children by Kofi Du, deceased, to whose estate the defendant had succeeded. The facts are sufficiently set out in the judgment of the Supreme Court.
COUNSEL
V. Owusu for the appellant.
D. S. Effah for the respondent
[p.466]
JUDGMENT OF VAN LARE J.S.C.
Van Lare J.S.C. delivered the judgment of the court. This is an appeal from a judgment of D. E. Gwira, Esquire, Commissioner of Assize and Civil Pleas (as he then was) delivered on the 16th June, 1960, in the High Court, Kumasi, dismissing the plaintiff's claim for an amount of £G2,500 alleged to have been spent by her covering a period of ten years for the maintenance and education of four of her five children by her late husband one, Kofi Du, to whom the defendant, Kwabena Kuma, respondent before us, is a successor appointed by customary law. The late Kofi Du was a storekeeper for the United Africa Company Ltd., and served as an evangelist to the Presbyterian Church at Kukuom where he died intestate on the 1st January, 1939, and he was possessed of substantial properties including eight cocoa farms and two houses, all of which estate devolved upon the defendant as his successor.

Although the plaintiff's husband died in 1939 the action was not instituted until June 1958, and the claim is in respect of the immediately preceding ten years, i.e. 1947-1957. This was because prior to the year 1947 there was litigation over the estate of the deceased between the parties, during which time the plaintiff was in possession of three of the cocoa farms to which she laid claim, but she lost them all to the defendant as a result of the litigation ending in 1947 when the defendant inherited all the properties of the deceased. He has since failed to look after the children of the person whom he succeeded. The cost of maintenance and education of the children was borne by their mother, the plaintiff, who brought this action against the defendant, successor to the properties of the deceased father of the children,

relying particularly upon an order made by the court of the Chief Commissioner, Ashanti, based upon an arbitration award, and confirmed by the West African Court of Appeal, in a suit between the parties in the Ahafo Native Court, whereby the defendant became responsible to look after the children of his predecessor, the late Kofi Du, and generally upon a successor's liability under customary law. The plaintiff filed a statement of particulars of the expenses of her claim.

The defendant does not deny that there was an arbitration award against him but contends that such an award did not create a binding and enforceable obligation on him to maintain and educate his predecessor's children who belong to their mother's family in a matrilineal society. According to him the arbitrators' award was only advisory and that under customary law there is no legal obligation on a successor to educate the children of the deceased up to elementary, secondary or other standard as the plaintiff's claim implies; further he contends that the children are the responsibility of the plaintiff's family on the death of their father and his obligation as a successor is moral rather than legal, and that the arbitrators being conversant with the customary law "advised" him to attend to the children and set no financial limits to the care he could give them. The defendant also contends that the plaintiff has no locus standi to bring the action.

[p.467]

The main points for decision in this appeal are whether by customary law there is a legal obligation upon a successor to maintain and educate the children of a deceased whom he succeeds, and also whether the plaintiff, as the children's mother, is entitled to bring this action.

Both counsel for the plaintiff and the defendant agree that the law is well settled as to a successor's responsibility to maintain the children of the person whom he succeeds. But counsel for the defendant, however, has submitted that in a matrilineal society the entitlement of the children is at its best the same as the interest which children of a Ga six-cloth marriage in Accra have in their deceased father's estate, and which, as enunciated in Amarfio v. Ayorkor,[i] [1] amounts only to a right of support out of the estate. He further submitted that the exact share or interest which the child gets is not laid down; that it depends upon the decision of the head of the family assisted by the other members of the family and that if he thinks he has been unjustly treated, a child has the right to say so. It has been submitted on behalf of the defendant upon such basis that the amount which the successor should spend on the maintenance and education of the children is at the sole discretion of the successor.

There is, however, a dearth of authority of the superior courts on this aspect of the customary law. This is so for two reasons: firstly, the cases against successors for maintenance of children of deceased persons have usually involved small sums of money and such cases are dealt with in the inferior courts and do not generally proceed to the superior courts; secondly, in the generality of cases instituted in the High Court by children against their fathers' successors, the children claim either that they are by customary law successors of their deceased fathers, or that they are by custom entitled to specific share in their deceased fathers' estate (to which only six-cloth children in Ga-Mashie as distinct from children in any other matrilineal society in Ghana are by law entitled). See for example Vanderpuye v. Botchway[ii] [2] and Amarfio v. Ayorkor[iii] [3]. The same is the position in respect of claims by widows under customary law against the successors of their deceased husbands. There are, however, a few High Court decisions on the point both as to widows and children, but in the main they relate to a patrilineal family society. We are, therefore, faced with the task of laying down the principles applicable in a matrilineal society, and to be able to discharge this duty we have had to resort to the available materials on the point.

There is no doubt that by customary law a successor stands in the shoes of his predecessor and assumes liability for his legal responsibilities within at least the means of the estate

inherited by him. It is also settled law common to all tribes throughout Ghana that a man is responsible for **[p.468]** the maintenance and training of his children. All the text-book writers Sarbah, Rattray, Danquah and Field are agreed on this principle of the customary law which was rightly applied by the Divisional Court in Adjei v. Ripley.[iv]4

What then is the extent of the father's responsibility to maintain and train his child, which responsibility devolves upon his successor? Rattray in his Ashanti Law and Constitution, at page 11, discussing the question under the sub-heading Training the Children, says:
"It is difficult to find any trace of systematic training of children. There were not any schools in the modern sense in olden times, but almost every hour of the daily life young children were undergoing unconscious instruction, mostly perhaps by a process of imitation of their elders. The bringing up of a boy seems naturally to have fallen on the father, and to have begun very early in life."
Field in her book, Social Organisation of the Ga People, also lays emphasis on the principle that the practical training of the boy is carried out by the father and that of the girl by the mother, but that both the wife and the child are the responsibility of the man, and that upon a man's death, that responsibility attaches to his successor.
In his book the Tribes of the Ashanti Hinterland, Vol. 1 at pp. 162-171 in which he discussed customs of the various tribes of the Upper and Northern Regions, Rattray states the same principles and points out that the practical training of the girl is carried on by the mother while that of boy is carried on by the father. He is emphatic, however, that the wife and the child are both the entire responsibility of the man. He talks of the man owning the wife and child, not in the sense of slaves, but in the sense of being under his care and protection; that ownership, he says, devolves upon a man's successor; see Vol. 1 at pp. 266-267, where he talks of a man's wife and children as the first of the seven categories of property which a Nankanse man may own, and which devolve upon his successor.

From the above we are confirmed in the view that a man's responsibility to support and maintain his child involves giving the child such maintenance, training and education as should make him a useful member of the society and community in which he lives. The customary law is a progressive system. Its basic principles are so elastic in their application as make them capable of application to any stage of the cultural, social and economic progress of the nation and tribes. At a stage of development when agriculture and craftsmanship in their various forms were the thing of the time for men, and rudimentary house-craft was the prime concern of women, the father's responsibility which his successor assumed would extend to such training as would fit the child for that society.
[p.469]
Danquah, in his book Akan Laws and Customs, rightly expounds the progressiveness of the customary law in this regard when writing about the paternal responsibility of the father to fit the child for society. He says, at p. 192:
"To-day things have changed, or perhaps I should say are changing-which is worse. Paternal responsibility is no more a simple question of the upkeep of a child. It also involves an active improvement in a child's condition-the care and proper training of the child on lines required by modern social and economic exigencies."
We consider that the responsibility of a successor to maintain and train the child of his predecessor is a legal one, and the right enuring there from to the child is different in its nature from a right to succeed to or have a share in the estate of his deceased father. We quote the principles as stated by one of us, Ollennu J.S.C. in his book, The Law of Succession in Ghana, at p. 19 as follows:
"While young, the children, are entitled to maintenance. It is the duty of the father or the father's family to maintain the children, to exercise disciplinary authority over them, to find

work for them, such as put them to a trade or profession, to marry for them and to find them a place in society e.g. in the army groups. The father does this because they are his children. The idea that among the Akan children have no claim on their fathers is misleading. What they do not possess is right to inherit the property...."

We say therefore that a successor under customary law is under an enforceable obligation not only to maintain but also to educate the children of his predecessor to the extent of the property of the deceased which has come to his possession and his dealings therewith. We are satisfied that in this case the defendant came into possession of such an estate from his predecessor as could over conveniently maintain and educate his predecessor's children up to the middle school. We find that he is bound in law to carry out this obligation which he has failed to do over the years, and this having been done on his behalf by the plaintiff, he should be made to contribute accordingly.

We now turn to the question whether the plaintiff has locus standi to bring the action. The ground upon which her right to sue is challenged is that the claim should have been made by the children or such of them as are of age and not by her, the mother. A mother is, in the absence of the father or the father's successor, the natural guardian of her infant child, and is entitled to sue on their behalf for their maintenance or for any other relief. Therefore the defendant, successor to the father, having neglected the children the proper person to sue is the mother, the plaintiff. Furthermore, the claim is for expenses incurred by the plaintiff in discharging a legal obligation to the children which the defendant had neglected to discharge; the plaintiff is therefore an agent of necessity of the defendant and is entitled at common law to be reimbursed as to the amount she was obliged to expend on her children. But quite apart from the common law, the customary law recognises the right of a mother to claim from her husband or his successor expenses she may be put to for maintenance and **[p.470]** medical expenses for herself or child by him. "While a husband is living with his wife or is providing for and maintaining her, he is not liable for her contracts, debts, or liabilities, except for maintenance and any medical expenses she may be put to for herself or child by him"-see Sarbah, Fanti Customary Laws (1st ed.) at pages 35-36. We hold, therefore, that the plaintiff is properly before the court.
The learned trial commissioner made no findings on any of the issues of law raised; he dismissed the plaintiff's claim on the ground that she "has not adduced any direct evidence showing specific sums spent by her as shown in her particulars of claim." It is true that the plaintiff has led no evidence whatsoever in support of the particulars of expenditure as filed and the learned trial commissioner was on that basis unable to award any amount which has not been proved before him as the claim was for a specific sum representing expenses alleged to have been incurred by her. Mere filing of particulars of expenditure does not constitute proof; particulars are allegations of fact which ought to be proved by evidence. But although the learned commissioner was right in principle yet in view of the nature of the claim being one for maintenance and education of children of the defendant's predecessor and in view also of the uncontroverted fact that the plaintiff has maintained and educated the children, which duty the defendant should have performed, the trial court should have considered a reasonable award as contribution by the defendant in the discharge of that duty. We also point out that in actions for maintenance of children it may not be necessary to claim a specific sum of money, as the courts do award a reasonable amount either for the past or future maintenance according to the means of the person liable.

In considering the amount which the defendant ought to be made to contribute in this case a few preliminary observations, some of which have already been hinted at, must be made. Firstly, the deceased Kofi Du was an educated man, a storekeeper and an evangelist. Of him the defendant said in cross-examination, "My brother was a Christian and an educated man,

and he would have liked to see his children educated." Secondly, the said Kofi Du left a large estate, out of which the defendant who did no work during the lifetime of the deceased is now deriving substantial income and is educating four of his own children and three children of his sister, the second defence witness, by an illiterate husband. The stage of social and economic development of the country requires that children of a person of the social, economic, religious and cultural standing of the said Kofi Du should have, at least, full elementary education, that is, up to the end of middle school.

The claim is made after all the four children had left school, six years after one of them had been employed, three years after one of the girls had been married and two years after the youngest one had left school. There is no doubt that the action has been long delayed and earlier steps should have been taken to compel the defendant to contribute towards the maintenance and education of these children. The plaintiff was content to wait until she appeared to have completed the work before coming to court.

[p.471]

Delays under customary law do not operate to deny justice as customary law does not set any limitation as to time within which actions may be brought; but we think that actions of this nature should be brought without undue delay as it would not only relieve the incumbent but also remind the person liable of his responsibility. Maintenance of children is a continuing liability and the sooner any accrued liability is settled the better for all concerned. Delay for ten years as in this case is clearly unreasonable and so is the claim of £G2,500 particulars of which have not been established. However as we have said the plaintiff is entitled to a reasonable contribution from the defendant over the years for the maintenance and education of the children of the defendant's predecessor; we have to fix what we consider reasonable in the circumstances. Having regard to the cost of living and of educating a child up to the middle school we are of opinion that the sum of one thousand Ghana pounds (£G1,000) would not be an unreasonable sum to award as a contribution by the defendant to the plaintiff in this case.

We accordingly allow the appeal. The judgment of the court below is set aside. We enter judgment for the plaintiff in the sum of one thousand pounds.

DECISION

Appeal allowed.

Judgment for the plaintiff.

J. D.

FOOTNOTES

1 (1954) 14 W.A.C.A. 554 at p. 557.

2 (1951) 13 W.A.C.A. 164.

3 Supra.

4 (1956) 1 W.A.L.R. 62.

ADJEI v. FORIWAA [1981] GLR 378-387

HIGH COURT, KUMASI

18 MARCH 1980

ROGER KORSAH J.

The plaintiff and defendant are married under the customary law. On 6 April 1978, the plaintiff commenced this action in which she seeks'.

"(a) declaration that the customary marriage between the plaintiff and defendant still subsists;

(b) declaration that House No. 6, Block L, Dichemso, is the joint property of the plaintiff and defendant and is the matrimonial home of their marriage;

(c) recovery from the defendant of a sum of ¢2,850 which the plaintiff has expended on herself by way of maintenance since January 1978 and on the children of the marriage;

(d) order compelling the defendant to provide reasonably sufficient money for the future education or maintenance of the said children of the marriage and future maintenance of the plaintiff; and
(e) order of perpetual injunction restraining the defendant, his agents, servants and or workmen from ejecting the plaintiff from House No. 6, Block. L, Dichemso, Kumasi— the joint property of the plaintiff and the defendant and the matrimonial home of the said marriage."
The defendant, on his part, caused a writ of summons to issue out of the Magistrates Court, Grade II, Kumasi, against the plaintiff and her parents as the defendants, wherein he claimed the following remedies:
"(1) an order to compel the defendants to take necessary steps according to custom to dissolve the marriage between the plaintiff and the third defendant or an order dissolving the said marriage;
(2) an order ejecting the third defendant from the matrimonial home, i.e. House No. 6, Block L, Dichemso, Kumasi; and
(3) an, order of injunction to restrain the third defendant from entering the said house."
It is clear from the first relief endorsed on his writ filed in the magistrate's court that the defendant herein was seeking a dissolution of his marriage with the plaintiff. And it is equally clear from the first relief endorsed on the plaintiff's writ of summons herein that she resists any petition praying for an order dissolving the said marriage. The rest of the reliefs sought by both parties in their separate actions are reliefs, in the main, consequential to whether or not the marriage is dissolved.
The magistrate's court heard and entered judgment in favour of the defendant for the reliefs endorsed on his writ in spite of protestations by the plaintiff that the High Court was seised of a cause raising the same or similar issues. An appeal by the plaintiff's parents, who were the first and second defendants in the said action, was dismissed by the High Court, when all that was pending before the court was an application to stay execution, for the curious reason that the appeal was not pending before the High Court.
On 28 August 1978, relying on the order of the High Court dismissing the appeal, the defendant went into execution and ejected the plaintiff and her children from the matrimonial home. The order dismissing the appeal by the plaintiff's parents was vacated on 30 November 1978.
The proceedings in the magistrate's court were by consent removed into the High Court and the two actions consolidated. On 16 February 1979, this court disallowed an application to commit the defendant herein for contempt and instead ordered that the plaintiff and her said six children be reinstated in the matrimonial home - House No. 6, Block. L, Dichemso, Kumasi, within seven days. This court further imposed an injunction restraining the defendant herein from ejecting the plaintiff and her children by him from the said house pending the hearing and final determination of this suit.
In paragraphs (18) and (19) of her affidavit in support of her application for attachment or committal or both of the defendant for contempt, the plaintiff deposed to the fact that she and her children had been ejected from the chamber and hall which they occupied in the matrimonial home. And the order of injunction related to the said premises occupied by them. The said order was also made in the belief that it would be possible for the parties herein to live, if not in amity, at least without interference from, or molestation by each other. This apparently has not been the case. Hence this application by the defendant for an order exacting an undertaking from the plaintiff and three of her children - Yaa Adomakoh, Afua Afrah and Yaa Tiwaah - that they will refrain from continuing their wrongful acts of insulting and/or otherwise provoking the defendant and his wife and be of good behaviour during the pendency of this action. The order, which was intended to preserve the status quo pending the determination of this suit, appears to have opened a new and bitter chapter in the conflict between the parties. No longer did the uneasy peace prevail. Provocation and

open confrontation [p.382] became the order of the day. The affidavits of the parties in support of and against this application constitute a litany of grievances, abuses and assaults.
All the above decisions relate to marriages contracted under a statute. The courts of this country have since their inception been guided by the same principles that the English courts follow in respect of marriages contracted under the Marriage Ordinance Cap. 127 (1951 Rev.). And by section 41 (2) of the Matrimonial Causes Act 1971 (Act 367) it is provided that:
"41. (2) On application by a party to a marriage other than a monogamous marriage, the court shall apply the provisions of this Act to that marriage, and in so doing, subject to the requirements of justice, equity and good conscience, the court may—
(a) have regard to the peculiar incidents of that marriage in determining appropriate relief financial provision and child custody arrangements;
(b) grant any form of relief recognised by the personal law of the parties to the proceedings, either in addition to or in substitution for the matrimonial reliefs afforded by this Act."
In my view any party to a marriage other than a monogamous one who seeks a relief from this court, which but for the above-quoted section the court could not have entertained must be deemed to have made an application to the court to apply the provisions of this Act to the marriage. But for the provisions of this Acts it was not the province of the High Court to entertain petitions for divorce where the marriage was one contracted under customary law. Customary law divorce was by act of the parties not by a decree of the court. The court could be requested to ascertain whether there was a valid customary law marriage or whether such a marriage had been dissolved according to custom. But the customary procedures for the dissolution of customary law marriages did not lend themselves to a dissolution of the marriage by a court action. The courts, therefore, until the enactment of Act 367, could not entertain a petition for the dissolution of a customary law marriage.
The cross-petition by the defendant, being one for the dissolution of a customary law marriage, the defendant must be deemed to have requested the court to apply the provisions of Act 367 to his marriage. In applying the provisions of the said Act to a customary law marriage, the principles of divorce law upon which those provisions depend will necessarily have to be considered and applied, if justice, equity and good conscience so demand.
As stated earlier in this ruling, upon an allegation by the plaintiff that she and her children had been ejected by the defendant from the chamber and hall which they occupied in the matrimonial home, this court ordered the defendant to allow them to return to the said chamber and hall and restrained him by injunction from ejecting them. That order was made on 16 February 1979. More than a year has elapsed since that order was made. From the several affidavits filed it is clear that the defendant has made available for the occupation of the plaintiff and her said children a chamber and hall as ordered by the court. The plaintiff's children as evidenced by this application have, in pursuance of that order, moved to occupy the chamber and hall which it was alleged they occupied with their mother (the plaintiff) and from which they were ejected by the defendant. Yet the plaintiff has failed to move back to the matrimonial home. In Richman v. Richman [1950] W.N. 233 the wife was a half-owner of the matrimonial home. There were cross-charges in a divorce suit. She left the matrimonial home. Later she applied pending suit for an injunction to restrain her husband from entering the home which he continued to occupy, though she had left it. The application was dismissed.
The present application is not brought by the plaintiff, but one fact is common to both the Richman case (supra) and this one; that the wife has left the matrimonial home and continues to stay out. The rights of her children to remain in the matrimonial home depend on her personal right of occupation in relation to that matrimonial home, the marriage being a customary law one. Customary law knows no personal right of occupation by a wife. Under a matrilineal system, to which the parties herein belong, children belong to their mother's family. The children can, likewise, therefore have no personal right of occupation of the matrimonial home. The court, for the protection of children, may order that the father do

provide them with accommodation either in the matrimonial home or elsewhere, but their continued occupation of the matrimonial home must clearly be subject to good behaviour.
To my mind, it has been established that the conditions which now prevail in the matrimonial home are such as to make it quite intolerable for the defendant and his wife to continue sharing the home with Yaa Adomakoh and Afua Afrah. Both girls are adults and are working. Yaa Tiwaah is a school-girl and has not featured much in any of these quarrels. I am of the view that the conditions prevailing in the matrimonial home ought not, having regard to the welfare of Yaa Tiwaah, to be allowed to continue.
However, I agree with counsel for the plaintiff that as the plaintiff is not living in the matrimonial home and no allegation of misbehaviour is levelled against her, no order whatsoever can be made against her. But the occupation by the children of the chamber and hall in the matrimonial home is in pursuance of the order made in her favour on 16 February 1979, and which order she herself has not taken advantage of. It is therefore ordered as follows: This court's order dated 16 February 1979 is hereby discharged. Yaa Adomakoh and Afua Afrah are to remove themselves from the matrimonial home within 28 days from the date hereof. The said two adult children are to give an undertaking to be of good behaviour for the 28 days during which they remain in the matrimonial home within 24 hours of this order. In lieu of such an undertaking they are to be ejected forthwith.
I make no order as to costs.
DECISION
Application granted.

BOATENG AND OTHERS v. BOATENG [1987-88] 2 GLR 81-86
COURT OF APPEAL, ACCRA
7 JULY 1988
WUAKU J.S.C, AMPIAH AND ESSIEM JJ.A.

ESSIEM JA
This appeal concerns the ownership of house No EJ/174, Ejisu, Ashanti.
One George Boateng made a will and devised the said house to his children. The defendants in this action are the children of the said George Addo Boateng who are the devisees in terms of the last will of the said George Addo Boateng.
After the death of the testator, the executors duly took out probate. The late Boateng before his death, lived in the house with his children.
The plaintiff who is the respondent in this appeal sued the appellants before the High Court, Kumasi claiming in his writ of summons:
"1. Declaration that the house situate on plot No GC 3, Ejisu, Ashanti is the property of the plaintiff's family.
2. Recovery of possession of the said house from the defendants.
3. Damages for unlawful and wrongful trespass.
4. Perpetual injunction restraining the defendants, their servants or agents or both from interfering with the plaintiffs' possession of the said house."
The learned trial judge after a very detailed examination of the evidence adduced before him made the following findings, among others: That the land on which the house stands was obtained jointly by the fifth plaintiff witness (Mrs Beatrice Peprah), the plaintiff and the late George Boateng. He further found that the house was jointly put up by these four persons. In the end he found the plaintiff's case proved and gave him judgment in terms of the reliefs sought in the writ of summons. He however dismissed the plaintiff's claim for damages for trespass against the defendants holding that the same was misconceived. The trial judge made the following declaration in favour of the plaintiff.
"I . . . declare that the land together with the dwelling-house on plot No GC 3 Ejisu, Ashanti is the family property of the plaintiff. The plaintiff is entitled to immediate possession of the

said house and I do so order. The defendants, their agents, servants and assigns are hereby and forthwith perpetually restrained from entering the said land and house"
He dismissed the defendants' counterclaim.
The defendants have appealed to this court on three main grounds which are:
"(a) The judgment of the learned judge was against the weight of evidence.
(b) The plaintiffs are estopped from claiming that the two-storey house situate on plot No EJ 174, Ejisu is a family property and not the self-acquired property of the late George Boateng especially when to the knowledge of the plaintiff and his family, the late George Boateng, the lessee, had been dealing with the property openly as his own, ie using it as security for bank loans.
(c) The learned High Court judge misdirected himself in coming to a conclusion that the late George Boateng had no means of building the said house by himself since he kept on borrowing money from his sister Mrs Peprah."
Counsel for the appellants, Mr Bossman, abandoned ground (b) and argued grounds (a) and (c). The main submissions were based on the fact and he invited us in effect to reverse the trial judge on his findings of facts and the conclusions he drew from those facts. He also urged upon us in the alternative to vary the judgment of the court below in order to allow the children, i.e the defendants, to remain in the house in dispute subject to good behaviour.
In reply Mr Totoe for the respondents argued that the judgment is supported by the evidence on record and as such this court should dis miss the appeal. As to the rights of the children, if any, he asked that the court should leave that to the discretion of the family. He urged us to reject the invitation to vary the orders made by the trial judge.
Where, as in this case, the appellant contends that a judgment is against the weight of the evidence, he assumes the burden of showing from the evidence on record that this is so. After a careful examination of the evidence on record as well as submission of counsel, I am of the opinion that the findings of fact made by the trial court are amply supported by the evidence on record. I therefore find no basis for interfering with the main conclusions of the learned trial judge.
Similarly, I do not see any justification for varying the orders of the court below in favour of the children. The house was not the self-acquired property of their deceased father. It is their father's family house. They will have an interest in it if they belong to that family. The evidence does not suggest that they belong to their father's family.
In these circumstances the court cannot make any valid orders for the benefit of the children. When it is said that children under the Akan system of inheritance are entitled to remain in their father's house subject to good behaviour, that only relates to "the father's house", ie the self-acquired property of the father: see Sarbah, Fanti Customary Laws (3rd ed) at 50.
For the reasons given I will dismiss the appeal.

DECISION. Appeal dismissed.

YEBOAH AND OTHERS v KWAKYE [1987-88] 2 GLR 50-59
COURT OF APPEAL, ACCRA
5 JUNE 1986
ABBAN, OSEI-HWERE AND AMPIAH JJA

OSEI-HWERE J.A.
The properties in dispute may conveniently be lined up in two groups. In one group is the plot of land at Nsukwao, Koforidua which is partly developed into swish and cement-block buildings. In the other are the three cocoa farms at Suhien Aboye, a sugar-cane farm a Nsukwao, Koforidua Old Estate Road and a foodcrops farm near the cemetery, Koforidua. The

cement-blocks building comprise one storey structure (the main buildings and two outbuildings commonly called "boys quarters." Because all these building stand in close proximity, they have been registered at the Koforidua Municipal Council as one unit with the registration number T 29. The registered owner is given as Afua Pokua /J Y Donkor.

Afua Pokua (now deceased) was the mother of JY Donkor, described as Yaw Donkor at the trial. Afua Pokua had two sisters and two brothers, namely Abenaa Mframa, Amma Tanoa, Kwame Adjabeng and Tuffour. It does appear Amma Tanoa predeceased Afua Pokua. On the death of Afua Pokua her sister Abenaa Mframa was by-passed as her successor because she had voluntarily disclaimed her ties with her matrilineal family. Consequently her only surviving child, Yaw Donkor, was appointed successor. On the death of Yaw Donkor his family appointed Kwaku Kwakye, the son of Abenaa Mframa (the plaintiff herein) to succeed. The plaintiff mounted this action now on appeal against the defendants because Yaw Donkor, by his will, purported to dispose of the disputed properties to his wife and children.

The evidence of both the second plaintiff witness and the first defendant witness is consistent with the acquisition of the virgin forest by Adjabeng as family land. There was no evidence of a gift of the land to his sisters by Adjabeng. That being so the customary law made its full impact. That law is that where a family member made a farm on vacant family land even by his own private resources and unaided by the family, whether with or without the prior permission of the family, he acquired only a usufructuary life interest therein. Although the life interest is fully alienable (e.g. it can be given as security for a loan) it is not open to the life tenant, unless he acts with the concurrence of the head and principal members of the family, to alienate any greater interest than his' life estate. On his death, the interest in the property vests in the family. It follows that any disposition by the life tenant purporting to have any other effect, such as a devise under his will, shall be ineffective: see Amoabimaa v Okyir [1965] GLR 59, SC; Biney v Biney [1974] 1 GLR 318, CA and Osei Yaw v Domfeh [1965] GLR 418, SC.

RIBEIRO v. RIBEIRO [1989-90] 2 GLR 109-144
SUPREME COURT, ACCRA
12 DECEMBER 1989

ADADE, FRANCOIS, WUAKU AND AMUA-SEKYI JJSC AND OFORI-BOATENG JA

AMUA-SEKYI JSC

The petitioner, Barbara Ribeiro, and the respondent, Charles, were married in London in 1953. They have four children. In 1980 the petitioner filed a petition for divorce which included a prayer for financial provision. The petition for divorce was uncontested and was granted by the High Court, Accra in January 1981.

In support of her prayer for financial provision, the petitioner, (hereinafter called the wife) filed an affidavit in March of that year alleging that the respondent (hereinafter called the husband) was the owner of some ten buildings. She assessed his earnings at ¢30,000 per month. In answer to this, the husband denied being the owner of six of the buildings. He however admitted ownership of the building on Ring Road, Accra, which is the subject of this appeal. He said he had in all 22 children seven of whom were in schools in Ghana and two in schools in England. Besides, he had six elderly relatives who were partly dependent on him. With regard to his earnings he put them at between ¢3,000 and ¢4,000 per month. When called upon to give a breakdown of his expenditure on his infant children he revealed that he spent a total of ¢185,495 a year on the seven who were in Ghana and £13,440 a year on the two in England. Clearly, the wife had a better perception of the earnings of the husband than he was prepared to disclose to the court.

While proceedings were pending in the High Court to determine what provision, if any, should be made for the wife, the husband purported to convey the house on Ring Road to one of his concubines (his new wife) by whom he had four children. The High Court found the conveyance to have been made with intent to defeat the provision that might be made for the wife and rescinded it. It awarded the wife ¢150,000 and ordered that the property be conveyed to her as part of financial provision.

The husband appealed to the Court of Appeal and lost: (see Ribeiro v Ribeiro [1987-88] 2 GLR 460, CA. He now appears to have accepted the award of ¢150,000 made to the wife and seeks to challenge only the order vesting the Ring Road property in her. These questions arise, namely:
(a) whether the disposition was made with intent to defeat the, provision that might be made for the wife;
(b) if it was, whether the trial judge had power to rescind it; and
(c) whether he had power to vest the property in the wife.
As to the first question, the learned trial judge made a definite finding that the gift of the property to the concubine was made at a time when it was known that the wife was inviting the court to vest one of the husband's several houses in her as part of financial provision. The submission that even after the property had been disposed of the husband had other properties which the court could have ordered to be vested in the wife was answered by Abban JSC, sitting as an additional judge of the Court of Appeal, in this way at 469 of the report:
"I think the submission begged the question, for the court had a discretion as to which of the ten houses that should be ordered to be given to the wife-petitioner for her accommodation; and until that had been done the appellant could not interfere with any of them. The court must be given the opportunity of making up its mind first, before any disposition could be made by the appellant thereafter. After all, the court was to decide first and foremost whether or not all the ten houses were owned by the appellant. So all the ten houses were in issue before the court; after deciding that issue the court would go further to decide which one of the ten houses was suitable as accommodation for the wife-petitioner."
Like the trial judge, the Court of Appeal was in no doubt that the disposition had been made in bad faith and with intent to defeat any provision that might be made for the petitioner. These two concurrent findings of fact are entitled to our respect; and I, for one, will not disturb them: see Kwamin v Kufuor (1914) PC '74-'28, 28.
On the other two questions I have had no difficulty whatsoever in answering both in the affirmative. Section 26 (1) of the Matrimonial Causes Act, 1971 (Act 367) states:
"26. (1) The court may by order restrain either party to the marriage, or any other person, from permitting the disposition of the assets or property of either party to the marriage, and the court may rescind any disposition of such assets or property that has been made with the intention of defeating the financial provision or property settlement of the other party, except that a disposition for value to a purchaser in good faith may not be rescinded."
(The emphasis is mine.) The emphasised words leave me in no doubt that the court has power to rescind dispositions it finds to have been made with the intent described. Section 20 (1) also states:
"20. (1) The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the court thinks just and equitable."
(The emphasis is mine.) Again, the emphasised words satisfy me that not only is there power to vest immovable property as settlement of property rights, or in lieu thereof, but also as part of financial provision.

It was suggested that the power of the court to vest immovable property under section 20 (1) of Act 367 was contingent upon proof that the recipient was either the owner of the property or made a substantial contribution towards its acquisition. This view was [p.116] supported by references to a number of English cases, among them: Cobb v Cobb [1955] 2 All ER 696, CA; Appleton v Appleton [1965] 1 All ER 44, CA; and Pettitt v Pettitt [1969] 2 All ER 385, HL and to the decision of our Court of Appeal in Achiampong v Achiampong [1982-83] GLR 1017, CA. The short answer to the submission is that all the cases cited are irrelevant to the matter now on appeal. Without exception, the English cases were concerned with the interpretation of section 17 of the Married Women's Property Act, 1882 which laid down a procedure for resolving disputes between husbands and wives as to title to or possession of property. Our analogous law, the Married Women's Property Ordinance, Cap 131 (1951 Rev), did not have a similar provision. In any case, it was repealed by the Statute Law Revision (No 2) Decree, 1973 (NRCD 228) as being obsolete or unnecessary.

In Achiampong v Achiampong (supra) there was evidence that the wife had been persuaded by her husband not to acquire a house of her own and that she had, in fact, financed extensions to the matrimonial home. She claimed to be a joint owner of the home and succeeded in an application under section 20 (1) for a settlement of the property rights of the parties. But that is not all the power that section 20 (1) confers. There is also the power to make orders for financial provision. On such an application, the court examines the needs of the parties and makes reasonable provision for their satisfaction out of the money, goods or immovable property of his or her spouse.

If we have to go to England for guidance, it is to section 17 (2) of the Matrimonial Causes Act, 1965 and section 4 of the Matrimonial Proceedings and Property Act, 1970 that we must look. The latter reads in part:
"4. On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter (whether, in the case of decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may, subject to the provisions of sections 8 and 24 (1) of this Act, make any one or more of the following orders, that is to say—
(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;"
(The emphasis is mine.) The emphasised words show that the courts of England have power to make the kind of order made in this case.
The building which the High Court ordered to be conveyed to the petitioner is house No C 153/5, Ring Road, Accra. It has been called Haulage House because the Ghana Road Haulage Association have offices there. The other three houses the husband admitted as being the owner of are No D 537/1, Bruce Road, Accra; No D 571/3, Adedainkpo South, Accra; and No 24, Kimberley Gardens, London. If therefore, the suggestion that there were other houses which could have been vested in the wife is to be taken seriously, it means only that either the house on Bruce Road or that at Adedainkpo South would have done just as well. The husband offered two rooms and a hall in the Adedainkpo house for the life of the wife together with the sum of ¢20,000. I am of the opinion that the judge was entitled to reject this offer and make the orders he did make.

The question may be asked, "why choose the Haulage House?"
My answer is that having a discretion to exercise, it was for the trial judge to exercise it in the best way he could. As a judge sitting in Accra where the properties are located, he must be deemed to be familiar with the localities of the three houses and to have a fair idea of their

suitability as a residence for the wife who, with the husband, had lived what many of our people would consider a life of affluence which included sojourns in London. Two bedrooms and a hall at Adedainkpo could hardly have met the needs of a lady as refined as the wife must be. This court is not better placed than the trial court to determine what was suitable for the wife having regard to the circumstances of her case.
After a careful consideration of the matter, I come to the conclusion that the Court of Appeal was right in dismissing the appeal and that this further appeal should fail.
Appeal dismissed.

RIBEIRO v. RIBEIRO (NO. 2) [1989-90] 2 GLR 130-144
SUPREME COURT, ACCRA
10 APRIL 1990
ADADE, FRANCOIS, WUAKU, AND AMUA-SEKYI AND OFORI-BOATENG JA
ADADE J.S.C.
As a result of an uncontested divorce proceedings in the High Court the marriage between Charles Ribeiro and Barbara Ribeiro was dissolved in January 1981. Thereafter the wife applied to the court for financial provision. Whilst the application was pending, the husband transferred one of his ten houses, called the Haulage House, to his second wife. The High Court set aside the disposition, purporting to exercise powers given by section 26 (1) of the Matrimonial Causes Act, 1971 (Act 367). The court awarded the wife a lump sum payment of ¢150,000 as financial provision, and in addition, ordered that the Haulage House be conveyed to her as part of the financial provision under section 20 (1) of Act 367. The husband appealed against these orders. In the Court of Appeal he abandoned the appeal against the award of the ¢150,000 but pressed the appeal against the transfer of the house. The Court of Appeal unanimously dismissed the appeal: see [1987-88] 2 GLR 460, CA. The husband then appealed to the Supreme Court, which in a split decision of three to two also dismissed the appeal, on 12 December 1989 (see [1989-90] 2 GLR 110, SC ante. The husband now applies to the court to: "review the majority judgment upon grounds contained in the annexed affidavit and statement . . ."

Be it noted that the applicant does not say in the motion whether he is applying on grounds of error of law or of miscarriage of justice or of discovery of fresh facts or evidence, or whatever. He leaves the ground(s) for the application to be inferred by the court from the "annexed affidavit and statement", a course which creates the impression that he has no really good and substantial grounds for the applicant for review, but that he merely seeks to re-argue his appeal, [p.134] perhaps with greater emphasis, and, where he can, to raise new matters which might have escaped him so far and which he wished he had raised when arguing the appeal. Indeed, his supplementary statement in support of his application contains a number of such fresh arguments.

In this case we are not concerned with settling property rights where the court is called upon to determine the share in any property, which belongs to one or the other of the parties. Where a determination of such interest is not the issue, the question of the contributions of either party, substantial or otherwise, towards the acquisition of the property is irrelevant. That is why cases such as Achiampong v Achiampong [1982-83] GLR 1017, CA and Cobb v Cobb [1955] 2 All ER 696, CA and others are of no help whatever in this case. This point was made quite clear by my brother Amua-Sekyi JSC who in delivering the majority judgment now under attack said at 116 ante:
"It was suggested that the power of the court to vest immovable property under section 20 (1) was contingent upon proof that the recipient was either the owner of the property or made a substantial contribution towards its acquisition. This view was supported by references to a number of English cases, among them: Cobb v Cobb [1955] 2 All ER 696, CA; Appleton

v Appleton [1965] 1 All ER 44, CA; and Pettitt v Pettitt [1969] 2 All ER 385, HL and to the decision of our Court of Appeal in Achiampong v Achiampong [1982-83] GLR 1017, CA. The short answer to the submission is that all the cases cited are irrelevant to the matter now on appeal."
They are irrelevant because all those cases are concerned with a determination of the interests of the spouses in property which, on the face of it, belonged to one spouse only. For instance, in Cobb v Cobb (supra) the husband and wife contributed to buy the house in question. The decision of the court was simply that the two were entitled to the proceeds of the sale of the house in equal shares. In the Appleton case the house was purchased by the wife. The husband did a lot of work on the house to renovate it. His contribution was estimated to be about half the cost of renovation. The court held that he was entitled to so much of the sale proceeds as was commensurate with his contributions. My brother Wuaku JSC although in the minority, observed at 130 ante;
"Numerous authorities were referred to in the arguments of learned counsel for the parties such as Cobb v Cobb [1955] 2 All ER 696, CA; Pettitt v Pettitt [1969] 2 All ER 385, HL; Gurasz v Gurasz [1970] P 11, CA and Wachtel v Wachtel [1973] 1 All ER 829, CA. They are authorities which dealt with cases where one spouse either claimed beneficial interest in the property or the property as jointly owned or wholly owned. They were decided on the relevant sections of the several English Matrimonial Causes statutes. ln those cases a party's success or failure depended on establishing title and/or by proving substantial financial contribution towards the acquisition of the property in question. If title was established, the court decreed it: see Cobb v Cobb (supra). Failure to prove title is fatal and the court will not decree it: see Pettitt v Pettitt (supra)."

For the same reason Bentsi-Enchill v Bentsi-Enchill [1976] 2 GLR 303 and similar cases are not in point, if only because an application for financial provision is not an application for decent accommodation. The money ordered to be paid may, if paid in gross and is substantial, be used for acquiring a house. But it need not be. It may be used in purchasing stocks and shares, or may just be frittered away on riotous living. The money becomes the woman's, to be used as she pleases.

In Achiampong v Achiampong (supra) Abban JA (as he then was) made certain observations regarding the ambit of section 20(1) of Act 367. I understand those observations to be limited to that part of section 20(1) which deals with settlement of property rights. After all that was what Achiampong v Achiampong was all about: the wife petitioned, inter alia, for a declaration of joint ownership of all their household items and of an estate home which was the matrimonial home. It will be erroneous to extend Abban JA's observations to cover the portion of section 20(1) which relates to applications for financial provisions.

In this case the application was for financial provision, which the High Court has power to entertain under section 20(1) of Act 367. The said section reads:
"20. (1) The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the court thinks just and equitable."
This section, shed of excess fat, and reduced into a form which fits the facts of this case, may read as:
"The Court may order [the husband] to convey to the [wife] such ..... [house/building] .... as part of financial provision as the court thinks just and equitable."
Thus written, there is no doubt that under our law the High Court has power to make the order of transfer which it made.

The house or building or immovable property is being conveyed not because the court finds that it belongs to the wife, or that the wife was part-owner, or that she contributed in any way whatever to its acquisition. NO! It is being conveyed as part of a package of financial provision which the court considers the wife to be entitled to. Therefore the order for transfer is not contingent upon any claim of title by the wife. In the same way the transfer is not for the purpose of giving the wife residential accommodation in the matrimonial home or in any home at all. These points are worth driving home, if only to allay the confusion of thought and the misconceptions revealed by certain statements, of which the following are typical:
"(a) ... nowhere is a power of selection granted a judge under Act 367 to identify and earmark a particular house to meet a spouse's prayer for [financial] provision when that spouse has not a title or an interest in that property (per Francois JSC in his dissenting opinion in the Supreme Court at 121 ante); or
(b) ... the issue was simply whether [the wife] was entitled to be provided with decent accommodation by [the husband] as part of financial provision; and the [husband] agreed that he was so entitled. (per the Court of Appeal (supra) at 470); or
(c) ... in the absence of direct contribution to the acquisition of the said house by the [wife] her right to any property belonging to the [husband] was a right to reside in any of the [husband's] houses designated as the matrimonial home, and this right subsisted until the dissolution of the marriage."

The authorities cited for this proposition are Bentsi-Enchill v Bentsi-Enchill (supra) at 307 and Fribance v Fribance [1957] 1 All ER 357, CA. The statement above will be relevant if these proceedings had been concerned with "settlement of property rights" between the husband and wife, which is not the case here. When Francois JSC in his minority opinion in the Supreme Court at 119 ante castigated the judgments below for, eg giving "the courts powers arbitrarily to realign proprietary rights where there is no claim to title in the recipient party", it ought to be remembered that we are dealing with a specific provision of Ghana law which confers a power to transfer property even though the beneficiary makes no claim to title. This is why, in my opinion, a reference by Wuaku JSC in his dissenting opinion in the Supreme Court to section 21 of Act 367 is misleading because section 21 deals with a contest over title, which the court is called upon to resolve. It is for the same reason that the majority in this court refused to be detained by those English cases decided on section 17 of the English Married Women's Property Act, 1882. That section deals with questions of title to or possession of property, which is the subject of dispute between husband and wife. The parties start off with a dispute over property, and the court comes in to sort out the dispute for them. Under our section 20 (1) the claim which goes to court for financial provision is one for money. The court decides to give the money; but the section gives the court a discretion to make the award wholly in money, or partly in money and partly in non-money (ie money value) viz "such movable or immovable property ... as the court thinks just and equitable." In such a situation the English cases of Cobb v Cobb (1955), Appleton v Appleton (1965) and Pettitt v Pettitt (1969) et al, with their pronouncements on contributions cannot be a good guide to us. They are all beside the point. To draw them into the debate is, with respect, to evince that lack of clarity and perspicuity of thought which I referred to earlier.

This brings me to the matters raised by counsel in his supplementary statement. Counsel makes the point, not wholly unmeritorious, that if a house is to form part of the financial provision, the court must first indicate the full amount of the money intended to be awarded and the portion earmarked to be absorbed by, the house. Which means the value of the houses must also be ascertained. I dare say that this will be the ideal situation. But I do not think that in every case the court must be pushed to working out these awards with such mathematical precision. Such a duty will initially involve ascertaining the husband's total worth in terms of money. All his properties must be valued: houses, cars, bicycles, furniture,

plates and cutlery, pianos, farmlands and empty plots, oxen, dogs, clothing and everything which he owns on this God's earth. This will have to be done in order to decide what proportion of the money-value should go to the wife as financial provision, before the amount is split between money and non-money. It will be dangerous to impose such a burden on any court. A court should be able, using its best endeavours, to make an award, without first going through an exercise such as above proposed.

In the instant case, the learned trial judge took some evidence on the man's properties before making the award. It may be that another court may not have arrived at the same conclusion, but that does not mean that the trial judge was wrong in the way he dealt with the matter. As to learned counsel's submission that the husband's offer of a flat of two bedrooms and a hall with all conveniences should have been adequate for the wife's requirements, it is sufficient to point out that this action was not conceived by the learned Judge as a claim for decent accommodation. It was for financial provision. It is true the wife pleaded that the husband "be ordered to surrender one of his several houses to [her] by way of marriage settlement." But as my brother Francois JSC observed at 121 ante in his dissenting opinion from the majority decision "[The wife's] request for one of her husband's houses, can only in the context legitimately refer to a request for adequate `financial provision.'" That indeed is how all the courts appreciated that request. The request for the house was merely an invitation to the court to consider the financial provision in terms not only of cash, but also of immovable property. That invitation did not alter the true character of her position, namely a petition for financial provision. The provision, if made wholly in money, need not be expended on accommodation at all. It will be the wife's money. And this is why in my understanding, the award, if made partly in immovable property, that property need not be a residential property: it may be a farm, a building plot, a warehouse or a factory. Section 20(1) of Act 367 does not impose any limitation.

It is for this reason also that it is futile to argue that the property in question is after all a factory or a warehouse, and not meant for residence; or, if it is residential, that it is too big for the wife's requirements. These considerations are beside the point. The husband's offer of the flat was therefore neither here nor there. The court was within its rights to reject the offer.

Application dismissed.

BERCHIE-BADU v BERCHIE-BADU [1987-88] 2 GLR 260-268
COURT OF APPEAL ACCRA
28 JANUARY 1988

WUAKU J.S.C., OSEI-HWERE AND ESSIEM JJ.A.

OSEI-HWERE J.A.

The parties were married at Harringay Registry Office, London on 22 August 1970. They had three issues between them. On 4 March 1983 the petitioner filed her petition for divorce on the ground that the marriage had broken down irretrievably and beyond reconciliation. One of the grounds (for the purpose of this appeal) stated in her petition as contributing to the breakdown was that the respondent had fraudulently changed the title to the land at Nzima-Atwima the petitioner had purchased with her own money for the purpose of constructing a house. Wherefore, paragraph 12 (d) of her petition prayed the court to decree:

"That a transfer of the family's own matrimonial house now under construction at Nzima-Atwima be made to the petitioner on trust for the said three children of the marriage; the said plot having been purchased earlier by the petitioner for ¢150 of her own money."

Whilst the petition was pending before the High Court, Kumasi the petitioner brought a motion to oust the respondent and some of his family members from the matrimonial home. In her accompanying affidavit the petitioner now deposed that she had used her own money and

industry to construct the said matrimonial home. In his affidavit in answer, the respondent denied the petitioner's claim that she put up the said matrimonial home and asserted, at the same time, that he put up the house out of his own resources. The ownership of the matrimonial home became a triable issue alongside the issue of the breakdown of the marriage. The respondent cross-appealed for the dissolution of the marriage.

In his judgment the learned trial judge found that the parties could no longer live as man and wife and he, accordingly, dissolved the marriage. In regard to the three children of the marriage, the learned judge gave custody of the two boys to the respondent and custody of the third and youngest child, a girl, to the petitioner. He considered the matrimonial home as, the real bone of contention in the proceedings before him. He found that the plot was in the name of the petitioner but that the respondent had the building plans made out in his name. As to how the building was financed the learned judge found that it was "from the profits made in the largely illicit trade carried on by them between Kumasi and London." He finally declared that "Plot No 8 Block B, Nzima, near Kwadaso and the dwelling-house thereon (meaning the matrimonial home) to be the property of the petitioner:" He reasoned that the respondent knowingly expended money on a house being erected on land bearing his wife's name and that he was never left in any doubt that the wife regarded the house as being for her and her children.
On maintenance, he ordered that the respondent pay to the petitioner the sum of ¢600 per month as maintenance for their youngest child. In addition he was to pay her school fees and, if she should thereafter enter a boarding institution, the fees were to be paid by the respondent and the monthly maintenance reduced to ¢400 per month.

The order was made on 27 February 1985. Aggrieved by the decision of the learned judge granting title of house No 8, Block B, Nzima near Kwadaso, Kumasi, and the dwelling-house thereon to the petitioner, the respondent brought this appeal urging that:
"(a) the trial judge failed to consider the case of the appellant and therefore arrived at an erroneous decision;
(b) the judgment is against the weight of evidence; and
(c) the trial judge, having found that the matrimonial house was developed or constructed through the joint efforts and from the profit of the petitioner and the respondent, was wrong in law in holding that the petitioner is and should be the sole owner of the said house"
When the petitioner gave evidence she once again shifted her stand and said that the respondent contributed to the cost of the building although she said she could not tell how much. Having regard to the shifting positions the petitioner took as to how the construction of the building was financed, the learned trial judge ought to have placed no reliance on her evidence that she contributed towards the cost of the building and he should have accepted the respondent's insistence that he alone financed it. Be that as it may, I am of the view that the learned trial judge erred in decreeing title in the petitioner simply because the land is in her name. The doctrine of quicquid plantatur solo solo cedit has never found a niche in matrimonial relationships particularly in the acquisition of a matrimonial home. The finding that the respondent was never left in doubt that the petitioner regarded the house as being for her and her children was not supported by the conduct of the respondent who has retained his name all through on the building plans and refused to change them into her children's name contrary to her suggestion to do so. The application of the presumption of any trust on behalf of the children was thereby negatived.
Where spouses jointly acquired property the question may arise as to the amount of the share in the beneficial interest of a spouse in the said property where the legal estate is vested solely in the other spouse. In the celebrated decision in Gissing v. Gissing [1969] 2 W.L.R. 525 at 529, C.A. Lord Denning formulated the answer as follows:

"It comes to this: where a couple, by their joint efforts, get a house and furniture, intending it to be a continuing provision for them for their joint lives, it is the prima facie inference from their conduct that the house and furniture is a family asset' in which each is entitled to an equal share. It matters not in whose name it stands: or who pays for what: or who goes out to work and who stays at home. If they both contribute to it by their Joint efforts, the prima facie inference is that it belongs to them both equally: at any rate, when each makes a financial contribution which is substantial."
It must be noted that Gissing v. Gissing (supra) was reversed in the House of Lord s: see [1970] 2 All E.R. 780, H.L., where Viscount Dilhone expressed his opinion that the above-quoted formula of Lord Denning MR could not be regarded as good law in the light of the views expressed by the house in Pettitt v. Pettitt [1969] 2 All E.R. 385, H.L.

Indeed the House of Lords, in Gissing v. Gissing (supra) gave a practical formulation of the answer to the effect that where a contributing spouse makes a direct or identifiable contribution towards the acquisition of the matrimonial home the share due to the spouse must be proportionate to the payment made. But where the contributing spouse makes indirect or unidentifiable contribution, although in such a case the relevant share in the beneficial interest is likely to be less easy to evaluate, the difficulty in evaluating the relevant share does not in itself justify the application of the maxim "equality Is equity" where the fair estimate of the intended share may be some fraction other than one half. On this aspect of the matter Lord Reid said at 783:
"I think that the high sounding brocard 'Equality is equity' has been misused. There will of course be cases where a half share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than a half."
And Lord Pearson also said at 788:
"I think also that the decision of cases of this kind has been made more difficult by excessive application of the maxim 'Equality is equity'. No doubt it is reasonable to apply the maxim in a case where there have been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the proportion borne by the contributions to the total price or cost is difficult to fix. But if it is plain that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing."
I have to reiterate by way of emphasis of the lack of consistency that in her petition the petitioner never mentioned that she put up or contributed to the erection of the matrimonial home. Her case as stated in her petition was that she purchased the plot out of her own money. She accused the respondent for fraudulently changing the title of the plot into his own name. She prayed that the matrimonial home be transferred to her on trust for the three children of the marriage because she paid for the plot. Subsequently in her two affidavits filed on 1 November 1983 and 12 April 1984 in support of her two motions to throw out the respondent and his relations from the matrimonial home, she maintained that she used her own money and industry to construct the matrimonial home. In her evidence on oath she said that the respondent contributed in financing the building. The respondent said that he supplied the ¢150 to purchase the plot. The trial judge did not believe him. This court cannot reverse the finding that she paid for the plot because the trial judge believed her evidence. But not so in regard to her evidence that she contributed in financing the erection of the house because it conflicts with the statement in her petition and also with what she deposed to in her affidavits. From the foregoing the only matter the petitioner could prove was that she paid for the plot and in determining her beneficial interest in the matrimonial home it should be the proportion the ¢150 bears to the total cost of the building which the petitioner estimated at ¢80,000 but the respondent said it costs ¢65,000. That will, of course, make her beneficial share to be negligible if only the court was asked to answer the cold legal question (as it

seems to me the court below set itself the task to answer that question unmindful of any divorce proceedings): what interest has the wife in the matrimonial home?

When the High Court, however, assumes its divorce jurisdiction it is armed with sufficient powers to make provision for the wife on the breakdown of the marriage. To this end section 20 of the Matrimonial Causes Act, 1971 (Act 367) provides:
"20. (1) The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as thinks the court as just and equitable.
(2) Payments and conveyances under this section may be ordered to be made in gross or by instalments."
In the exercise of its discretion to award ancillary relief under the section the overriding consideration is that the order must be "just and equitable."

Even if it can be inferred that the trial judge had in mind section 20 of Act 367 when he stripped the respondent of his interest in the matrimonial home, the question is whether the order can be said to be just and equitable. The matrimonial home seemed to be the only capital asset of the family when the order was made. By the court's order the custody of the two older children as well as the maintenance and education of all three children were consigned to his care. This is a heavy enough burden. In all cases where the husband is to be completely deprived of his beneficial interest in the matrimonial home the circumstances must be exceptional. For instance where the conduct of the husband (in attacking the wife and incapacitating her to earn her living) was of such a gross kind that it would be offensive to a sense of justice if it were not to be taken into consideration: see Jones v. Jones [1975] 2 All E.R. 12, C.A.; or where both spouses had worked hard to acquire the family asset and whilst the wife had enhanced its value the husband had saddled it with a burdensome charge: see Martin v. Martin [1976] 2 W.L.R. 901; or where the husband's contribution in acquiring the property is not very substantial; or where the husband failed to discharge his obligations imposed by the court to maintain his wife and children and there is the need to protect them: see Bryant v. Bryant (1976) 120 S.J. 165, C.A. All these situations justified an order to strip the husband's beneficial interest in favour of the wife. These examples, of course, do not exhaust those exceptional circumstances. Ultimately the court's order must be suited to the particular facts of each case.

It is a matter for regret that counsel for the petitioner did not choose to address the court for ancillary relief by way of financial provision under section 20 of Act 367 but that he seemed to have marched into battle under the banner of section 21 (1) of Act 367. That section only entitles the court to order the transfer to a spouse what property is really due to that spouse, and nothing more or nothing less. Its potency is accordingly limited. As already noted the petitioner' s interest (under section 21) will be an insignificant fraction. But although counsel failed in his duty this court cannot be inhibited in applying the wide powers of section 20 to serve the ends of justice.
From the facts of this case it will not be just and equitable to deprive the respondent of the whole of his interest in the house. Taking into consideration that the petitioner paid for the plot and also that no financial provision was ordered on her behalf I would order that the petitioner's beneficial share in the matrimonial home should be half and the respondent should also hold a half share.
I am, accordingly, of the view that the appeal ought to be allowed and the judgment set aside. I would order that in place thereof the said matrimonial home ought to be held in equal shares by the parties.

ANANG v. TAGOE [1989-90] 2 GLR 8-13
HIGH COURT, ACCRA
2 NOVEMBER 1988

BROBBEY J

By her writ the plaintiff has claimed a declaration that she is the joint owner with the late George Okai Mensah Tagoe of a house situated on a plot at Mataheko numbered as B 747/4. She also applied for perpetual injunction to restrain the defendant and her agents or assigns from interfering with the quiet enjoyment of the said house by her and her children.

The action was originally instituted against her husband Robert Okai Mensah Tagoe but he died before the case was concluded. The current defendant, Major Tagoe, a brother and successor of the late Tagoe, was substituted for him. Before he died, the late Tagoe denied the plaintiff's claims and counterclaimed for a declaration that he was the sole owner of the house in dispute.

The plaintiff's case is that she was married to the late Tagoe in about 1952. Thereafter a plot of land was acquired at Mataheko for the purpose of building for her late husband, herself and their children a matrimonial home. She averred further that in the course of the construction of the said house she made financial contributions. Her contributions included providing meals for the workers engaged in the construction, giving moneys to the workers for the purchase of building materials like iron rods or off-loading and cartage of timber purchased by the defendant, organising the production of blocks used in constructing the building and on diverse occasions physically being present by herself to supervise the said construction.

The late husband as the defendant on the other hand denied that he received any assistance from the plaintiff. His case is that the house was the sole effort of himself and that he made all the payments for the various items used in constructing the house. He maintained that it was he who acquired the plot. In support of his application he tendered the indenture on the land as well as numerous receipts for various purchases of building materials which were all in his name.

A critical examination of the evidence led in the course of the trial shows that the plaintiff made financial contributions towards the construction of the house. There was evidence that it was part of the contract between the defendant and the first builders of the house up to lintel level that while work was going on food should be supplied to the workers. That it was the plaintiff who supplied the food was supported by the first plaintiff witness, one of the builders. In addition, the moneys she paid, materials she bought and her physical labour expended on supervision were satisfactorily corroborated by the evidence from the first, second, third and indeed the fourth plaintiff witnesses. Evidence was led to the effect that defendant was a police officer who was on transfer to various stations. Most of the time he was outside Accra and he left the supervision of the construction to the plaintiff who was then trading in Accra.

To establish her financial means, the plaintiff led evidence to support the assertion that she was a trader with passbooks from the Ghana National Trading Corporation (GNTC) and her witnesses further buttressed her stand that she was a trader in meat and timber. From the nature of the trading enterprise she described, I am satisfied that she was capable of making the monetary contribution which she claimed to have made towards the construction of the house.

It is true that the plaintiff has not been able to establish the precise extent of the contributions in terms of cash or materials. That; however, should constitute no bar to her claim for joint ownership. This is because the house was built at a time when the defendant was married to

the plaintiff and when no incident has occurred to adversely affect their relationship or cause their marriage to founder. In the normal run of affairs, transactions between a man and his wife cannot be viewed with the same scrutiny which is associated with commercial transactions pertaining to normal business people for purchases, payments and such like matters to be formally documented or receipted. This has been the attitude of the courts throughout the Commonwealth and in our courts as well: Notable authorities on the principle are Rimmer v Rimmer [1953] 1 QB 63 at 67 and 76, CA; Fribance v Fribance [1957] 1 WLR 384 at 387, CA and Achiampong v Achiampong [1982-83] GLR 1017, CA.

It has been established that where a wife makes contributions towards the requirements of the matrimonial home in the belief that the contribution is to assist in the joint acquisition of property, the court of equity should take steps to ensure that that belief materialises and indeed if that were not so, husbands would unconscionably be made to unjustly enrich themselves at the expense of innocent wives. This is particularly the case where there is evidence of some semblance of agreement for a joint acquisition of property. A classic authority for this is the case of Achiampong v Achiampong (supra) especially holding 4. In the instant case, evidence was led that the defendant for several years was a police officer who worked in several parts of the country. To a large extent he left the running and financial provisions for their matrimonial home to the plaintiff as he was transferred from one station to another. The plaintiff at some stages was left to pay school fees of the children. Evidence was led, as per exhibit C, that the late husband, the defendant, gave the impression to the plaintiff that the home was being built as their matrimonial home and for their children. That was confirmed by a letter, exhibit H, which gave the unequivocal impression that the house was for the children of the plaintiff. It is significant that exhibit H was written when the defendant had several children by other women and yet the late husband made reference to the plaintiff and her children only. In the light of the ostensible intentions of the late husband as known even to his brother, the substituted defendant, it should not be surprising that the plaintiff would expend all that money and resources of her own to assist in the construction of that house. No court of equity and conscience would permit the defendant to get away with those contributions, the volume of which must have been induced by the defendant's own utterances and attitude.

As stated already, the defendant pegged his case on the fact that the receipts and indenture were all in his own name. That fact alone is not sufficient to conclusively establish his exclusive right to the house. The defendant was challenged on his assertion that he initially bought three plots and his brother put up a house on one of the plots and so he knew how the plots were acquired. That brother appeared in court as one of the persons sought to be substituted. He withdrew from the case and was not called to testify for the defendant on the defendant's assertion relating to the land.

The defendant did not seem to be a truthful person. In an affidavit filed by him in a maintenance case between him and the plaintiff he deposed that his sole income was derived from rents. In his testimony in court he stated that he had a cocoa farm, a cattle ranch and a commercial vehicle. He was stoutly challenged on these averments but he took no steps to adduce any corroborating evidence in proof thereof. To further show how untruthful the defendant was, he admitted in his pleadings that the plaintiff was a trader but in court he sought to down rate the wife with whom he has had six children, by asserting that she was a maidservant by the time he married her. In the light of these conflicts, I am inclined to accept the assertion of the plaintiff in preference to that of the defendant, and I hold that the defendant's means was derived from his income as a police officer and that was the more reason why he must have found the contributions of the plaintiff salutary at the time.

In the light of the plaintiff's challenges and opposition to the crucial issues pertaining to the acquisition of the land and payments made towards the construction of the house, it was not enough for the defendant to have relied on mere oral assertion in proof of his case, and this is particularly the case where the receipts showed only part of the purchases and could not have covered every item bought or paid for to further the construction of his house. The case of Majolagbe v Larbi [1959] GLR 190 cited by counsel for defendant is rather more applicable to proof of the assertions by the defendant than proof of what the plaintiff averred which was clearly borne out by evidence from witnesses she called.

Even if receipts were issued in the name of the defendant, I cannot lose sight of the fact that the defendant was an aspiring police officer who rose from the rank of a constable to that of Assistant Commissioner of Police and his wife was a semi-literate whose level of education did not reach even Middle School Standard Seven. This was the defendant who had eighteen children with four other women and with so many women and children around him, it is only natural to expect that he would put receipts in his own name and not in the name of his semi-literate wife.

The truth of the case is that the receipts only showed the contributions of the defendant and it was those contributions, added to the plaintiff's contributions which jointly saw through the construction of the house. There is more than ample evidence on record of massive contributions made by the plaintiff towards the construction of the house in dispute. The plaintiff therefore succeeds in her claim for a declaration that she is a joint owner of the house, i.e. the out house and the storey building situated on plot No B 747/4 Mataheko. It is hereby declared that the plaintiff is a joint owner and in the light of the authority of Achiampong v Achiampong (supra), she is entitled to one-half of the two buildings on that plot.
It follows from the foregoing that her claim for injunction also succeeds. The substituted defendant and all persons claiming through him or the deceased defendant are hereby restrained from interfering with the quiet enjoyment of the plaintiff's half share of the properties.
The defendant's counterclaim fails and is dismissed accordingly with costs assessed at ¢10,000 against the defendant.

DECISION
Judgment for plaintiff.

SYLVIA GREGORY Vrs NANA KWESI TANDOH IV [NO. J4/8/10] 12TH MAY, 2010 (Unreported)

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA

CORAM: WOOD (MRS), C.J (PRESDING)
OWUSU (MS), JSC
DOTSE, JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL
NO. J4/8/10

12TH MAY, 2010

SYLVIA GREGORY } .. PLAINTIFF/APPELLANT/ APPELLANT

VRS

NANA KWESI TANDOH IV} .. DEFENDANTS/RESPONDENTS/ } RESPONDENTS

BRIDGET HANSON }

J U D G M E N T

DOTSE, JSC:

INTRODUCTION

The parties in this case began their relationships on a good note as friends, presumably later as lovers and lately as bitter enemies, who are residing in the same house, albeit in different apartments.

When a similar set of facts emerged in the unreported Sekondi High Court case of suit No. TS 2/2000 intituled I.B. Clement – Plaintiff vrs Andrews Annietey – Defendant dated 4th June, 2003 I quoted the following passage from William Shakespeare's Book, Julius Caesar Act IV, Scene 3, to depict the circumstances and this reads as follows:-

"There is a tide in the affairs of men. Which taken at the floods, leads on to fortune; omitted, all the voyage of their life, is bound in shallows, and in miseries. On such a full sea are we now afloat; we must take the current when it serves or lose our ventures."

FACTS:

Even though the facts of this case admit of no serious controversies, in view of the concurring findings of fact made by the trial High Court and the first appellate court, to wit the Court of Appeal, we will set out the facts in some detail in order to set the records straight.

The Plaintiff/Appellant/Appellant, hereafter referred to as the Plaintiff is an African American now resident in Ghana, Ankaful, near Cape Coast in H/No. AV. 31/3 to be precise.

The Defendants/Respondents/Respondents hereafter referred to as Defendants, are husband and wife with the 1st Defendant being a Traditional Ruler in Elmina and both also reside in the same house as the Plaintiff.

The plaintiff visited Ghana in or about 1988, met the 1st defendant and they subsequently became friends with the latter introducing the Plaintiff to his wife the 2nd defendant. This

friendship grew in leaps and bounds with the plaintiff accepting an invitation to lodge and reside with the defendants anytime she visited Ghana thereafter.

It must be noted that, the Defendants, were by then residing in rented premises and the Plaintiff had made it known to the defendants that she had planned to relocate to Ghana and make it her home.

Plaintiff thereafter resided with the Defendants anytime she visited Ghana and with the passage of time the Plaintiff and 1st defendant fell in love. According to the facts on record, the 1st defendant then proposed to marry the plaintiff at the Cape Coast Municipal Assembly.

Even though this marriage ceremony never took place, the relationship between the parties grew stronger with the 2nd defendant not showing any signs of rivalry and jealousy as women are by nature bound to show.

According to the plaintiff, she was convinced by the defendants to provide funds for the construction of a house on a vacant plot of land belonging to the defendants. The plaintiff obliged and appears to have contributed substantially to the construction of the house on this land.

When the house was barely completed, the plaintiff moved into occupation later followed by defendants with the plaintiff virtually occupying the first floor of the house and the defendants the ground floor.

Even though the defendants dispute the substantial contributions of the plaintiff towards the construction of the house, they did not take steps to prevent the plaintiff from either occupying the house altogether or the almost 50% sharing of the occupancy.

The Plaintiff later brought her daughter from the United States of America to reside with the defendant's in Ghana and provided a bus which was run commercially by the 1st defendant who was reputed to have rendered accounts to the plaintiff anytime she returned from the United States of America to Ghana.

Matters soon got out of hand and it became increasingly clear that the plaintiff's family and the defendant's family cannot cohabit together in peace in the same premises.

With series of skirmishes, quarrels and criminal acts which often time were reported to the police, the plaintiff on the 24th day of November, 1997 issued a writ at the High Court, Cape Coast against the defendants, claiming the following reliefs:-

> "The plaintiffs claims against the defendants jointly and severally is for
> a. An order directed at the defendants compelling them to convey the land on which H/No. AV. 31/3, Ankaful, Cape Coast is standing to the plaintiff.
>
> b. An order of perpetual injunction directed at the defendants restraining them by themselves, their dependants, agents and persons claiming title through them from interfering with plaintiffs possession of H/No AV 31/3, Ankaful, Cape Coast.
>
> c. Any order that the court may deem fit on the justice of plaintiff's case."

The Defendants entered appearance and defended the suit by putting in a counterclaim in the following terms:-

"The defendants repeat the averments contained in paragraph 1-35 of the statement of Defence and counterclaim against the plaintiff as follows:-

a. A declaration that title to H/No. AV. 31/3 Ankaful, Cape Coast is vested in the defendants.

b. An order for recovery of possession of the portion of the premises occupied by the plaintiff.

c. An order of perpetual injunction restraining the plaintiff her agents/servants/relatives assigns from in anyway interfering with the defendant's title to the said property".

The case then proceeded apace, with the issues being set down for trial, both parties testified and called witnesses.

JUDGMENT OF THE HIGH COURT

On the 23rd day of August, 2002, the High Court, Cape Coast presided over by Tweneboa-Kodua J as he then was, delivered judgment in the case, and stated in part as follows:

"The principle is well settled, he who owns the land, owns whatever is on it, for guidguid plantatur solo solo cedit (what is attached to the land is part of the land). The defendant's ownership of the house is not in doubt, notwithstanding the plaintiff's contribution, ill-defined except as acknowledged in pleadings and sworn testimony by the defendants set against the foregoing, the defendant's counterclaim must succeed and it is accordingly granted as follows:

a. A declaration that title to House No. AV. 31/3 Ankaful, Cape Coast is vested in the defendants.

b. An order of recovery of possession of a portion of the premises occupied by the plaintiff.

c. An order of perpetual injunction restraining the plaintiff, her agents, servants, relatives, assigns from in anyway interfering with the defendant's title to the said property.

The defendants are entitled to evict the plaintiff from the House No. AV 31/3, Ankaful, Cape Coast and the Plaintiff shall give vacant possession of the said house thirty (30) clear days after this day, that is to say on 23 September, 2002.

That to my mind is not the end of the matter. The court has been invited in limb (c) of the plaintiff's claim to make

"any order that the court may deem fit on the justice of the plaintiff's case". In her misguided anxiety and dream to own a house in Ghana, ***theplaintiff indeed made some contribution to the construction of the disputed house****. The defendants have*

admitted some contributions she made by way of assistance. As demonstrated in their Solicitor's address, the defendants do not begrudge her being adjudged to recover her contribution, they would not, it was suggested, resent paying the monetary equivalent of the assistance received".

"It is reasonable on the justice of the plaintiff's case" to order the defendants to return the plaintiffs assistance or contribution .

The Registrar of this Court, with the assistance of the Regional Auditor of the Judicial Service, Cape Coast, shall assess the contribution in monetary terms for recovery by the plaintiff within 30 days from this day.

The parties shall bear their own costs and I therefore make no order as to costs"

As was to be expected, the plaintiff filed an appeal against this High Court judgment to the Court of Appeal on 5th September, 2002.

JUDGMENT OF COURT OF APPEAL

The Court of Appeal on the 14th day of July, 2006, by a unanimous decision dismissed the appeal filed by the plaintiff herein in the following terms:-

"In the instant case, the learned trial judge found that the plaintiff did not contribute substantially to the construction of the house in dispute and that whatever assistance she rendered in the course of the construction of the house was insignificant. He also found that no valid marriage existed between the plaintiff and the 1st defendant. ***I find nothing wrong with these findings of fact and I will not therefore disturb them.*** *It is obvious therefore that a resulting trust in any of its forms was clearly inapplicable in the circumstances of this case.*

In conclusion and for the reasons given in this judgment I find no merit in this appeal. I will therefore dismiss it and it is accordingly dismissed. The judgment of the court below is thereby affirmed."

Feeling naturally aggrieved and dissatisfied with the decision of the Court of Appeal, the plaintiff on the 21st day of February, 2007 sought leave and was granted same by the Court of Appeal to appeal to the Supreme Court.

APPEAL TO SUPREME COURT

Pursuant to leave that was granted by the Court of Appeal, the plaintiff herein through her new Solicitors, Messrs Cann, Quashie and Co. on the same 21st day of February, 2007 filed an unbelievable 18 grounds of appeal with the proviso that more grounds of appeal could be filed.

GROUNDS OF APPEAL TO THE SUPREME COURT

It is now my painful duty to set out concisely the 18 grounds of appeal.

i. The judgment is against the weight of evidence.

ii. That both the trial Court and the Court of Appeal failed to adequately or at all to consider the case of the Plaintiff.

iii. The court of Appeal misconstrued the imports of Exhibits 12, 12A & 12E with regard to the construction of the House.

iv. The Court of Appeal failed to consider the relationship (albeit erroneously) held by the Appellant that she and 1st Defendant/Respondent were "husband" and "wife" as a result of which she left the documentation of the construction of the house to him.

v. Since the relief claimed against the Defendants/Respondents was jointly and severally the statutory declaration by the 2nd Defendant which was against her interest ought to have been admitted and that it's rejection has occasioned miscarriage of justice.

vi. The holding that the Plaintiff could not take advantage of a Statutory Declaration of which she is not a party is not supported by law having regard to the fact that a Statutory Declaration is NOT an agreement between parties but a unilateral solemn declaration by whoever is the declarant.

vii. That the holding that the 1st Defendant not being a signatory to the Statutory Declaration and thus same could not be tendered through him is also erroneous in law having regard to the fact that the 1st Defendant testified for and on behalf of the 2nd Defendant who was the Declarant of the Statutory Declaration.

viii. That the consequent conclusion by the Court of Appeal that the Statutory Declaration was rightly rejected on grounds that the Plaintiff and 1st Defendant were not signatories was therefore erroneous in law.

ix. That the rejection of the Statutory Declaration thus occasioned a miscarriage of justice as its admission would have shown the Plaintiff's contribution to the construction of the house being admitted by the Defendants.

x. Both the trial Court and Court of Appeal failed to appreciate that the Appellant's possession and occupation of the top floor with American specifications and fittings which is bigger in size than the ground floor occupied by the Defendants conclusively shows the extent and nature of the Appellant's interest in the house.

xi. The Court of Appeal failed to appreciate the reliance of the Appellant on the representation by the 1st Defendant that the Appellant and 1st Defendant were "man" and "wife".

xii. The Court of Appeal failed to appreciate that by reason of the Defendant's counterclaim, the defence of equitable estoppels

raised by the Appellant was a shield in protection of her contribution towards the construction of the house.

xiii. Both the trial Court and the Court of Appeal erred in delegating the quantification of the Appellant's contribution to the Registrar and the Regional Auditor of the Cape Coast High Court having regard to the evidence on record.

xiv. Both the trial Court and the Court of Appeal erred in not quantifying the so called "insignificant" contribution by the Appellant.

xv. The Court of Appeal failed to recognize the issue that an Appeal is by way of rehearing and failed to critically examine and evaluate the evidence on record.

xvi. The Court of Appeal seriously erred in law when it concluded that the Plaintiff failed to discharge the burden of proof on her in accordance with Sections 10 (1) and (2) and 11 (1) and (4) of the Evidence decree (1975) NRCD 323.

xvii. The both the trial Court and Appellate Court misapplied the law on the burden of proof as between the Plaintiff in relation to the relief sought by her and Defendants who had also counterclaimed for a declaration of the title to the house.

xviii. The finding that there was no evidence that Plaintiff's contribution to the construction of the house in dispute was substantial is not supported by the evidence on record.

xix. (Additional grounds of Appeal will be filed upon receipt of record of proceedings).

CONTENTS OF GROUNDS OF APPEAL

Rule 6 of the Supreme Court Rules 1996 C. I. 16 deals with Notice and grounds of appeal in the Supreme Court. Rule 6, 2 (f) of C. I. 16 provides as follows:-

" A notice of civil appeal shall set forth the grounds of appeal and shall state

(f) the particulars of a misdirection or an error in law, if that is alleged".

Rule 6 (5) provides that the grounds of appeal shall be set out concisely and under distinct heads the grounds which the appellant intends to rely upon at the hearing without any argument or narrative.

Rule 6 (4) on the other hand provides that vague or general grounds of appeal which do not disclose any reasonable ground of appeal except the general ground that the judgment is against the weight of evidence shall not be permitted.

In the instant appeal, as we have already pointed out, the plaintiff herein has filed no less than 18 grounds of appeal.

We have observed that Counsel for the plaintiffs did not comply with the requirements stated in Rule 6 of the Supreme Court Rules in the formulation of the grounds of appeal. The result has been that, there are so many grounds of appeal which could have been subsumed under one broad ground, whilst particulars of misdirection or error of law that is alleged will be stated in the Notice of Appeal, instead of setting them out as distinct heads or separate grounds of appeal.

It should therefore be noted that, Counsel who formulate grounds of appeal for their clients, should endeavour to comply with the provisions of Rule 6 of the Supreme Court Rules C. 1. 16 to prevent unnecessary and sometimes repetitive grounds of appeal being filed in clear breach of the Rules of the Supreme Court, reference grounds v, vi, vii, viii and ix of the grounds of appeal which all dealt with Statutory Declaration which could have been subsumed under one ground of appeal, touching and dealing with the issue of Statutory Declaration.

CONCURRENT FINDINGS OF FACT

We have noted that the Court of Appeal in their judgment concurred in the findings of fact made by the learned trial Judge.

There is this general principle of law which has been stated and re-stated in several decisions of this Court that where findings of fact such as in the instant case have been made by a trial court and concurred in by the first appellate court, in this case the Court of Appeal, then the second appellate Court such as this Supreme Court must be slow in coming to different conclusions unless it is satisfied that there are strong pieces of evidence on record which are manifestly clear that the findings of the trial court and the first appellate court are perverse.

This point was re-emphasised by the Supreme Court in the recent unanimous unreported judgment in Suit No. CA/J4/7/09 dated 3rd February 2010 intituled ***Assemblies of God Church, Ghana vrs Rev. Ransford Obeng & 3 others.***

The same point had been made in the following cases:

1. Achoro vrs Akanfela [1996-97] SCGLR 209 holding 2

2. Akuffo-Addo vrs Cathline [1992] 1 GLR 377 per Osei Hurere

3. Thomas vrs Thomas [1947] AER 582

4. Powell vrs Streatham Manor Home [1935] AC 243 at 250

5. Doku vrs Doku [1992-93] GBR 367

6. Koglex Ltd. (No. 2) vrs Field [2000] SCGLR 175

7. Jass Co. Ltd. vrs Appau [2009] SCGLR 26 5 which deals with circumstances justifying interference with findings of fact by Supreme Court

8. Awuku Sao vrs Ghana Supply Co. Ltd. [2009] SCGLR 710 also deals with conditions under which the Supreme Court will interfere with findings.

There are however a host of other respected authorities to support the contention that the above principle is not a cast iron situation which is incapable of being departed from.

From the reading of the cases referred to supra and others not referred to, it appears the rationale for the principle is that, an appellate court must be slow in interfering with the findings of fact, made by a trial court because it is the trial Judge alone who had the advantage of seeing, hearing and observing the demeanour of the parties and the witnesses which appeared before him. For example, if quite apart from the facts of the case as stated on record, the findings of fact were influenced or based solely on the demeanour and credibility of the witnesses, then it would be manifestly unjust to vary or depart from such findings of fact. But then, sufficient indication must be given in the judgment based on the record of proceedings to indicate the credibility and demeanour of the witnesses.

However, where the findings were based on established facts such as in the instant case, then the appellate court was in the same position as the trial court and was perfectly in a position to draw its own inferences from the established facts.

In Koglex Ltd. (No. 2) vrs Field [2000] SCGLR 175, at 176 holding 1, the Supreme Court by a majority decision on a review application held that

"*A second appellate court, like the Supreme Court, must satisfy itself that the judgment of the first appellate court was justified or supported by evidence on record.* ***Where there was no such evidence that finding ought to be set aside".***

It is therefore clear that, a second appellate court, like this Supreme Court can and is entitled to depart from findings of fact made by the trial court and concurred in by the first appellate court under the following circumstances:

1. Where from the record the findings of fact by the trial court are clearly not supported by evidence on record and the reasons in support of the findings are unsatisfactory.

2. Where the findings of fact by the trial court can be seen from the record to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the entire evidence on record.

3. Where the findings of fact made by the trial court are consistently inconsistent with important documentary evidence on record.

4. Where the first appellate court had wrongly applied the principle of law in *Achoro vrs Akanfela* (already referred to supra) and other cases on the principle, the second appellate court must feel free to interfere with the said findings of fact, in order to ensure that absolute justice is done in the case.

In the recent unanimous decision of the Supreme court in the case of ***Fosua and Adu-Poku vrs Dufie (deceased) & Adu Poku Mensah 2009 SCGLR 310 at 313*** the court, per Ansah JSC held as follows:-

"A second appellate court would justifiable reverse the judgment of a first appellate court where the trial court committed a fundamental error in its findings of fact but the first appellate court did not detect the error but affirmed it, and thereby perpetuated the error. In that situation, it becomes clear that a miscarriage of justice had occurred and a second appellate court will justifiable reverse the judgment of the first appellate court".

I also made the following observations in the Fosua and Adu Poku vrs Dufie case referred to as follows:

"An appellate court such as this court may interfere with the findings of fact of a trial court where the latter failed properly to evaluate the evidence or make the proper use of the opportunity of seeing or hearing the witnesses at the trial or where it has drawn wrong conclusions from the accepted evidence or where its findings are shown to be perverse. It is clear that there are cogent and credible pieces of evidence which this court on its own can use to differ from the findings of fact made by the trial court and the first appellate court."

In the instant appeal, after a perusal of the entire record and the submissions of learned counsel for the parties, we are of the considered opinion that, based on the following pieces of evidence, the findings of fact made by the learned trial Judge and concurred in by the first appellate court are not supported by the evidence on record and clearly perverse having regard to the circumstances of this case.

In evaluating the evidence on record, we note that the 1st defendant testified and recounted the circumstances under which he met the plaintiff on a Tour bus which he conducted. This is what the 1st defendant said.

"In the course of operating the Tour company, I met the Plaintiff on a Tour Bus (vehicle) which has been arranged by the said Company."

Continuing the 1st defendant stated as follows:

"In the process, the plaintiff was making the loudest noise inviting me to sit by her. She was sitting alone at the rear of the bus. In the process we chatted for sometime. She in the process offered me finally $70 U.S dollars.

When I arrived back home, I informed my wife about the gift of $70 U.S dollars from the plaintiff. So my wife and I went to her in the Elmina Motel to thank her for the gift."

It was during this visit according to the 1st defendant that the plaintiff and members of her group were invited to lunch at the rented premises of the Defendants at the Ramblers Cottage, at Ankaful.

The 1st defendants stated that, whilst at the lunch, "*the plaintiff expressed an amorous interest in me and that apparently was a standing joke"* because as 1st defendant put it, he was then, and still is married to his dear wife the 2nd defendant.

It is clear therefore that, the defendants considered this gift of $70 U.S dollars so significant and important in 1988 that it demanded both man and wife going to express appreciation to the plaintiff.

Secondly, it is also clear that the 1st defendant knew or had an inkling about the amorous intentions of the plaintiff in him from that early stage. Any movement by either of them from then onwards towards each other must be deemed to be concretising the consummation of such an interest.

Thereafter, it was also very much evident that the plaintiff and the defendants were very close to the extent that in 1990, the plaintiff brought her daughter from the United States of America to reside with the defendants in Ankaful.

Based on the above background, the following pieces of evidence when properly evaluated would show that the learned trial Judge made the wrong findings of fact, which cannot be supported.

What then are these?

The evidence of the plaintiff was corroborated to a large extent by her witnesses.

1. PWI Abubakar Mustapha confirmed plaintiff's assertion that she and the 1st defendant procured building materials with which the disputed house was built. This PW1 also confirmed the destruction of some land crete blocks that the 1st defendant on his own moulded before his contact with the plaintiff. This PWI was the person who offered to keep the building materials of the 1st defendant free of charge as they were close to his house. What must be noted is that, unlike the plaintiff who is a foreigner, all the witnesses called by the plaintiff are Ghanaians and citizens of Ankaful or its environs. There is no reason for them to tell lies against the 1st defendant.

2. PW2 - John Kweku Eshun- Carpenter

This witness together with his brother PW3 worked on the disputed house. Even though an attempt was made during cross-examination of this witness to cast doubt on his sanity and therefore credibility, his evidence remained, unshaken because of the following:

a. His evidence was confirmed by PW3 his brother.

b. The evidence of the witness on the material and relevant pieces of evidence was not affected by the cross-examination. He stated thus,

> *"I am talking about the work upstairs: that one we did carry out"*

It was PW2 who first corroborated the evidence that when they needed to be paid for work done on the project from 1st defendant, they were informed by 1st defendant that the plaintiff had travelled and so they should wait for her. Later, when the plaintiff returned, the materials were bought jointly by the plaintiff and 1st defendant and in some instances, payments were made directly from the plaintiff through 1st defendant to them.

3. PW3 - Kwasi Obeng, also a carpenter a brother of PW2 corroborated the evidence of the Plaintiff and his brother on the

record. For example, PW3 stated during evidence in chief that even though it was 1st defendant who handed over the job to him, he told him the project was for the plaintiff who had travelled outside the country and that money would be made available upon his return.

As a matter of fact, funds started to flow when the plaintiff returned and PW3 testified that he was paid by funds provided by plaintiff.

Out of abundance of caution, let us refer to some pieces of evidence led by PW3 during cross-examination:-

Q. "From whom did you receive the payments

A. The 1st defendant but it was the plaintiff who gave the money to the 1st defendant to pay me.

Q. These payments were made in the absence of the plaintiff.

A. The plaintiff was there but the 1st payment was done behind the plaintiff but later payments were made in the presence of the Plaintiff."

Continuing further, PW3 answered thus:-

Q. "Are you saying the payment was made to you in the presence of the plaintiff.
A. Yes, when the 1st defendant paid me the plaintiff was present.

Q. On all three occasions the 1st defendant paid you.

A. When we needed the money we told the first defendant and the 1st defendant went to the plaintiff to collect the money.

Q. You never saw the plaintiff gave money to the 1st defendant for payment to you.
A. I did see
Q. Where did you see this
A. The plaintiff brought the money upstairs and the 1st defendant collected the money from the plaintiff and paid me."

4. PW4 – Mrs Juliana Appiah, the wife of the landlord of the defendants when they were residing in the rented apartment at Ramblers Cottage. The evidence of PW4 is important in the sense that it gave an account of the circumstances of the defendants when they resided in the rented premises. As a matter of fact, it was not all that rosy as the 1st defendant would want this court to believe. This explains why they were so excited about the gift of the $70.00 U.S dollars to the 1st defendant by the plaintiff.

5. **EXHIBIT G**

This exhibit is a handwritten record of programme for completion of the house by the 1st defendant. In it, were estimates in U.S dollars which is the legal tender of the plaintiff.

The only conclusion to be drawn by this court is that these were items of expenditure which the 1st defendant expected the plaintiff to provide and pay for to complete the house.

It is therefore correct to infer that once the house had been completed and is now being occupied, then the said items of expenditure must have been paid for by the plaintiff. As a matter of fact, if the issue of marriage which the plaintiff and 1st defendant toyed with to the extent that marriage forms were even collected from the Cape Coast Municipal Assembly, then what began as an amorous intent had been concretised.

Considered from this background, the payments and contributions by the plaintiff towards the house must be understood with this idea of an intended marriage or subsisting amorous relationship and that explains why the plaintiff did not produce documentary proof other than the handwritten document, exhibit G.

As was stated by Atuguba JSC in the Fosua & Adu Poku vrs Adu Poku Menash case, already referred to supra on page 311, where he stated as follows:-

> *"Given the high evidential potency of documentary evidence, in the eyes of the law, the trial Judge should have given cogent reasons for doubting the veracity of exhibit 2, being the undertaking given by the late Kwaku Poku."*

In the instant case, it is our considered view that the learned trial Judge should have given some really serious examination and consideration to exhibit G. If the learned trial Judge had done that, he would have come to an irresistible conclusion that really the 1st defendant depended on the plaintiff in the construction of this house.

6. A.G.C SHARES (ASHANTI GOLD COMPANY SHARES)

The 1st defendant himself in answer to a question during cross-examination stated as follows:-

"*Before this case came to court, the Counsel for the plaintiff wrote a threatening letter to me, the effect that all legal avenues and if need be the press would be used to ensure that the plaintiff received justice. I have the letter here in my capacity then as the Acting President of the Traditional Council, I weighted the opportunity of costs or the value of these shares as opposed to publication of wild story about Nana Kwesi Tandoh VII (the 1st defendant herein) and the rationale behind reclaiming those costs was that such wild story by which I was threatened were published in the National Dailies for the gullible readers. It was the reason why I wrote the letters in question. So I wrote the letter as a result of intimidation."*

This is exhibit E. It is also clear that but for the timely intervention of learned Counsel for the plaintiff, the 1st defendant would have unjustifiably held on to the A.G.C shares which as it turned out was paid for by the plaintiff.

7. RESPONSIBILITY OF THE PLAINTIFF IN UPKEEP OF THE HOUSE

The plaintiff testified that her intention of coming to Ghana was to settle in Ghana in addition to the United States of America. It was in pursuit of that resolve that the plaintiff brought her daughter to reside with the defendants because they had their own children.

According to the plaintiff, before her daughter came, she purchased a "Trotro" bus for their use. The plaintiff continued her evidence in chief thus:-

"So my daughter came, I took over responsibility for food, school fees, clothing, transportation, etc. So my daughter's presence here was to their advantage."

Continuing further, the plaintiff stated as follows:-

"At one point, I took the 2nd defendant to America for four months and she saw what I was doing and the source of the money I was bringing".

All the above pieces of evidence were not shaken during cross examination. For example, plaintiff reiterated her case during cross examination that the defendants could not pay their own bills, and for that reason needed assistance which she provided.

We believe the plaintiff's explanation on the record of proceedings that it was because of the marriage she thought she had contracted with the 1st defendant that she did not demand and or obtain receipts for all that she did for the defendants as she thought they were all one family.

Under the circumstances, we believe it is correct to presume that the plaintiff assumed she was married to the 1st defendant and therefore provided all that was necessary for the upkeep of the home, i.e. maintenance. If therefore assuming the 1st defendant used his own money for the construction of the house which is denied, will the plaintiff be left helpless without any remedy in the house built by the 1st defendant at a time she honestly believed she was married to the 1st defendant and took up the upkeep of the house? We think not. Under the circumstances, and in line with the decision in a number of respected Ghanaian cases like:

1. Mensah vrs Mensah [1998 – 99] SCGLR 350

2. Boafo vrs Boafo [2005-2006] SCGLR 705

The plaintiff's contribution in equity will be deemed as contributions towards the house. We shall therefore call in aid equitable principles to give meaning to the quest of this court to do justice in all cases and to all manner of persons.

8. PLAINTIFF'S OCCUPANCY OF THE 1ST FLOOR

From the evidence on record, it is clear that whilst the plaintiff alone virtually occupied the 1st floor save one bedroom which was strategically reserved for the 1st defendant, the rest of the defendant's family were confined to the ground floor. Even though the 1st defendant gave some explanation for this state of affairs, no critical mind will accept such a lame excuse. We are definitely of the view that the occupancy of the entire floor by the plaintiff is another way of stamping her authority on the building.

9. LAND TRANSACTIONS

There is also uncontroverted evidence that the plaintiff entrusted so much confidence in the defendants, especially the 1st defendant so much so that she virtually made him her trustee of her properties. For example, the plaintiff testified as to how she paid monies to the 1st defendant for the purchase of lands at Ankaful, and in Elmina. From the beginning, because the plaintiff had confidence in the 1st defendant, she entrusted everything in his name. This

is the confidence that the 1st defendant and his wife abused. We take note of the fact that all these facts go to explain why the plaintiff dealt with the defendants in absolute good faith. This should have been noted by the learned trial Judge.

10. STATUTORY DECLARATION

From the record of proceedings, the learned trial Judge delivered a ruling in which she rejected the tendering of a Statutory Declaration made by the plaintiff, 1st and 2nd defendants, but executed only by the 2nd defendant. It must at this stage be noted that the defendants were sued jointly and severally and the 1st defendant also testified on behalf of the 2nd defendant his wife. The 1st defendant admitted that his wife contacted a notary public to prepare a document and explained the reasons for this document as follows:

"Q The 2nd defendant offered the plaintiff 50% share of the house in dispute. I put that to you.

A. What I know about this is that amongst several attempts made, as I have earlier on indicated. Plaintiff's Counsel had already threatened to use the media to embarrass myself and my wife, so my wife indicated to me in the interest of peace we get a notary public to come in, working out something to bring peace. This was the height we were prepared to go in order to avoid publication of lies in the papers, radio and on the internet. So after all when we realised that all that did not make any difference, the offer never took place. It was not consummated, so to speak."

Taking the above explanation into consideration and the Evidence Act 1975, NRCD 323, section 25 (1) thereof which states:

"*25 (1) Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the instrument, or their successors in interest.*"

it is clear and apparent that the 2nd defendant, who on her own made a statement voluntarily against her own interest must be held bound by the depositions so contained in the Statutory Declaration which is on page 189 of the record as a rejected document. We must note that the rejected Statutory Declaration actually conforms to the precedent set out in the Statutory Declarations Act, 1971 Act 389, and for that matter satisfies the requirements in section 2 of Act 389 on the use of statutory declarations.

We take further note that the said declaration was duly sworn by the 2nd defendant before a Notary Public and by virtue of section 5 of the Act, a person who makes a statutory declaration knowing it to be false in a material particular, or who makes a declaration which is false in a material particular, or reckless whether it is true or not, commits a misdemeanor.

This therefore means that Statutory Declarations are to be considered as serious, solemn and sacred documents which should be treated seriously hence the creation of a criminal offence for those who willingly and knowingly make false declarations.

Besides, a walk through the rejected declaration makes it quite clear that it contains all the items of properties that the plaintiff entrusted the 1st defendant to procure or acquire for her. These include:

1. The disputed house

2. A.G.C. shares
3. Two undeveloped plots for plaintiff's daughter Tersah Bumbry at Ankaful
4. Poultry project

What must be noted is that, once the 2nd defendant has executed the document, which was admitted by the 1st defendant, the explanation that it was executed in order to put to rest their harassment by the plaintiff is an after thought and is soundly rejected by this court.

The reasons given by the learned trial Judge for rejecting the Statutory Declaration executed by only the 2nd defendant are wrong in Law and also erroneous. This is because:

i. The Statutory Declaration had been executed by the 2nd defendant and notarized.

ii. As between the 2nd defendant and the plaintiff, the declarations therein contained are deemed to be true hence the criminal sanctions provided for in Act 389.

iii. The 1st defendant must be deemed to have given evidence for and on behalf of himself and the 2nd defendant.

iv. The defendants were sued jointly and severally, that meant what can be used against one party can bind the other party. In this case, the execution of the document by 2nd defendant binds the 1st defendant.

v. It must be noted here that, the contents of a statutory declaration must be understood to mean a solemn declaration of the contents of the document as between the declarant and the plaintiff herein. Therefore as in the instant case, the 2nd defendant made declarations against her own interest, affirming in all material particulars the version of the plaintiff's case, a court of law like this Supreme Court cannot gloss over such an event.

For the above reasons, it is our considered opinion that the Statutory Declaration which was rejected by the learned trial Judge when the plaintiff sought to tender it into evidence was wrongly rejected.

We accordingly admit the said Statutory Declaration into evidence, for the purposes of confirming the contents of the document as the truth of the state of affairs between the 2nd defendant and the plaintiff.

What should be noted is that, the Statutory Declaration is not being accepted as a document conferring title on the plaintiff or 2nd defendant, but one evidencing the statement of the facts therein contained. Reasons that the document was not stamped and or registered, such as was proffered by the learned trial Judge were really not germane to the circumstances of this case.

GENERAL OVERVIEW OF THE EVIDENCE

From the above pieces of evidence which have been analyzed and referred to supra, it is our contention that if the learned trial Judge and his senior brethren in the Court of Appeal had been more circumspect and critical, they would have realised that the plaintiff was able to make a strong enough case to entitle her to be granted judgment. What must be noted is that, once the plaintiff has made a case which is reasonably probable, the learned trial Judge should have applied the same burden of proof to the defendant's case since they had also

counterclaimed. An appeal is definitely by way of re-hearing, see case of ***Tuakwa vrs Bosom [2001-2002] SCGLR 61.***

Based on the totality of the evidence before this court, it is our considered view that the trial court and the court of Appeal both erred in their findings and came to the wrong conclusions.

On the evidence, it is clear that the findings of fact by the learned trial Judge and concurred in by the Court of Appeal are unsupported by the evidence on record.

Under the circumstances the judgment of the Court of Appeal dated 14th July, 2006 and by necessary implication, that of the High Court, dated 23rd August, 2002 are hereby set aside.

Instead, the appeal herein by the plaintiff succeeds in part as follows:-

1. Plaintiff's share in H/No. AV. 31/3 Ankaful Cape Coast is put at 50%. This is because this court considered her contributions as substantial coupled with the customised completion she did on the first floor where she lives.

2. The defendants are entitled to 50% share or interest in this house AV 31/3 Ankaful.

3. In order for lasting peace to prevail between the parties in the house, it is ordered that, the house, the subject matter of this appeal shall be valued by the Land Valuation Board and the parties herein shall bear the cost of the valuation equally. The defendants herein who are also entitled to 50% interest in the said property are given the first option to buy the interest of the plaintiff, within six (6) months from the date of judgment, that failing the plaintiff shall also be given the next option, failing which the offer will be made in the open market.

4. It is further ordered that until these are completed and the plaintiff paid off to enable her relocate, the defendants and their agents are restrained from interfering with the quiet, peaceful enjoyment and the occupation of the plaintiff in her portion of this H/No. AV 31/3, Ankaful.

5. On the authority of **Hanna Assi No (2) vrs GIHOC Refrigeration & Household Products Ltd. No. 2 [2007-2008] SCGLR**, this court on the basis of doing substantial justice to the parties directs as follows:-

The first defendant to take steps to convey to the plaintiff the plots of land the plaintiff paid him to purchase for her to wit land at Ankaful and Elimina, within six (6) months of the date of judgment.

6. The Court below that is the trial High Court at Cape Coast to carry out these directives.

J.V.M. DOTSE
JUSTICE OF THE SUPREME COURT

GBADEGBE, JSC:

I agree entirely with the judgment that has just been delivered by my worthy brother Dotse JSC; but as we are differing from the two lower courts on the correct inferences to be drawn by the established facts, I propose to add a few words of my own. I begin by saying that I accept Dotse JSC's statement of the facts that he carefully narrated in his judgment and the proper inferences to be deduced from them. I think that he correctly expounded the law regarding the role of this court when faced with concurrent findings of fact by the trial court and the first appellate court and desire in this delivery not to detain the precious time of the court in referring to them but to limit myself only to the determination of the nature of interest that the appellant acquired in the disputed property by virtue of her contribution. The record of appeal on which the proceedings herein turn establishes quite plainly that she provided sums of money towards the property but unfortunately she was unable to prove the extent of quantum her contribution. That aside, she hugely contributed to the upkeep of the home that she occupied with the respondents. In my view, however her failure to prove how much she actually expended on the building should not prevent us from determining the interest that she acquired by virtue of her contribution as the other contributors; the respondents herein were also unable to prove beyond the value of the plot on which the disputed property stands the exact amount that they expended on the property. I observe that very often as happens in cases like this, it is difficult to determine the exact contribution of the parties but this should not prevent us from doing justice to the parties in the light of all the circumstances of the case.

Although the parties herein acknowledge each other as joint contributors, the appellant, not being a citizen of Ghana is precluded by Article 266 of the 1992 Constitution from acquiring a freehold interest in any land situate within Ghana. It is therefore impossible for us to confer on her a tenancy in common with the other contributors. I think that from the evidence the parties for some time now have not been living in harmony such that in the absence of the constitutional bar contained in Article 266 to make such an order would not be in accord with good reason. Although the appellant is not a spouse of the 1st respondent, I am of the opinion that it is permissible for us to grant to her a beneficial interest that is proportionate to her contribution. I think that the effect of her contribution to the acquisition of the disputed property is creating a resulting trust in her favor to the extent of her contribution. In the case of ***Cooke v Head [1972] 2 All ER 38***, the Court of Appeal applied the doctrine of resulting trust imposed by the courts on a legal owner in the case of a husband and wife who by their joint efforts acquired property to be used for their joint benefit to the case of a mistress and a man who had by their cumulative efforts acquired a property for the purpose of setting up a home together. In the course of his judgment at page 42, Lord Denning MR observed of the approach in apportioning beneficial interest to persons other than husband and wife as follows:

"In the light of recent developments, I do not think it is right to approach this case by looking at the money contributions of each and dividing up the beneficial interest according to those contributions. The mater should be looked at more broadly, just as we do in husband and wife cases. We look to see what the equity is worth at the time when the parties separate. We assess the shares as at that time. If the property has been sold, we look at the amount, which it has realized, and say how it is to be divided between them."

In my opinion having regard to the circumstances under which the appellant came to contribute to the property she must have believed that she was entitled to remain in the property with the 1st respondent and his family even though they were not married. From the evidence, I am left in no doubt that this is a reasonable inference to be deduced from the conduct of the parties. It being so, I think that the court must do that which is in accord with their reasonable expectations as at the time that the building works were being carried out.

Approaching the matter this way, the court is enabled to give effect to the common intention of the parties in a manner that is fair and just. In this regard, I take into account the fact that she is a foreigner and for that matter as said earlier on in this delivery unable to acquire a freehold interest in the property against the background of exhibit G, which appears to show that the appellant must have borne a substantial part of the expenditure on the building. I then turn to consider the extent of area that she occupied in the building; and think if her contribution were insignificant the respondents and their family would not have sat by to allow her to occupy virtually the entire first floor of the building as though that part of the building was meant only for her occupation. In my opinion by allowing the appellant to occupy what appears to be half of the disputed property without any objection the respondents must be deemed to have accepted her as being entitled to one-half share of the property that was intended by them to be used as a dwelling house in common. As it is since the respondents are a husband and wife and entitled to have a freehold interest in the property, I should think that it is reasonable and just to allow in their favor fifty percent beneficial interest in the property with the remaining fifty percent going to the appellant. In my thinking this apportionment represents what is fair and just having regard to the facts, which have unfolded before us in the proceedings herein.

N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

G.T. WOOD (MRS)
CHIEF JUSTICE

R.C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

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CHAPTER ??
FORMALITIES FOR THE TRANSFER OF INTERESTS IN LAND

CHAPTER 10—THE TRANSFER OF OWNERSHIP AND LESSER INTERESTS
1. INTRODUCTORY

THE discussion in preceding chapters has dealt with the real bone and marrow of the matters that must be taken into account in commercial transactions relating to land—matters such as the permitted modes of operation in regard to property owned by corporate groups like the family and the oman or stool, the pecularities of the various interests that may be the subject-matter of contract and alienation, and the principal machinery instituted under various enactments for regulating these interests and dealings in regard to them. This chapter presents an account of the indigenous law relating to sale, gift, mortgages, and landlord-tenant arrangements in their present-day setting against the background of the preceding discussion.

It is contended that the retention of the essential characteristics of the indigenous law in relation to the ownership of interests in land discussed in preceding chapters is worth attempting, especially if, as we have sought to indicate—common-sense steps are taken to adapt its modes of operation to the needs of the time, as is the case with other systems of law. But the area of buying and selling, pledging and leasing of interests in land to which we now come presents a more compelling case for change. This is essentially the law of contract in its application to the matters discussed. To improve its machinery so as to enable parties to arrive at agreement smoothly and to lesson the incidence of error, frustration and fraud, is to enhance the chances of peace and orderly intercourse among men. Inattention to the need for radical improvement in this area is scarcely excusable.

Sale, gift, mortgage and lease imply relationships which, in essential characteristics, cannot but be the same among men everywhere. Notwithstanding the fact that the great legal systems of the common law and the civil law reach far in the analysis of the problems arising in these relationships and in providing solutions for them, there persists within them an impressive activity of **[p.348]**criticism and legislative reform. By contrast, the prevailing attitude to the indigenous law cannot but be regarded as complacent. Is this justifiable?

As we saw in Chapter I, the legislation concerning "the law in force" enables parties to elect between English law and their personal law, with the result that they can render either law applicable to their transaction by express agreement or by implication from "the form or nature of their transaction". It is therefore particularly in this dynamic branch of the law that the effects of the dualism indicated in Chapter 1 are most manifest. For seldom does any Ghanaian expressly opt for the exclusive application of English law to his transaction, the general approach of the man in the street being to make use of whatever machinery is available for the safe and efficient implementation of his wishes. So that, the question of determining the law applicable to a transaction usually presents itself in the form of drawing the proper inference from the form and nature of a transaction-a troublesome exercise.

The posture in regard to the applicable English law has not been very enterprising. That law remains substantially the law as it stood at July 24, 1874, so far at least as the statute law, conveyancing forms and practice are concerned. The Contracts Act, 1960, however, has brought needed improvement and clarification concerning third party rights, the assignment of legal rights, the law as to consideration, and to frustration of contracts.

Although the indigenous law does make significant provision for the various types of dealing in land, much of its formal machinery and some of its substantive provisions have long needed thoughtful adaptation to meet the needs of the increasingly commercialised society of today. Actual present-day practice and custom in these areas reveal development and adaptation; but the law as stated in court decisions and the treatises often betrays a somewhat antiquarian posture not in keeping with present-day needs. Nor, until recently, has much attention been paid to the assistance that might well be forthcoming from well-conceived legislation.

An important change in customary practice which has forced itself on the attention of the courts has been the use of written memoranda in regard to customary dealings in land. There is in fact in many places a widespread supersession of the ceremonial acts of title transfer (substantially equivalent to livery of seisin under English law) by the indenture or conveyance. This, when **[p.349]**properly drafted in tile light of court decisions, carefully recites the due performance of the ceremony of transfer, whether performed or not. It can readily be seen how the use of English precedents in memoranda and conveyances concerning transactions known to the indigenous law raises ticklish problems in the determination of the applicable law.[v]1

2. DISABILITIES

A general issue not previously considered but which has relevance to each of the types of transaction about to be considered is whether, under the indigenous law, the capacity of individuals to contract is in any way affected by their sex and marital status, age, sanity or status as aliens. There would seem to be no doubt that persons of unsound or feeble mind, infants and senile persons are not deemed competent to make grants in respect of interests in land owned individually by them. They are normally under the care of someone else, usually a close relative. And even as grantees the publicity requirements of the general law and the condition of such persons clearly make it necessary that some mature individual should act on their behalf in making acceptance and entering into possession. The provisions of the Administration of Estates Act, 1961, concerning infants are to be noted in this regard. Where an infant is appointed the sole executor of a will, administration with the will annexed has to be granted to his guardian or to some other suitable person until the infant attains twenty-one years, when probate may be granted to him and when any interest vesting in him by virtue of the appointment may vest.[vi]2

No disabilities attach to grown-up women whether married or unmarried; though if unmarried there is a tendency for them to remain longer under the guardianship of their parents and family. The status of being an alien is also not in itself a basis for lack of capacity. But a stranger under the indigenous law had other important matters to attend to besides, such as making sure that he was welcome to stay in the community in which he was seeking to buy land. Visas and entry permits for non-nationals entering Ghana are the present-day equivalents of that type of requirement.[vii]3

[p.350]

Other specific statutory restrictions have to he noticed, especially the provisions in the concessions legislation in regard to "non-natives" limiting the extent and duration of any interest in land that they may acquire from a "native" and declaring any conveyance of an interest in land to a non-native by a native void unless it is in writing, and so on.[viii]4 The provisions of sections 21 and 22 of the Concessions Ordinance in this regard may be quoted:[ix]5

(not located)

21. No certificate of validity shall be issued in respect of any concession which purports to confer any right, interest or property in or over any land for a longer period than ninety-nine years, or in respect of any concession which purports to confer an option of acquiring any right or interest exercisable after the grant thereof for a longer period than three years, or for a longer period than one year in the case of any right, interest or property in or over timber. The Court may reduce the term of any concession so as to bring it within the limits aforesaid.

22. (1) No person shall hold any concession, and no certificate of validity shall be issued in respect of any concession, which purports to confer—

(a) mining rights over an area exceeding five square miles; or

(b) rights to collect rubber or relating to any products of the soil other than timber, over an area exceeding twenty square miles.

(2) No person shall hold at one time in the Colony or Ashanti concessions which purport to confer—

(a) mining rights over areas the aggregate of which exceeds twenty square miles;

(b) rights to collect rubber or relating to products of the soil other than timber, over areas the aggregate of which exceeds twenty square miles;

and no certificate of validity shall be issued in respect of any concession if such concession would result in any person holding a concession or concessions in contravention of the provisions of this subsection:

[p.351]

Provided that notwithstanding anything in this section contained to the contrary, it shall be lawful—

(a) for the Court, where a concession purports to confer rights over an area exceeding any of the aforesaid limits, to issue an certificate of validity in respect of any portion of such area not exceeding the limits aforesaid, which may be selected by the holder;
(b) for the (President) by Order to declare that any person named therein may hold, upon such conditions (if any) as to the (President) may seem fit, any concession or concessions conferring rights over an area or areas specified in the Order in excess of the limits set forth in this section, and upon such order being made the restrictions on the issue of a certificate of validity set forth in subsection (1) or (2) (as the case may be) shall not apply to any concession or concessions held in accordance with such order.
The wording as we see is general, and thus covers native grantees if their grant is conveyed to them by written instrument. Section 3 of the Ordinance produces the curious result that so far as Africans are concerned there is no limit to the size and duration of an interest in land that they may acquire by parol customary procedure. But if the interest is conveyed by instrument in respect of land exceeding 25 acres, then it would be void unless the concessions procedure is followed and a certificate of validity obtained with its attendant limitations on the duration and extent of the concession.

3. SALE
Selling land involves agreeing to part with one's interest in a given tract of land and actually parting with it in return for valuable consideration, generally money. There is the agreement to sell involving compliance with the usual requirements of contractual transactions, *viz*: (a) competent contracting parties, (1) their mutual assent regarding the subject-matter of the sale—an ascertained area of land with determined boundaries in which the vendor has an interest of the type that can be sold and which the purchaser has agreed to buy—and the price to be paid including the time of payment. There is, too, the performance of the agreement, a matter involving on the part of the vendor the transfer of ownership to the purchaser and on the part of the purchaser the payment **[p.352]**of the price.[x6] The tradition of a formal ceremony of title transfer suggests that a distinction is drawn between the conveyance of title and the contract therefor. But neither the contract nor the conveyance is, in the traditional law, written; and though present day practice often provides a written conveyance, which following English precedents recites a contract, it is rare for the contract itself to be written separately and in advance of conveyance.
Competent Contracting Parties
The discussion of corporate titles in Chapter 3 and of the problems of corporate action in that and other chapters must have served to emphasise the care which the prospective purchaser of land must take to inspect the laud he wants to buy and to make inquiries as to the proper persons to deal with. His dangers may have been lightened somewhat by the penalties imposed by section 34 of the Land Registry Act on persons who make grants of land when they have no title or authority or who make conflicting grants.[xi]7 But in the indigenous law, as in English land law, the principle is, let the purchaser beware! *Caveat emptor*. The doctrine of notice emphasises the same duty to make proper inquiries, and the purchaser has himself to blame if he does not.
Striking the Bargain
This goes to the heart of the contract and calls for no discussion. Clearly the land and its boundaries must be ascertained, the interest being sold understood and agreed, including any conditions; so also must be the price and time of payment. The usual thing is for the price to be paid in full before formal conveyance is made. This is particularly the case where land is sold because money is needed for some pressing purpose. But agreement to pay the price over a period of time is common.
Effectiveness of Agreement Prior to Title Transfer

The view is often expressed that until the ceremony of title transfer has been performed there is no contract and the vendor is at liberty to sell to someone else if he can get a better price. Says Sarbah,

[p.353]

"then is paid the earnest money (Trama).[xii]8 This binds the contract, for without the payment of Trama to the vendor no contract exists, and he is at liberty to sell the land to someone else for a larger price; the intending purchaser can withdraw his offer and repudiate the contract without being liable to any damages, although the Trama becomes forfeited; but if any part-payment has been made, it is doubtful whether it can be recovered. In this connection is the expression 'if you have not eaten anything you do not pay for it'."[xiii9]

Patently, various types of situation and complication have not been considered in this statement. Even considered as a statement of the Fanti law as at 1903 (the date of the edition from which we have quoted), it is open, we submit, to criticism on the ground of incomplete analysis. The situation contemplated in it, so far as the vendor is concerned, is primarily the one where no payment on account of the price has been made and no *trama* paid. So far as the intending *purchaser* is concerned, the situation considered is one where *trama* has been paid, and some part-payment made by him.

Taking the vendor's position first, there is no difficulty concerning a proposition that in the absence of the payment of *trama* the contract is incomplete, especially if there is also no payment of the purchase price. But what if the purchaser has paid the price and the boundaries had been demarcated at his expense? Or, more difficult still, if the purchaser had paid part of the price and been let into possession?[xiv10] We submit that if Sarbah had considered these situations he would not have been content with the adequacy of his statement.

Turning to the purchaser, we submit that it is significant that even with the contract perfected by the payment of *trama*, Sarbah is sure that upon the purchaser repudiating the contract his trama would be forfeited but that he would not be liable to any **[p.354]**damages; and that concerning any part-payment the farthest he would go was to, say that "it is doubtful whether it can be recovered". The maxim he quotes in fact suggests that the part-payment would be recoverable. The truth of the matter, we respectfully submit, would seem to be that Sarbah was here primarily concerned to assert the importance of the compact-concluding function of trama and that he did not address his mind to the possible varieties of situations in which, notwithstanding the formal imperfection of a contract (because *trama* had not yet been paid) no panel of ciders, deciding according to traditional standards of fairness and equity, would have allowed the vendor to resile from his bargain where this was complete in all save the performance of the evidentiary formalities. Against the background of the possible application of the doctrines of estoppel by agreement or by acquiescence, the statement becomes even less persuasive.

Without doubt, it is valid to stress the importance of trama and other title transfer ceremonies by saying that their performance is required and must usually be complied with. But the essence of their importance lies in the fact that they serve the primary function of providing conclusive evidence of the character of a transaction as a sale where that is disputed.[xv]11 The essentially evidentiary character of *trama* is brought out in his later statement that:

"the Trama is sometimes distributed among the witnesses to the contract, as token of their presence when the bargain was struck; but it is more usual for the vendor on receiving the Trama to give to the witnesses a distinct amount of money."[xvi12]

[p.355]

To similar effect in stressing the importance of the ceremony rather than being concerned with general analysis is Dr. Danquah's comment on the Akim Abuakwa custom of guaha in his *Akan Laws and Customs*.[xvii13] "To prove any legitimate purchase of land," he writes,

"The British Law Courts in the colony have constantly, and rightly, sought to satisfy themselves as to whether this custom has been observed. It is in fact a *sine qua non* in the system, and where it is not observed the sale is considered null and void."
And in that book he distinguishes *guaha* from *trama* as follows:
"The important thing is the cutting of 'Guaha', or paying of *trama* in case of a chattel for 'guaha cutting' is the customary way of giving 'livery of seisin'."[xviii]14 But in the introduction to his *Casesin Akan Law* (p. xxxii) he speaks of *trama* as evidence of *performance*. He writes:
"A small sum of money called 'Ntrama' is given to the two actors in the 'guaha' ceremony, and this completes the sale. This money has been called, I think by Sarbah, 'earnest-money' after the Roman *arra*, but it should be noted that whereas in Roman law earnest money preceded completion of a contract and was only evidence of the parties' intention to carry out promises, the payment of 'Ntrama' in Akan law is the final evidence of the *absolute performance* for a contract. In all sales of land the vendee should consider the transaction imperfect if the cutting of 'guaha' and the payment of Ntrama are omitted in the final ceremonies. A sheep is generally killed as a sacrifice to the gods or spirits of the land on completion of sale." (emphasis added).[xix]15

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A brief comment must suffice: there is always the possibility of a slip between the cup and the lip, between a contract and its performance, and between actual performance and the evidence of its performance. What are the implications of substantial or full performance in circumstances where other evidence is available even though the final ceremonies have not been performed? Reasoning along lines of the equitable remedies of injunction and specific performance emerges inescapably out of the very texture of the problems raised by this sort of situation. In the necessary endeavour to indicate the paths to a just solution, the common law—or any other system of law within which problems of this sort have been grappled with—is entirely relevant. Echoing Hutchinson C.J., in *Assraidu* v. *Dadzie*, one could say that:
"I have very little doubt that a native court, applying the general principles of native law and custom, and deciding according to what they thought fair and equitable, and in accordance with those principles"[xx]16
would think along such lines, or, at any rate, find such reasoning acceptable. For, as Brandford Griffith C.J., pointed out:
"no doubt there are some native customs which are more or less inflexible, but native custom generally consists in the performance of the reasonable in the special circumstances of the case".[xxi]17

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And the traditional approach to justice involved a strong emphasis on preliminary effort at amicable settlement.

Place of the Transfer Ceremony Today

The reader will no doubt make his own analysis and draw his own conclusions from the material assembled above. Presumably there is no harm in allowing the continuance of these methods of title transfer provided that they are not left out of all relation to the general scheme and machinery of title assurance. These procedures served, among other things, the crucial function of ensuring publicity, and the availability of witnesses and of affording protection to grantees of land. And this evidentiary and protective function has to be performed somehow. Writing does not do away with witnesses, but its permanence patently helps witnesses to be truthful. And so it has caught on—even to the extent, as the experience of any lawyer practising in Accra, Cape Coast, Sekondi or Kumasi will testify, of superseding the payment of trama and the cutting of guaha.[xxii]18 In many places **[p.358]**where the traditional ceremony is alleged to be performed, it is increasingly more usual to make a payment representing the estimated value of a sheep, Sometimes a live sheep is given, but seldom does anybody pause to ask what actually happens to the sheep. Thus in *Akomea* v. *Biei* the evidence which the Court of Appeal accepted regarding performance of the *guaha* custom (rejecting the trial

Native Court's holding that the custom had not been properly performed in accordance with Akim custom) was the following brief statement regarding *payment*:
"We *paid* 2s. 7d. for the performance of guaha custom plus one live sheep and a bottle of gin to seal or sanction the sale."[xxiii19]
Writing, however, presents its own dangers and problems everywhere, and these are more serious in communities where high illiteracy rates prevail. Dr. Meek, writing in 1946 and basing himself on the *Annual Report of the Social and Economic Progress of the People of the Gold Coast, 1938-39,* had this to say:
"At the present time it is said that the Gold Coast farmer of the South is so land-conscious that it is becoming the rule rather than the exception that he should obtain his farm by way of absolute grant, evidenced by written instrument. No indefeasible title based on a Government survey can, in fact, be obtained, but many landowners nevertheless waste their money on private surveys which are usually merely ground plans unrelated to the triangulation of the Colony. These worthless surveys are often regarded by their possessors as **[p.359]**title deeds, and unscrupulous claimants to land use them to overawe less sophisticated occupiers whom they wish to dispossess."[xxiv20]
One avenue to safety in the use of written instruments would seem to lie in the use of notaries public, court magistrates and registrars of title as the officers before whom written transactions are finally completed or rceorded.[xxv21] A system of land tenure which insisted on these traditional ceremonies of transfer must be eminently sympathetic to machinery which achieves similar purposes better.

Consequences of the Use of Writing
Aspects of this issue have received some attention in Chapters 7 and 9. Briefly, the use of writing as such imports no alteration of the law applicable to a transaction. Thus is manifestly the case where writing is used only as a memorandum of a customary transaction already completed.[xxvi22] But it is also generally the case even where a written conveyance replaces the traditional ceremony of transfer; the interest sold does not thereby lose its character as an indigenous law interest. As was pointed out in Chapter 7, it has long been settled law that the use by persons subject to the indigenous law of a conveyance drawn up in accordance with the forms of English law does not of itself "cause the land to cease to be held under native tenure".[xxvii23] However existing rules of construction have tended to force the courts to construe these conveyances in terms of English property law.[xxviii24] So that there is a clear need for a new law of conveyancing closely attuned to local needs and providing precedents of greater simplicity and brevity.

Conveyances, to be sure, are instruments within the meaning of the Land Registry Act, 1962, and therefore come under its regime. And as such instruments, they may also come within the **[p.360]**range of concessions that have to comply with the procedures for obtaining a certificate of validity, under the Concessions Ordinance (Cap. 136).
4. GIFT
A gift is like a sale in which the vendor expects no price to be paid and asks for none". That is to say it is a voluntary transfer of title to another for no consideration. As in a sale, the donor must be the owner of the thing given, have the competence to transfer it and fully intend so to do, and purport to do so. If these conditions are satisfied, but the intended donee refuses to accept the proferred gift then there is no gift. For a donee willing to accept the gift is needed for the making of a gift; and an acceptance of some sort by the donee is necessary to complete the gift.
But why, let us ask, should there be any law about so simple a thing as making a gift? *A* wants to make a gift to *B* and makes it. B accepts it. Should that not be the end of the matter? Indeed yes, provided *A* does not deny that he has made the gift, or (A being dead) his successors do not deny that any such gift was ever made. Alternatively, what if B who claims

to be the recipient of a gift is lying? It is primarily the need to deal satisfactorily with this type of situation that generates the law relating to gifts. An owner and his family or beneficiaries require protection against fraudulent claims resting only on oral statements; and a rightful donee also requires protection from wrongful deprivation after a donor's death. What provision did the preliterary indigenous law make for this sort of situation?

The Role of Acceptance

The provision which reflection and analysis of the available evidence indicates to be central with us generally, is the requirement that the acceptance of a gift, especially of land, must be made by the presentation to the donor of some token of acknowledgement and gratitude and in the presence of witnesses. This device brilliantly serves many purposes, and solves many theoretical and practical problems relating to gifts. In the first place, the acceptance itself fulfils the necessary function of perfecting the gift. Secondly, where no gift was intended by a putative donor, a purported acceptance in the presence of witnesses affords an **[p.361]**opportunity for express denial of a donative intent. Thirdly the requirement of acceptance in the presence of witnesses performs the following additional functions: where, as is usually required, some members of the donor's family are among the witnesses, it makes the gift not only impossible or difficult to deny afterwards, but operates as a treble check, preventing the donor from making a gift of what is not his own, namely family property, and from extravagantly or improperly giving his property away to outsiders to the neglect of his family and dependants, and preventing fraud. As a device which solves the problem of proving donative intent, it neatly obviates some of the uncertainties surrounding the issue of delivery concerning which there is so much debate in Anglo-American law.[xxix25] And it copes elegantly with types of gift which involve no delivery, such as releasing a debtor from his debt or gratuitously undertaking to perform some obligation for another, e.g., educating his child.

But excessive insistence upon formalities even of this useful kind can operate to prevent a court from doing justice in cases where it may be possible to prove a gift by other means than mere compliance with form. And this is particularly so in the informal areas of family and friendship where gifts usually occur. The judgments in the leading case of *Kwakuwa* v. *Nayenna*[xxx26] afford a good illustration of the law and of some of the problems involved. Said the trial Native Tribunal:

"The Tribunal find that, although it might be that Assimaku intended to make a gift of a portion of his building to plaintiff, his wife, the course adopted seems to have been improper; it is tantamount to private transaction or dealing; gifts of this kind **[p.362]**must be made public, that is: relatives of both the donor and the donee and some outside persons must be present to act witnesses, and donee in accordance with custom acknowledges or accepts the gift by giving some present or presents in return as a thanksgiving.

"This is not so in this case and it cannot therefore be said that the gift is valid in accordance with Native Customary Law. The claim of the plaintiff fails, and the building left by Kobina Assimaku on his death automatically goes to his family.

"In view of the apparently good services rendered by plaintiff to her late husband Assimaku, the Tribunal recommended to the defendant that plaintiff, who is already in occupation of one of the rooms in her late husband, Assimaku's building, he allowed to continue in occupation for the time being until such time as she would again be married to another man when she should quit."

Part of the judgment of the Provincial Commissioner's Court reversing this decision reads as follows:

"The Tribunal in its judgment sums up the evidence quite correctly, namely that the appellant assisted her husband during his lifetime to build a house and for services so rendered he presented her with a portion of it and the rest to his sister and nieces.

"This statement is supported by evidence which is good and is not rebutted.
"Respondent's statement is simply it blunt denial of these facts but supports it with no evidence. The Tribunal then goes on to say that this gift of a portion of the house to appellant was contrary to Native Custom and finds in favour of the mother, i.e., the respondent in this case.
"It is recognized Native Custom that a person can dispose of self-acquired property, i.e., property which he has bought or constructed during his lifetime. It is contended by the respondent that even so his mother ought to have been told" There is unrebutted evidence in the record that she was told.
[p.363]
"The Court finds that the Tribunal wrongly interpreted Native Custom in this respect and this Court therefore, in view of the fact that the evidence is strongly in favour of plaintiff-appellant and Native Customary Law is also in her favour, allows the appeal with costs to be taxed."
And so to the West African Court of Appeal:
"It will be seen from the passage of the judgment of the relied on was invalid, according to Native Law and Custom, because—
"(a) it was not made with the necessary publicity, and
"(b) the donee did not in accordance with custom acknowledge or accept the gift by giving some present or presents in return.
"In the 1st edition of Sarbah's *Fanti Customary Laws* it is stated at pages 69 and 70—
"'The acceptance of a gift should have as much publicity as possible having regard to the nature of the gift but the acceptance of a gift, consisting of immoveable property, must be invariably made public. Acceptance is made—
"'(i) By rendering thanks with a thank-offering or presents, alone or coupled with an utterance or expression of appropriating the gift; or
" '(ii) Corporeal acceptance, as by touching; or
" '(iii) Using or enjoying the gift; or
" '(iv) Exercising rights of ownership over the gift.
"'If the donee is in possession, either alone or jointly with the donor before the gift, the continuance of his possession is sufficient without any new delivery, provided the donee makes acceptance in the way set forth by (i) above.
"In our opinion there was no evidence that the Native Tribunal was wrong in holding that the gift relied on in this case was invalid according to native law and custom. We therefore come to the conclusion, having regard to the principles laid down by the Privy Council in their judgments cited above (relating to the grounds on which findings of fact by a court of first instance are to be set aside by a an appellate court), that the finding of the Native Tribunal should not have been disturbed.
[p.364]
"We accordingly allow the appeal . . . and restore (the judgment of the Native Tribunal."
Another important purpose served by the requirement of formal acceptance before witnesses is that it provides a *locus poenitentiae*—an opportunity for changing one's mind and for undoing what has been done. As pointed by Sarbah—
"What is given by a person in wrath or excess of joy, or through inadvertence, or during minority or madness, or under the influence of terror, or by one intoxicated, or extremely old, or afflicted with grief or excruciating pain, or what is given in sport, is void.
"Where anything is given for a consideration unperformed or to a bad man mistaken for a good one, or for any illegal act, the owner may take it back."
An occasion for such taking back is afforded by this requirement of formal acceptance in the presence of witnesses. And, of course, if the donee fails to make the necessary acceptance then the gift is imperfect and it is all the more easy for the owner or his successors to recover the gift.
Any Other Modes of Acceptance?

As will have been noticed from the citation in Kwakuwa's case reproduced above, Sarbah lists three additional modes of acceptance, namely (a) corporeal acceptance, as by touching, or (b) using or enjoining the gift or (c) exercising rights of ownership over the gift. These other modes, we submit, relate more to moveable (even there in a limited context) with which Sarbah's section "Gifts" is also concerned. For it is significant that he not only says that "The acceptance of a gift consisting (If immoveables property must invariably be made public" but also that "if the donee is in possession either alone or jointly with the donor before the gift the continuance of his possession is sufficient without any new delivery, provided the donee makes acceptance in the way set out in (i) above "—namely, rendering thanks with a thank offering' and publicity, i.e., before witness. And even here, his use of the word 'delivery' suggests strongly a shift of his attention from what he sets out to describe, namely, acceptance. For the functions of formal public acceptance outlined above sent to minimise the **[p.365]**significance of delivery as the test or a donation.[xxxi]27 Delivery may take place, in fact usually takes place, before formal acceptance; and under the guise of the performance of gratuitous undertakings, usually takes place later.

In any case, the three modes of acceptance listed by Sarbah are intrinsically neutral and proclaim no particular type of transaction—whether sale, lease, mortgage, gift or even adverse possession under colour of title. They are therefore inconclusive in the absence of manifestations of donative intent and grateful acceptance. Accordingly, in the event of any major gift likely to arouse envy or opposition—such as a house, land, a farm and significant moveable—the essential gift-perfecting requirement, we submit, is the *aseda* or thank-offering made in the presence of witnesses. For notwithstanding the fact that gift-making primarily occurs in the context of intimate relationships, the structure of patrilineal and matrilineal family relationships with its built-in expectations of inheritance sets the stage for this necessary type of acknowledgment.
However the supply of necessaries to dependents in the way of clothing, schooling and the like are not, as a rule, attended with formality, though even here an expectation exists for some major latter day "aseda" to a guardian for the trouble taken in bringing up the young. And here, "corporeal acceptance . . . using or enjoying the gift . . . or exercising rights of ownership over the gift" adequately indicate the donative intent. For if there were none, use would be speedily prohibited—as where a son wears his father's or his uncle's sandals.

Are Gifts Irrevocable?
A distinction may be drawn between (a) the formalities required for the perfecting of a proferred gift, non-performance of which renders a gift nugatory and liable to be recovered where delivery has already been made, and (b) the question whether or not gifts, formally completed or perfected, are revocable under the indigenous law. It is the latter issue that we proceed to discuss.
It may be observed that it is only by virtue of the *presence* of **[p.366]**English law that a doubt may be said to arise in the minds of Ghanaian lawyers trained in that law as to whether gifts under the indigenous law are revocable or not, especially as many a gift of land is now made by instruments modeled on English precedents. For with us gifts appear to be made on the basis of a general assumption of continued good relations and gratitude, and while it might be objected that the multifarious grounds listed by Sarbah as grounds for taking back a gift or for the nullity of a gift leave too wide a scope for arbitrariness on the part of a clan or, the view that gifts under the indigenous law are revocable on serious grounds can be said to be the prevalent one, and the one which on the fact of past decisions a present-day court would take.
It so happens, however, that the only decision on the point reported by Sarbah in his two collections of cases is that of Hayes Redwar, then an acting judge, in *Bimba* v. *Mansa*[xxxii]28

which appears to decide to the contrary. But let us see why, from the following passage in that judgment—

"A further point was raised by plaintiff's counsel that, according to native custom, a gift is revocable. He has produced no authority for this proposition, and the cases cited tend rather the other way. In the absence of any authority as to the native law on this point, I feel myself bound to be guided by the settled principles of English law on cases of this kind, and to hold that although it may be doubtful whether this was a purchase, even as a voluntary gift it is good against the grantor himself, and those claiming under him."

Let us pass over Redwar's manifest error in applying English law instead of being "governed by the principles of justice, equity and good conscience" as the relevant rules then required, in the said circumstances.[xxxiii28a] The point of interest here is that this decision which Sarbah cites in the one footnote to his section on "Gift", is probably responsible for the contradiction he involves himself in on page 81 of his *Fanti Customary Laws*, For after listing earlier on that page various grounds on which gifts can be taken back (cited and commented on above), the following statement suddenly appears at the foot of the same page (after intermediate material on mocks of acceptance)—

[p.367]

"Every gift when completed is irrevocable, except in gifts between parent and child, which can he recalled or exchanged at any time by the parent in his or her lifetime, by his will or dying declarations."

However, *Bimba's* case was considered by Brandford Griffith C.J., to have been overruled by the Full Court judgment in *Adai* v. *Daku*.[xxxiv29] This is a case that came before the learned Chief Justice on appeal from the Court of the Omanhene of Akwapim. The defendant-appellant had formerly been given part of a tract of land by the plaintiff-respondent, and in consequence of the defendant later claiming the whole tract as his own the plaintiff revoked the original gift and claimed recovery. The Akwapim Court upheld the plaintiff's claim, and Brandford Griffith affirmed this decision, declaring: "It is a well-known custom or law that a gift of land is not irrevocable, and evidence has been given to that effect and is not contradicted." His judgment was affirmed by the Full Court, Smith J., declaring—

"This, certainly, is the native custom that obtains in the Central Province, and, from the judgment of the native Court, and the evidence of the native expert witnesses, the same prevails here."

This is the view of the law which might be said to be generally prevalent. It is necessary to go into it at some length here because Mr. Justice Ollennu in his Lectures,[xxxv30] apparently basing himself on Sarbah, has roundly declared that:

"a gift of land validly made is irrevocable."

The context in which this assertion was made shows clearly that Ollennu J., as he then was, based himself on the second of Sarbah's two opposing statements—the one which, as we submit must have been occasioned by the decision in *Bimba's* case. He also adopts the earlier passage where Sarbah says that gifts made during minority, madness, intoxication, old age, excruciating pain and so forth, are **[p.368]**void, and even illuminates it with the phrase: "in short, all gifts made at a time when the donor could not be expected to exercise his powers of reasoning properly" are "null and void, as not being 'acts' of free volition." But he does not advert to the all important sentence that immediately follows, namely that—

"where anything is given for a consideration unperformed or to a bad man mistaken for a good one, or for any illegal act, the owner may take it back."

In support of his pronouncement that a gift validly made is irrevocable Ollennu J.A., cites his own decision in *Boakye* v. *Broni.*[xxxvi31] This was an appeal from a judgment of the Kwahu Native Appeal Court upholding the decision of the Native Court "B", Mpraeso, whereby the plaintiff's claim for a declaration of title to a certain cocoa farm was dismissed. The plaintiff had made this claim as the successor to his late brother, alleging that the farm was the self-developed and self-acquired property of his late brother. The defence put up by the first

defendant (who was the step-father of the plaintiff) was that the farm was his self-acquired property: that he had made a gift of it to the plaintiff's late brother; that upon this brother's death there had been a protracted dispute in the deceased's family as to who should succeed the deceased, during which period the farm had been neglected; that he, the first defendant, had maintained the farm during this period of neglect, and upon the settlement of the succession dispute he had called upon the deceased's family to pay the expenses incurred by him in the maintenance of the farm together with a sum of forty pounds which he had lent to the deceased donee before his death, The deceased's family, however, said the defendant, refused to pay this slim of forty pounds "on the grounds that there was no document on it"; accordingly he had revoked the gift saying that the gift, like the loan, was made "*in camera as well*" i.e., not before witnesses or supported by any document. This revocation had elicited an apology from the deceased's family in consequence of which the defendant had regranted the farm to them "on condition that they should pay the £40. But they failed to do so".

The trial Native Court having found generally in favour of the defendant on these facts, and its judgment dismissing the plaintiff's **[p.369]**claim for a declaration of title to the farm having been upheld by the Native Appeal Court, the issue before Ollennu J., as he then was, centred on the question whether the facts as found by the lower courts amounted to a sufficient ground for revocation. He allowed the appeal for the following reasons:

"A gift of land made *inter viros* is irrevocable once it is completed and the donee is placed in possession. The defendant therefore is not entitled to revoke the gift, which upon the evidence he effectively, made some forty years ago to the plaintiff's predecessor.

"Again, even if the defendant could lawfully revoke the gift and in fact did revoke it, the evidence that:

"'Later the head member of plaintiff's family rendered apology for the farm and the defendant granted same on condition that they should pay the £40,'

"taken together with the evidence that the defendant thereafter accepted a promissory note from the plaintiff, and then received part payment of the £40, is evidence of a fresh completed grant made for valuable consideration, that consideration being the undertaking by the family to pay a debt which the defendant could not either at law or by native custom prove against the estate of a deceased member of the family.

"Thus, upon the defendants' own showing, title in the farm has legally passed to the plaintiff, and the Native Courts should have given effect to that legal position by entering judgment for the plaintiff. For these reasons, I would allow the appeal."

This judgment, it is respectfully submitted, may well be good persuasive authority on issues such as estoppel by conduct and agreement or contract; but not on the issue as to whether or not gifts are revocable. For, on that issue, it asserts without any supporting authority the proposition that such gifts are irrevocable; the main body of reasoning in it is focused on establishing that the gift was validly made in the first instance—mainly by an exposition of the other modes of acceptance listed by Sarbah and criticised above—and, but for the redeeming argument based on the promissory note and the part-payment, concludes that since the gift was validly made, such gifts being *ex hypothesi* irrevocable, **[p.370]**therefore the judgment sustaining revocation cannot stand, what ever the ground for revocation may have been.[xxxvii]32

The Donatio Mortis Causa

But even in English law the proposition that a gift validly made is irrevocable is subject to important qualifications.[xxxviii]33 The *donatio mortis causa* or gift made in contemplation of death is a notable exception. Concerning such a gift made in contemplation of death it is well established that recovery to health of the donor works *per se* a revocation of the gift, and that it can be revoked by the donor at any time before his death.[xxxix]34

The point of interest here is that this is one way—probably the original way—in which the *samansiw* or nuncupative will under the indigenous law operates. As explained in Chapter 6,

however, the *samansiw* can be made when immediate death is not contemplated and one is in perfect health. In either case there is no dispute that "the disposition so made, may be revoked at any time before his death".[xl35] Consider next the case of *inter vivos* gifts to children, which by common admission are revocable. It will be observed that, rather than there being any significant differences between these **[p.371]**and ordinary gins *inter vivos* (apart from differences in intention) the crucial requirement in all these transactions is the manifestation by the donor of a donative intent at least on the occasion when appropriate acceptance in the presence of suitable witnesses is made of a proffered gill, though the exigences of the real deathbed scene may occasion some relaxation in the acceptance requirement in that type of case, In every case it is essential for the donor or testator to indicate in a manner that leaves no doubt precisely what is being given. Whether for the particular gift a physical inspection and demarcation of land is necessary or not must depend on the circumstances of the particular case, not on whether it is a will rather than an *inter vivos* gift that is being made, What is intended to be given may be a portion of land requiring to be carved out; on the other hand the gift may be of land already identifiable and in the possession of the donee or of someone else. It is facts like these that will determine the steps necessary to be taken for the unequivocal identification of the gift sought to be made. And it would seem that the power of revocation is based not on whether a gift is *mortis causa or inter vivos* but on the gratuitous character of the transfer.

The problem, however, is that, as Dr. Danquah put it, "to withdraw or recall a gift is always a matter of controversy".[xli36] There are many issues in this area that await definitive resolution, and legislative assistance is needed. Thanks to the Land Registry Act, 1962, it can now be said that when gifts of land are made by instrument, as is very common now, such gifts will now be of no effect as against other instruments affecting the same lands until they are registered. Does the use of such instruments for customary transactions alter the character of the transactions? If, as is essentially the case, they do not, how and under what conditions may any power of revocation incident to the gift be exercised? In view of the desirability of ensuring that a person does not leave his widow and other dependants destitute, by his will or upon his intestacy, should any value limitations be placed on the gifts that a man may make? If so, what can successors and dependants do in the event of their being so left destitute, and within what limitations? Should deeds of gift be required to show the same type of acknowledgement in the presence of some member's of one's family and outsiders? Some inspiration for the resolution of issues **[p.372]**such as these and others may be obtained by looking at the way they have been dealt with in other systems of law.[xlii37]

Basic rule was stated in the case of:

Bruce v. Quarnor (1959) GLR 292, at page 297.

"A conveyance of land made in accordance with customary law is effective from the moment it is made. A deed subsequently executed by the grantor for the grantee may add to, but it cannot take from the effect of the grant."

Because customary law did not know writing, ceremonies were usually performed in the presence of witnesses to show the conclusion of the transaction relating transfer of land.

For the transfer of land by sale, Sasraku v. David (1959) GLR 7 suggested that "Guaha" is the ceremony among the Gas and its equivalent in Ashanti is "Tramma".

However, see Adjowei v. Yiadom (1973) 2 GLR 90, which appear to take a different perspective.

In Tei Angmor v. Yiadom III (1959) GLR 157, at 161, Korsah CJ stated as follows:

"In order to conclude a contract for the sale of land at native customary law certain ceremonies have to be performed before ownership in the land can be transferred to a purchaser. That custom is known as the "Guaha" custom (for personal property the custom is "tramma".) After conclusion of the negotiations, if the parties intend the ownership to pass from the

vendor to the purchaser, they agree on a date when the customary ceremony will be performed. They then invite witnesses for the purpose, and proceed to the land. There representatives of each party collect some twigs or branches of trees on the land, and come before the witnesses. The parties face each other, the vendor holding one end and the purchaser the other end of the twigs or branches. They then declare the purpose of the ceremony, i.e. that the contract of sale is now being finally concluded, and they break the twigs into two. After this the witnesses receive witness fees, and this concludes the ceremony."

Gift was considered in Ahmed v. Afriyie (1963) 2 GLR 344, at page 347 the court indicated that two requirements must be satisfied to validate a gift:
Must be made in public before witnesses; and
Donee must accept.

In Yoguo v. Agyekum (1966) GLR 482, the Supreme Court (with Ollennu JSC) stated that there must be:
Ceremony of transfer of the property;
Publication to the living and the dead that ownership has passed from the donor to the donee;
Pouring of libation; and
Aseda indicating acceptance of a gift of land.

ASK class which of these requirements they find unnecessary?
See also:

Donkor v. Asare & Others (1960) GLR 187, at page 189.

DONKOR v. ASARE AND OTHERS [1960] GLR 187-190
IN THE HIGH COURT (LANDS DIVISION), ACCRA
20TH JUNE, 1960

OLLENNU J.

In 1952 the defendants applied to the Akwapim stool for a grant of land for development into a football field. As the Oyoko family was in possession, the stool approached the family in accordance with customary law and the family made a direct grant of a piece of the land to the defendants, under an agreement whereby the defendants were to develop the land and share the proceeds accruing from the land with the family. The defendants converted the land into a football field and paid annually to the family a third share of the "gate money."
In 1956, a member of the Oyoko family without the consent and concurrence of the head and principal members of the family purported to sell the land to one Opanyin Kwadjo Donkor (the plaintiff). After several unsuccessful attempts to dispossess the defendants, the plaintiff in 1957 approached the family at Mamfe and bought, as he thought, the land. The transaction and performance of Guaha custom took place at Mamfe. The Oyoko family thereupon gave the defendants notice to quit. The defendants refused to quit the land and the plaintiff brought this action against them in the Akwapim Native Court "A" for a declaration of title and recovery of possession of the land. The trial court gave judgment for the defendants and the plaintiff appealed to the Land Court.
.....
Only one ground of appeal was filed and argued; it is that the judgment is against the weight of evidence. Under this ground it was submitted by counsel as follows:
"(1) that there was sufficient evidence in proof of the plaintiff's title, and consequently the Native Court misdirected itself in refusing to grant the plaintiff the declaration of title he sought even if it could be said that he is not entitled to an order for recovery of possession, and

"(2) that the defendants are mere licensees without any interests in the land, and could be ejected at will, and therefore the Native Court was wrong in holding that the notice to quit given to them was defective."
In my opinion the second point made by counsel is a question of law, not weight of evidence. I am further of the opinion that the first point also involved important principles of customary law.
Taking counsel's first submission the question which arises is: did the plaintiff prove title to any land, and if he did, to what land? For his title the plaintiff relies upon sale by customary law. Among the essentials of a sale of land by customary law are:
(1) identification of the area of land sold, and
(2) placing the purchaser in possession of the area sold in the presence of owners of the lands which form boundaries with the land being sold to ensure that no one else's land is delivered to the purchaser.
The identification of the land is made by demarcating the boundaries of the land; if it were agricultural land, boundary trees are planted or marks made on existing trees in the presence of the owners of the adjoining land, and if it were building land in a town some stones or sticks (in modern days pillars) are fixed at the corners.
At such identification and delivery the custom known in Akan as Guaha and in Ga Adangbe as Yibaa Foo is performed. Literally that custom means severing the leaf or branch from the tree, and signifies that the vendor has completely divested himself of the whole of his right, title, and interest in the particular piece of land, and vested the same completely in the purchaser: Ntrama v. Attia and Another (1 W.A.L.R. 94).

Upon these facts what piece of land has been identified as the land sold to the plaintiff of which a court can grant declaration of title? The plaintiff says this, his vendors say that. The two of them have never at any time agreed on any particular piece of land as the land to be sold and purchased.
This principle of the customary law that in sale of land the parties should be ad idem as to the identity of the subject matter of the transaction and that the Guaha should be cut on the land after its demarcation is quaintly expressed by a Ga proverb which says " Moko yee yelenaa ye su mli " which means yams are not sold while they are in the soil, they should be uprooted and exposed so that the vendor should know what he sells and the purchaser should know what he buys.
Since the transaction between the parties is not in conformity with the customary law of sale of land, the transaction is void; the vendor sold nothing and the purchaser acquired nothing. Consequently the native court arrived at a correct decision when it held that the plaintiff was beguiled to purchase the shadow of this land in dispute and not the substance. But it must be pointed out that the reasons given for the said decision are quite wrong.
A plaintiff in a suit for declaration of title and recovery of possession can only succeed upon the strength of his own case, never upon the weakness of the defence. A defendant may not be able to show any title at all to, or any right or interest in the land. Nevertheless, the plaintiff will fail all the same if he is unable to produce evidence sufficient in law to warrant a declaration in his favour. Therefore, where the plaintiff is unable to establish his title, the court need not consider the case for the defence but will dismiss the plaintiff's case even if the defence shows that the defendant has no right to the land, and even if no evidence was led on behalf of the defence: Adumua-Bossman v. Bannerman (unreported) and Thompson v. Mensah (3 W.A.L.R. 240).
Consequently, the decision that the plaintiff acquired no title to any identifiable piece of land disposes of the whole appeal, and makes it unnecessary for me to deal with the second point on which counsel addressed the court at length. It is enough for me to observe that from the evidence that the licence was granted with customary practice, and particularly from the evidence led both by the co-plaintiff and the first defendant that under the said agreement

the defendants were to develop the land at their own expense and to share all proceeds accruing from it with the owners, it appears to me that the licence granted is not a mere licence in the English sense, determinable at will; rather it is a right in town land which is of the same nature as abusa or abumim (abetsem) tenancy of an agricultural land, which cannot be determined upon short notice except where the tenant denies the title of his licensor.
Again if the sale made to the plaintiff in March, 1957 had been valid, the plaintiff conveyed the land with all encumbrances on it; therefore in August, 1957, the plaintiff would be the only person competent to serve notice to quit on tenants of the land, and not the Oyoko family, his vendors. It follows that the notice which Kwabena Asamoah the head of the Oyoko family purported to give the defendants in August, 1957, is not effective.
The appeal is dismissed with costs.
DECISION
Appeal dismissed.

Norquaye-Tetteh v. Malm (1959) GLR 368, at page 373.

NORQUAYE-TETTEH (EMMANUEL) v. MALM & ANOR. AND NORQUAYE-TETTEH (DAVID QUAO) v. MALM & ANOR. (CONSOLIDATED) [1959] GLR 368-376
IN THE HIGH COURT (LAND DIVISION), ACCRA
9TH NOVEMBER, 1959

See Usufruct supra

CASES

SASRAKU v. DAVID & ORS. [1959] GLR 7-16
IN THE COURT OF APPEAL
12TH JANUARY, 1959.

VAN LARE AG. C.J., GRANVILLE SHARP J.A. AND OLLENNU J.

Granville Sharp J. A.:
The claim in this action was for a declaration of title to and ownership of land, and for an injunction to restrain the defendants from trespassing on the said land.
The plaintiff, as representative of a family-company of Teshie people, based his title to the land upon three documents dated 23rd December, 1927, 4th August, 1934 and 12th April, 1935 respectively, by which (he claimed) the said land had been sold to him absolutely in three parcels by the Stool of Chempaw. The co-defendant in the suit, representing the Stool of Kokofu, bore the whole burden of the defence, the defendant Sawmill Company simply relying on the protection of a felling agreement granted to them by the Kokofu Stool, and dated 30th October, 1953.
The co-defendant did not admit that the land was sold as alleged by the plaintiff, and contended further (a) that land is not alienable by sale in Ashanti, and (b) that if there had been any sale by the Chempaw Stool it was a sale made without the knowledge or consent of the Paramount Stool (the co-defendant), and was therefore invalid.
The co-defendant further, by amendment of his pleading, counter-claimed for a declaration of title to the land in dispute, for recovery of possession as against the plaintiff, and for damages for trespass as against the plaintiff.
Both the claim and the counter-claim, therefore, contended for absolute ownership of the land which was the subject matter of the action.
It was not disputed that the co-defendant was the Paramount Stool served by the Chempaw Stool, and the Chempaw Stool did not appear to dispute the sales set up by the plaintiff.
There was no dispute, either, as to the identity of the land in question, and Counsel for the co-defendant admitted that the lands described in the several documents produced by the

plaintiff constituted, in fact, the whole of the land for which the rival claims were set up in the action.
At the trial the plaintiff admitted that the documents in themselves could not, in the light of the Concessions Ordinance, be relied upon as constituting valid documents of title, but contended that they had important evidentiary value as being confirmatory of the earlier customary sales to which they referred and at which, in each case, the custom of 'Guaha' had been performed. The family company represented by the plaintiff was a Ga family, and would seem to have wished, ex abundanti cautela, that the Ga custom should be observed, even in Ashanti.

In the course of the hearing before the Land Court the issues became narrowed. It could not be questioned on the evidence that the three purported sales relied upon by the plaintiff had in fact taken place, and it was not seriously disputed that 'Guaha' had been performed on each occasion. The evidence upon these matters was all one way. There remained only the issues as to whether land in Ashanti was alienable by sale and, if so, whether the sales here in question were carried out without the knowledge and consent of the co-defendant, the Stool paramount over the vendor Chempaw Stool.

The learned Judge of the Land Court resolved both these questions favourably to the plaintiff. He therefore dismissed the counter-claim and entered judgment for the plaintiff, granting him a declaration of title to ownership of the land and an injunction as prayed. He awarded no damages for trespass, but in his award of costs fixed Counsel's fee at two thousand guineas.
From the judgment so given the co-defendant has appealed to this Court. He has appealed also against the award of costs. I will deal first with this latter aspect of the appeal. The general order, by which the learned Judge directed that the plaintiff should have the taxed costs of the action against the defendant and co-defendant jointly and severally, could not in ordinary circumstances be disturbed by this Court….
.....
Passing now to the legal substance of the appeal, I would say first that the Notice of Appeal seems to me to be somewhat supercharged with reasons set up to support the view that the learned Judge was wrong in his decision and in his reasoning. There are no less than ten grounds of appeal, but learned Counsel did not find it necessary to argue all of them because it is reasonably clear that they are, taken as a whole, variations upon three main themes:
(a) that the sales by custom of 'Guaha' were not proved,
(b) that it was not proved that the sales were made with the knowledge and consent of the Paramount Stool (the co-defendant), and
(c) that sale of land in Ashanti is not possible under native custom. I cannot accept any of these contentions.

The learned Judge made exhaustive research into the question whether land in Ashanti is capable of alienation by sale, much of which research, it is true, entered channels which could not be expected to lead very far in a Court of Law. He did, however, consider the opinions of learned writers whose views are authoritative, and found there what is supported by the evidence on the record, that over the past quarter of a century (and more) the impact of western ideas of land-holding upon what was at one time a rigid system of native customary law has led to a relaxation of these ancient laws. In consequence, it is not uncommon, though it is not usual, to find land being sold in parts of the country, including Ashanti, where in former days such a transaction would not have been sanctioned by native customary law.
The evidence given by the co-defendant, and by his main supporting witness, itself goes a very long way to support this view. The co-defendant admitted to having expressed the view that: "A sub-stool cannot give away or sell any land either to a stranger or Ashanti man without

my permission." He said further, "I still say that before land could be sold by the Chempaw Odikro, he, being a caretaker merely, must first seek the approval of the Kokofu Stool and the elders." References were made by him to other cases in which chiefs and sub-chiefs had sold land, and whose only offence would appear to have been that they did it without consulting the elders.
One of the co-defendant's witnesses, one Appiah, the Chief Secretary to the Asanteman Council, said,
"I have heard of the custom of 'Guaha,' but not in Ashanti. In Ashanti we have 'Tramma,' which is the equivalent of 'Guaha' in other Akan States. `Tramma' is the effective means or ceremony of sale outright in Ashanti of all properties."
In cross-examination he went farther. This is a part of his evidence:
"So far as I know and can remember there has never been any declaration, before or after 1952" (i.e. the year of the State Councils Ashanti Ordinance. 1952), "that lands are not saleable in Ashanti. Before lands became valuable in Ashanti, there were gifts of land in Ashanti. The transfer of the whole interest in land is a common incident of native customary law, but sometimes only agricultural rights are transferred. When I said land in Ashanti is not saleable, that was the case when land had no value, but it was a common practice to transfer the whole interest in land (for services rendered) subject to the share (if any) of the grantor in case of treasure-trove, and for mineral rights in case of Stool lands."

It is clear, to my mind, that the co-defendant really had no faith at all in the contention that land was not saleable in Ashanti. His real defence was that the land was sold without the knowledge or consent of his Stool, although he said in evidence, "My defence in this action is two-fold (1) that land is not saleable in Ashanti, and (2) the land in question was sold to the plaintiff's company without the knowledge and/or consent of the Omanhene of Kokofu, Nana Kofi Adu. Of these the first defence (that land is not saleable in Ashanti) is more important." Neither his evidence nor that of his supporting witness, Appiah, can be said to uphold this latter contention. Indeed, it traverses the whole of it, and in my view the learned Judge was perfectly right in holding as he did on this part of the case. There was a mass of evidence led by the plaintiff in support of such a finding, to which I need not refer.

Mr. Hayfron-Benjamin, for the appellant, referred to the case of Mensah & ors. v. Wiaboe (Div. Court (1921-1925) 170), a case by which, so he argued, the learned Judge was bound. The learned Judge was not, in my view, in any way bound by a decision of a Court of equal and concurrent jurisdiction with his own, and even if he were bound by it, this Court is not. I would find it impossible to uphold the principle that appears to be enunciated in the case, and for which learned Counsel invited our support, that no evolutionary change in native customary law since 1874 can be recognized in these Courts, and that only those elements of that law which subsisted before the date mentioned can be administered by the Judges in Ghana. Stagnation of the law in a fast developing State should be regarded with abhorrence.

As I have already said, there was strong evidence that 'Guaha' was at the time of these sales recognised in Ashanti, though generally it is referred to there as 'Tramma'. The documents produced by the plaintiff referred to the customary law, and it is legitimate to draw the inference from this that what is referred to is `Guaha' or `Tramma.
The question then arises, whether the transactions evidenced by the documents were carried out with the knowledge and/or consent of the Omanhene of Kokofu, at that time Kofi Adu.
There was evidence that the Omanhene had, in fact, assented to other sales of lands in the locality, and it was proved that certain destoolment charges against him (to which he made no answer) included complaints in respect of such sales. Two important facts emerged in the course of the evidence. In relation to the first and the third sales, the documents are

witnessed by the Linguist to the Omanhene of Kokofu, which signature is binding on the Omanhene.
It would be unlikely that the Omanhene could have been in ignorance of the intervening sale, though no signature affecting him appears on the relevant document. The three sales were of contiguous parcels of land, comprising in all an area of some eight square miles.

At the date of the objection raised by the later occupant of the Stool, these portions had been occupied by the plaintiff family company for periods varying between 20 and 30 years. The whole area had been clearly demarcated, and the boundary cuts and marks had, it appears, been meticulously kept and cleaned. Even if it could not be said (as I hold it could) that on this evidence the learned Judge was correct in finding knowledge and consent on the part of the Kokofu Stool, the facts clearly constitute proof of such laches and acquiescence on the part of the Stool as would render it inequitable to interfere with the plaintiff in occupancy of the land. It would be still more inequitable if it should be in the interest of the Sawmill Company, whose felling agreement is in the most general terms, and would seem to grant them carte blanche to wander over the whole length and breadth of the Kokofu Stool lands, and fell wherever they encountered fellable timber, this to the extent of thousands of trees.

The learned Judge, rightly in my opinion, summed up his view of the co-defendant's conduct in the following words: "Such attempts…from the evidence, constitute concerted determination of a Stool occupant to regain Stool lands lawfully sold by his predecessor to strangers, in order to acquire further use or rents therefrom." He said, and I respectfully agree with him, that to encourage such a manoeuvre would "constitute. . .'a travesty of the administration of justice."
In the result, I agree with the learned Judge in his finding that the plaintiff proved his case that the land was sold to his family with the knowledge and consent of the occupant of the Kokofu Stool and his elders. Even if I were to disagree, I would hold that the co-defendant is estopped by laches amounting to acquiescence.

It remains to be considered what estate was transferred by the "sales" of which the documents are evidence. The plaintiff, as I have said, earlier conceded that no title could pass by the documents themselves. They cannot operate as validated concessions because they sin against the Concessions Ordinance in two respects:
(a) the area involved exceeds 25 acres, and (b) no certificate of validity exists, no enquiry having been sought or held. They are, however, evidence of the facts stated in them, that the land was sold according to native custom. It therefore follows, in my opinion, that such [p.16] estate passed as would usually pass on such a sale, as between natives, of Stool lands. This is not an unqualified ownership or right to the land, but a possessory right to occupy the land and enjoy the usufruct thereof; in other words, the usual native tenure. The price paid by the plaintiff can be looked upon as payment of tribute, partly in advance. That further tribute was payable was recognised by the parties in a document dated 23rd December, 1927, which reads as follows:-
"THIS AGREEMENT made the 23rd day of December, 1927 that we the undersigned have agreed that if any Gold Manganese or Ore will be found out in the said land from Hill or Hills by any Miner or Miners the Profit or Profits thereof will be divided into three equal parts.
"That two-thirds of the said profit or profits will go into the hands of the Purchasers aforesaid and one-third thereof should go into the hands of the vendors aforesaid being friends to the said Purchasers.
"In witness whereof we have hereunto set our hands this 23rd day of December, 1927."
By this document the allodial right of the real owner was recognised, and, so long as this is so, and the plaintiff-family does not become extinct, or desert the land, they are entitled to remain on the land and have the same protection as if they were in fact the owners. This

must, in my view, be taken to be what the learned Judge of the Land Court meant when he pronounced "a declaration of title to the piece or parcel of land the subject matter herein." The Order for possession followed naturally upon the finding of trespass, which was fully justified by the evidence.

AKWEI v. AGYAPONG AND ANOTHER [1962] 1 GLR 277-279
IN THE HIGH COURT, ACCRA
13TH APRIL, 1962

OLLENNU J.

The plaintiff claims declaration of title, an order for recovery of possession, damages for trespass and injunction in respect of a piece of land situate north of the Mental Hospital, Accra. The said piece of land is demarcated on the plan exhibit 1 and thereon edged pink.

The plaintiff's title to the land has been expressly admitted but the trespass is denied. It was pleaded for the first defendant that a binding agreement for sale of the said parcel of land exists between the plaintiff and first defendant, and that the entry of the first defendant upon the land was in pursuance of the said contract for sale, or upon leave and licence granted to him by the plaintiff.

The law of Ghana recognises two forms of contract for the sale of land. These are: (1) contract for the sale of land under the common law as defined in section 17 of the Interpretation Act, 1960 (C.A. 4), and (2) contract for the sale of land under customary law.

Under section 4 of the Statute of Frauds, 1677, a statute of general application, applicable to Ghana by virtue of section 154 (4) of the Courts Act, 1960, a contract for the sale of land under the Ghana common law, with certain special exceptions, has to be evidenced by a note or memorandum in writing to make it enforceable. There is no such note or memorandum in writing in this case, and no circumstances have been shown which take this case out of the statute: see Short v. Morris.

Contract for the sale of land by customary law is concluded by the offer of drink made by the prospective purchaser and acceptance of it by the prospective vendor. No negotiations in connection with the transfer of land or grant of an interest in land under customary law can be concluded without drink given and received to seal it. As D.W.1 properly admitted, since no drink was offered and received, it means that the negotiations between the parties, whatever they were, did not reach a stage of conclusion. This is further borne out by the evidence of D.W.2 the surveyor, who, explaining why he did not sign the plan exhibit 1 drawn by him said that the said plan is not complete, and that the defendants simply wanted to know by the plan whether or not the land the defendants had started to build upon included portion of the land of the plaintiff, and that after he had drawn the plan and the people had seen that the area included the plaintiff's land, they said they were going to negotiate with the plaintiff for the sale of his portion to them, adding that if the plaintiff agreed to sell, they would return to him and instruct him to prepare the final plan. He said the defendants had not gone back to him since he prepared exhibit 1. Thus apart altogether from the law on the point, this evidence of D.W.2 leads to a definite conclusion that the plaintiff never at any time agreed to sell the land, subject-matter of the suit, to the defendants or any of them, and he did not grant them or any of them leave and licence to go upon the land to put pegs on it, or to carry out building operations of any sort.

DECISION

Judgment for plaintiff.

TEI ANGMOR & COY. v. YIADOM III & ANOR [1959] GLR 157-162
IN THE COURT OF APPEAL
2ND APRIL, 1959.

KORSAH C.J., ACOLATSE J. AND SMITH J.

Tei Angmor, representing a group of people described as a company, claimed as against the Nkwatia Stool a declaration of title to 2 pieces of forest land allegedly sold by that Stool to them. The Stool brought a cross-action in a separate suit, but the suits were not consolidated, and the cross-action was not tried.

The native Court of Kwahu, Grade "A" (Abene), stated the facts thus in its judgment:

"It is a fact in this proceedings that the disputed area is part and parcel of the Nkwatia Stool land in the Afram plains.

"It appears that the Nkwatia Stool sold to the Plaintiffs (100) One hundred ropes of the forest land over 15 years ago for (£1,000) one thousand pounds when the Stool was in hardship at £10 per rope. This happened during the reign of late Nana Kofi Sefa of Nkwatia. The plaintiffs were unable to pay when he died.

"In this reign of the 1st defendant (Nana Asante Yiadom III), the Stool met in accounts with the plaintiffs at Nkwatia. It was agreed in evidence that the plaintiffs had paid £463 out of the £1,000.

"The chief then agreed to go and cut and demarcate to the plaintiffs part of the land which would be the equivalent in value of their paid amount of £463. The plaintiffs instituted this action as being the owner of the disputed land."

The Native Court held:

"In fact this Court cannot support the plaintiffs' claim as being the full owner as they have not paid for.

"Further argument ensued between the parties on the measurement of the land. The plaintiffs agreed to be 24 fathoms per rope instead of 12 fathoms allowed by the defendants.

"The Court agrees to be 12 fathoms on the merit of evidence on the record.

"Case dismissed. No order as to costs."

The unsuccessful plaintiff (Angmor) appealed to the Land Court. The learned Judge (van Lare J., as he then was) allowed the appeal, and the following passage is taken from his judgment:

"As far as the defendants have admitted an absolute sale in accordance with custom, when the Stool was in financial difficulties and used the money paid to them to pay Stool debt, the sale became effective from the date of sale; in view of this evidence the Native Court is wrong in dismissing the plaintiffs' claim for declaration of title; plaintiffs are also entitled to damages for trespass because the defendants have again attempted to resell portion of the plaintiffs' land to a third party who went on the land at the instance of the defendants.

"I know of no native customary law to the effect that after property in land has been customarily conveyed, that is to say, Trama and Guaha cut, etc., in the presence of accredited witnesses (vide Ex. "B", Memorandum of Pillars Agreement, dated 8th August, 1941), the vendors are entitled to rescind such contract of sale. As far as I know there is nothing in native customary law permitting a vendor of land to redemarcate an area sold to a purchase in proportion to the sum of the agreed purchase price paid. Even if such a customary law exists it cannot be applied in this case, because the plaintiff-purchasers have offered to pay the balance of the purchase price, but were refused.

"I hold, therefore, that on the facts and the native customary law the property in the whole area passed to the plaintiffs and the plaintiff Company."

Exhibit "B" was a document headed "Memorandum of Pillars Agreement," bearing date the 8th August, 1941. It stated that the land forming the subject matter of the present suit had been "entirely sold, and the necessary native customary rites performed." It was signed on behalf of the plaintiffs only, but bore also the signatures of six witnesses and marks of twelve more. It was produced and tendered in evidence by one of the two persons who had signed it on behalf of the plaintiffs. It had not been stamped. Apart from the mention of "customary rites" in Exhibit "B", there was no evidence that 'Guaha' had been performed.

In 1951 the Paramount Chief of the plaintiffs sent his linguist and the plaintiffs to the defendant bearing a letter (Exhibit "F"), in which the Paramount Chief referred to the plaintiffs having "for some years now been negotiating for land from your Stool."
The now unsuccessful defendants appealed to the Court of Appeal, where they succeeded (Civ. App. No. 21/57).
With respect, I can find no evidence on record to support these categorical pronouncements which presume that evidence had been adduced to prove an absolute sale and/or conveyance according to native customary law. The reference to Trama and Guaha and to Exhibit "B," suggest that the learned Judge accepted Exhibit "B" as proof that Trama and Guaha custom had been performed.
It will be observed that Exhibit "B" is disputed by the defendants. It purports to be a paper prepared in the forest by someone, when the messengers of the vendors went to demarcate the area which was to be sold to plaintiff-company. The writer was not called to give evidence, nor was any literate person, alleged to be present at its preparation, called to testify to its contents. No evidence has been adduced to prove that the document, which is in English, was translated to the messengers or that they knew the contents thereof. Nor was the person who made the marks of the messengers called. It is admitted by the plaintiff that this document was not shown to the defendant when they returned from the bush, nor was the defendant even informed that any document had been executed by his messengers. It was produced by plaintiff, who says it was made by the messengers and others when they were in the forest, and given to him in the forest. He did not mention it to the defendant until producing it 15 years later at the trial of this case in the Native Court.
In Kwamin v. Kufuor (Renner, vol. 1, para 2, p. 808) it was held that there is no presumption that a native of Ashanti, who does not understand English and cannot read or write, has appreciated the meaning and effect of a legal instrument because he is alleged to have set his mark to it by way of signature.
Exhibit "B," the intrument upon which the learned Judge based his judgment, is stated to be a "Memorandum of Pillars Agreement." Whatever this menas, it purports to be an agreement relating to transfer of interest in or title to land. It is therefore an instrument which is liable to stamp duty. It is unstamped, and therefore could not be pleaded or admitted in evidence in any Court (vide sec. 15 of the Stamp Ordinance). Thus in Antu v Buedu (F.C. 1926-1929, p. 474) it was held that when a document which is liable to stamp duty had not been stamped, a copy thereof is inadmissible in court proceedings.In order to conclude a contract for the sale of land in native customary law certain ceremonies have to be performed before ownership in the land can be transferred to a purchaser. That custom is known as the Guaha custom. (For personal property the custom is Trama.) After the conclusion of negotiations, if the parties intend the ownership to pass from vendor to purchaser, they agree on a date when the customary ceremony will be performed. They then invite witnesses for the purpose, and proceed to the land. There representatives of each party collect some twigs or branches of trees on the land, and come before the witnesses. The parties face each other, the vendor holding one end, and the purchaser the other end, of the twigs or branches. They then declare the purpose of the ceremony, i.e. that the contract of sale is now begin finally concluded, and they break the twigs into two. After this the witnesses receive witness fees, and this concludes the ceremony.
This is not a ceremony which can be performed without the knowledge of the vendor – in this case the chief and his elders, who by native custom are the persons entitled to alienate Stool lands. It is a custom which must be strictly proved if a party alleges it in a dispute about land. In this case plaintiffs did not allege the ceremony, nor did they call any witnesses to prove it. Throughout the plaintiffs' case at the trial they did not even mention it; hence the Native Court did not discuss it in its judgment. Exhibit "B" was tendered in evidence while Tei Angmor was giving evidence, and this is what he said: "When the purchase money had not been paid, the Nkwatiahene and elders wrote an agreement on the purchased land, dated 8th August,

1941, I tender in evidence." Then the record states. "accepted and marked Exh. 'B'". I have already stated reasons in this judgment why no reliance can be placed on this document. I have only to add that there is nothing in Exhibit "B" to show that the Nkwatahene, predecessor of the present defendant, wrote and/or executed it. Indeed, there is evidence that he was not informed of its existence.

In Ntrama v. Attia & anor. (1 W.A.L.R. 94) it was held:

"(i) As there was no evidence that there had been the public demarcation of boundaries required on a customary sale of land, no formal transfer of title to the plaintiff had taken place.

(ii) There was insufficient evidence to demonstrate that the agreement between the plaintiff and the defendant was one for a sale of land by which ownership passed from vendor to purchaser."

In Ababio & ors. v. Darkwa & ors. (1 W.A.L.R. 124) it was held inter alia:

"It was a requirement of custom in 1913 that a conveyance of forest land should be evidenced by the performance of the customary rites concerned with publicizing such sale. In the absence of such supporting evidence and on the particular facts of the case the conveyance of 1927 would not operate to confer a valid title on the plaintiffs, even if the Akanteng Stool had been in a position to grant such a title."

For these reasons, I would allow this appeal, set aside the judgment of the Land Court, and restore the judgment of the Native Court, with costs for the appellants in this Court, fixed at £42 14s. 4d., and of the Court below to be taxed.

DONKOR v. ASARE AND OTHERS [1960] GLR 187-190
IN THE HIGH COURT (LANDS DIVISION), ACCRA
20TH JUNE, 1960

OLLENNU J.

In 1952 the defendants applied to the Akwapim stool for a grant of land for development into a football field. As the Oyoko family was in possession, the stool approached the family in accordance with customary law and the family made a direct grant of a piece of the land to the defendants, under an agreement whereby the defendants were to develop the land and share the proceeds accruing from the land with the family. The defendants converted the land into a football field and paid annually to the family a third share of the "gate money."

In 1956, a member of the Oyoko family without the consent and concurrence of the head and principal members of the family purported to sell the land to one Opanyin Kwadjo Donkor (the plaintiff). After several unsuccessful attempts to dispossess the defendants, the plaintiff in 1957 approached the family at Mamfe and bought, as he thought, the land. The transaction and performance of Guaha custom took place at Mamfe. The Oyoko family thereupon gave the defendants notice to quit. The defendants refused to quit the land and the plaintiff brought this action against them in the Akwapim Native Court "A" for a declaration of title and recovery of possession of the land. The trial court gave judgment for the defendants and the plaintiff appealed to the Land Court.

.....

Only one ground of appeal was filed and argued; it is that the judgment is against the weight of evidence. Under this ground it was submitted by counsel as follows:

"(1) that there was sufficient evidence in proof of the plaintiff's title, and consequently the Native Court misdirected itself in refusing to grant the plaintiff the declaration of title he sought even if it could be said that he is not entitled to an order for recovery of possession, and

"(2) that the defendants are mere licensees without any interests in the land, and could be ejected at will, and therefore the Native Court was wrong in holding that the notice to quit given to them was defective."

In my opinion the second point made by counsel is a question of law, not weight of evidence. I am further of the opinion that the first point also involved important principles of customary law.
Taking counsel's first submission the question which arises is: did the plaintiff prove title to any land, and if he did, to what land? For his title the plaintiff relies upon sale by customary law. Among the essentials of a sale of land by customary law are:
(1) identification of the area of land sold, and
(2) placing the purchaser in possession of the area sold in the presence of owners of the lands which form boundaries with the land being sold to ensure that no one else's land is delivered to the purchaser.
The identification of the land is made by demarcating the boundaries of the land; if it were agricultural land, boundary trees are planted or marks made on existing trees in the presence of the owners of the adjoining land, and if it were building land in a town some stones or sticks (in modern days pillars) are fixed at the corners.
At such identification and delivery the custom known in Akan as Guaha and in Ga Adangbe as Yibaa Foo is performed. Literally that custom means severing the leaf or branch from the tree, and signifies that the vendor has completely divested himself of the whole of his right, title, and interest in the particular piece of land, and vested the same completely in the purchaser: Ntrama v. Attia and Another (1 W.A.L.R. 94).

Upon these facts what piece of land has been identified as the land sold to the plaintiff of which a court can grant declaration of title? The plaintiff says this, his vendors say that. The two of them have never at any time agreed on any particular piece of land as the land to be sold and purchased.
This principle of the customary law that in sale of land the parties should be ad idem as to the identity of the subject matter of the transaction and that the Guaha should be cut on the land after its demarcation is quaintly expressed by a Ga proverb which says " Moko yee yelenaa ye su mli " which means yams are not sold while they are in the soil, they should be uprooted and exposed so that the vendor should know what he sells and the purchaser should know what he buys.
Since the transaction between the parties is not in conformity with the customary law of sale of land, the transaction is void; the vendor sold nothing and the purchaser acquired nothing. Consequently the native court arrived at a correct decision when it held that the plaintiff was beguiled to purchase the shadow of this land in dispute and not the substance. But it must be pointed out that the reasons given for the said decision are quite wrong.
A plaintiff in a suit for declaration of title and recovery of possession can only succeed upon the strength of his own case, never upon the weakness of the defence. A defendant may not be able to show any title at all to, or any right or interest in the land. Nevertheless, the plaintiff will fail all the same if he is unable to produce evidence sufficient in law to warrant a declaration in his favour. Therefore, where the plaintiff is unable to establish his title, the court need not consider the case for the defence but will dismiss the plaintiff's case even if the defence shows that the defendant has no right to the land, and even if no evidence was led on behalf of the defence: Adumua-Bossman v. Bannerman (unreported) and Thompson v. Mensah (3 W.A.L.R. 240).
Consequently, the decision that the plaintiff acquired no title to any identifiable piece of land disposes of the whole appeal, and makes it unnecessary for me to deal with the second point on which counsel addressed the court at length. It is enough for me to observe that from the evidence that the licence was granted with customary practice, and particularly from the evidence led both by the co-plaintiff and the first defendant that under the said agreement the defendants were to develop the land at their own expense and to share all proceeds accruing from it with the owners, it appears to me that the licence granted is not a mere licence in the English sense, determinable at will; rather it is a right in town land which is of

the same nature as abusa or abumim (abetsem) tenancy of an agricultural land, which cannot be determined upon short notice except where the tenant denies the title of his licensor.
Again if the sale made to the plaintiff in March, 1957 had been valid, the plaintiff conveyed the land with all encumbrances on it; therefore in August, 1957, the plaintiff would be the only person competent to serve notice to quit on tenants of the land, and not the Oyoko family, his vendors. It follows that the notice which Kwabena Asamoah the head of the Oyoko family purported to give the defendants in August, 1957, is not effective.
The appeal is dismissed with costs.
DECISION
Appeal dismissed.

ADJOWIE v. YIADOM III AND OTHERS [1973] 2 GLR 90-99
COURT OF APPEAL, KUMASI
9 APRIL 1973
APALOO, SOWAH AND ANIN JJ.A.

SOWAH J.A.
This is an appeal from the judgment of the High Court, Kumasi, in which the court dismissed the claim for a declaration of title to the two parcels of land described in the writ of summons. The plaintiff instituted his action in a representative capacity as the leader of a group of Ningo and Shai farmers who joined together to form a company or syndicate with the purpose of purchasing farm land. Some of the original members were dead at the time of the action; the plaintiff was the successor of his late father Kommey Teikutey, the leader of the original group. It is the usual practice of such groups on the death of a member, for his successor at law to be substituted as a member; it is in accordance with this practice that the plaintiff became the leader of the group following the death of his father.

The case of the syndicate was that members of the original group left their native Ningo and Shai towns and were prospecting for good farming land in Ashanti, when they were invited by the odikro of Asankare, Nana Kwame Arku who offered the sale of his land. At a meeting at the ahinfie, the chief and his elders informed members of the syndicate that as a result of litigation, the stool and its elders had run into debt and that execution had been levied against their properties in satisfaction of the judgment debt. It was for this reason that the offer for the sale of stool land was being made.

Accordingly, on the first day of the meeting, the group and some of the elders of the stool inspected the land for sale, and on return to the ahinfie, the syndicate signified its acceptance of the offer by the provision of two bottles of gin at the price of thirteen shillings. The company offered to buy 100 ropes of land at the cost of £5 a rope. On a subsequent date when the parties again met for the demarcation of the area, the chief informed members of the syndicate that as time was running out, the stool would require as immediate payment on account, the sum of £45 for the liquidation of the judgment debt and the removal of the attachment. The company duly paid this sum.

The evidence reveals that at all times the person primarily responsible for negotiations on behalf of the stool was Kofi Fofie its linguist. He, it was, who sent the invitation to the head of the company and in the company of members of the syndicate inspected the land for sale. On the payment of the sum of £45 to the chief he and a member of the company were sent to pay that sum into court. When the parties went on the land and demarcated the area, the vendors were led by Kofi Fofie and the purchasers by Kommey Teikutey. The evidence which the learned judge accepted was that instead of the 100 ropes agreed upon, the vendor stool demarcated 79 ropes. There appeared to be no protest from the purchasers. The exercise of demarcation was completed within four days, thereafter the syndicate was requested to

provide a sheep for slaughter on the land and drinks for the pouring of libation; subsequently the guaha custom was performed. The parties returned the following day to the ahinfie where the chief, the queen mother and all the elders had assembled and the syndicate paid on further account, the sum of £100. The purchasers were given time to complete payment of the balance of the purchase price; the payment of which was duly completed within two years. Thereafter the company purchased twenty more ropes of land in the area and paid £100 for it.
The cause of action arose when some years after, the defendant stool started allocating portions of the syndicate's land to its subjects and tenants.

The learned judge then addressed his mind to the essential prerequisite for a valid sale and transfer of land in accordance with custom and held that, there appeared to be no tramma demanded or given; secondly that the demarcation was neither performed in the presence of independent witness nor any of the adjoining boundary owners and finally that he was not satisfied that the guaha custom was performed, and even if it was, Kofi Fofie who performed it on behalf of the stool had no authority so to do. The absence of independent witness vitiated the whole of the ceremony; accordingly no title passed to the syndicate for the land which he had found was demarcated to it and on part of which members of the syndicate had settled and cultivated farms. The learned judge drew support for his finding from the cases of Donkor v. Asare [1960] G.L.R. 187, Aikins v. Kommenda [1959] G.L.R. 464, Ntrama v. Attia (1956) 1 W.A.L.R 94, W.A.C.A and finally Tei Angmor & Co. v. Yiadom III [1959] G.L.R. 157, C.A. He concluded that as a matter of law, the plaintiff never complied with the customary formalities of sale and therefore his claim failed. He held further that the evidence relating to the second purchase was so scanty that that claim also failed. It is from these conclusions that the appeal has been lodged.

As already indicated two of the main issues joined were: whether there was an agreement between the parties for the sale of the area in dispute and secondly whether or not there was an effective transfer by the vendor stool of its title to the syndicate.
From the findings of the learned trial judge, there can be at least inferred without dispute one conclusion, namely, that an agreement for sale was concluded. He, however, held as a matter of law that the agreement was never performed in that the requisite formalities in the conveyance of land according to custom were not adhered to; he arrived at the decision by the application of authorities to sale of land by guaha.
The very first observation which ought to be made is that all the authorities relied on related to conveyance of land in Akan states other than Ashanti. When Sarbah wrote on the essential requisites for the sale of land he was primarily dealing with the transfers of land in Fanti land. Ntrama v. Attia, Ababio v. Darkwa, Aikins v. Kommenda and Tei Angmor & Co. v. Yiadom III all referred to above were not Ashanti cases and there is no authority for the proposition that the only mode of conveyance of land at customary law in Ashanti is the cutting of guaha.

Such evidence as there exists in decided cases points to the contrary. The evidence of Appiah, chief secretary to the Asanteman Council referred to in Sasraku v. David [1959] G.L.R. 7, C.A. which appeared to have been accepted by the court ran thus at p.13: " I have heard of the custom of 'Guaha,' but not in Ashanti. In Ashanti we have 'Tramma' which is the equivalent of 'Guaha' in other Akan States. 'Tramma' is the effective means or ceremony of sale outright in Ashanti of all properties." (The emphasis is mine.) The furtherst the courts have gone is to state that the custom was recognised in Ashanti: see Sasraku v. David (supra). It was never positively postulated that the only mode of transfer of absolute title in land in Ashanti was by that custom only.

It is patent from the reasoning above, that the performance of guaha custom is not necessary in the sale of Ashanti land; it would seem however as was evident in the Sasraku case (supra) that the syndicate ex abundanti cautela had the custom of guaha performed; for the plaintiff states "we call this custom in Adangbe 'sugba yi ba' meaning outright sale. The Akans near where we were living at Suhum call it guaha custom." It is also said that members of the plaintiff company only occupied a small portion of the land, but considering that the area sold was forest land and that in those days (and even now) only the cutlass and a hoe were employed in the reduction of the forest to arable land the members could only occupy so much of the land as they could cultivate in a season. The area of cultivation increases as the farms are extended.

Though this appeal could be disposed of on the only ground that the performance of the guaha custom is not sine qua non in the transfer of absolute title to land and that the performance of the tramma custom is equally effective in Ashanti in achieving the same result and that the tramma custom was performed, it is necessary, in my view at least, to examine the reasons for the rejection of the evidence of the plaintiff on the performance of the custom guaha, in the light of the trial judge's own findings.

In this view, if any custom was performed it was defective in that at the demarcation of the area there were no witnesses present. Secondly that there was not the publicity which should attend such sale; thirdly Kofi Fofie who was said to have performed the ceremony had no authority so to do and finally that there were no witnesses at the cutting of the guaha.
Before embarking upon an examination of the reasons for the learned trial judge's dissatisfaction on this aspect of the plaintiff's case we may here re-echo the views of Griffiths C.J. in Yerenchi v. Akuffo (1905) 1 Ren. 362 at p. 367, "No doubt there are some native customs which are more or less inflexible, but native custom generally consists of the performance of the reasonable in the special circumstances of the case."

In all ancient countries where the art of writing was unknown, a way is found for the recording of events and for the perpetuation of testimony regarding such events. In our ancient society, the presence of the independent witness in all business dealings was considered essential. It is on the testimony of the independent witness that the elders can verify the truth of such matters as were in dispute. It seems to me reasonably to suppose if in spite of the absence of such witness, sufficient evidence could be brought to establish the truth of the matters in dispute, no reasonable group of elders would hold that the matter had not been proved because no witness was present. Even in the giving and payment of loans the presence of witness was considered important and essential.

The next source of the trial judge's dissatisfaction was that there was no publicity attendant on the sale. This finding is totally against the weight of evidence. It was upon the invitation of the stool that the leaders of the syndicate met with the chief, the queen mother, the linguist and the elders of the stool and the matters were publicly discussed. At the time, of course, almost all the elders had their properties under attachment and knew the reasons for the proposed sale. The learned trial judge did not stop to inform what other publicity there could have been in the circumstances of this case.
Yet another ground for his dissatisfaction was that the person who was alleged to have conducted the custom on behalf of the stool had no authority from the stool and that his authority extended only to demarcation. Kofi Fofie was the linguist to the stool and was the chief actor in all matters affecting the sale. It was he who was sent to invite the plaintiff company; he was present at the agreement for the sale, he demarcated the area to be sold and received the demarcation fee and there was evidence that he received part of the purchase price for the stool. There was no evidence either way that he received a mandate

to perform the custom, all the plaintiff could say was that he did perform the custom but whether he had or not the necessary authority, this could be tested in the light of later events and the judge's own findings. For after returning from the ceremony, the sum of £100 was given in part payment of the purchase price. If he had no authority the stool should have repudiated his acts; on the contrary it did no such thing, but allowed the plaintiff company to enter into and be in quiet possession for a period of over a decade. The judge himself made this finding:
"However, I find as a fact that the company occupied a portion of the land in dispute and is at present in effective possession and control of the area edged violet in the south-west of the plan exhibit H. The greater portion of the remaining area has since been granted by the defendant stool to strangers who farm the land as 'abusa' tenants five of whom were joined to this suit as 'abusa' tenants."

The question which ought to be asked is: how did the company acquire possession and what is the nature of that possession? There can be only one answer to that in view of the findings, namely, it entered into possession by reason of the sale to it of the land demarcated.
It seems highly unjust to hold that when there is evidence of agreement for the sale, demarcation, payment of part of the purchase price and possession that the sale was incomplete only by reason that witnesses were not present at the performances of guaha custom. In any case the burden ought to have shifted upon the defendant on proof of the matters adverted to, which the learned judge accepted, to establish that the sale was incomplete and that equitable principles would not avail the plaintiffs or that in the circumstances of this case the stool was entitled to resile from the sale. There was no such proof, instead it took up the position that the plaintiffs were their abusa tenants which the learned judge rejected.
The authorities purported to be relied upon by the trial judge, merely go to show that the guaha custom is the mode of conveyance of absolute title on sale of land. I think that in the circumstance of this case and if it had been necessary for the decision, the equitable principle of part performance could avail the plaintiff, there will of course be equity to perfect the imperfect transfer.
Appeal allowed.

NTIM v. BOATENG [1963] 2 GLR 97-122
IN THE SUPREME COURT
24TH JUNE, 1963

ADUMUA-BOSSMAN, CRABBE AND BLAY JJ.S.C.

ADUMUA-BOSSMAN J.S.C.
The action resulting in this appeal was tried in the Kwahu-West Local Court constituted by a local court magistrate. The plaintiff-appellant-respondent (hereinafter called the plaintiff) by his writ of summons issued in respect of two parcels of land described therein claimed: (1) recovery of possession of such portions thereof as were being wrongly trespassed upon by the defendants-respondents-appellants (hereinafter called the defendants) and (2) £G50 damages for trespass against the defendants jointly and severally. The said two parcels of land are situate and lying contiguous to each other and together have the appearance of forming one whole sexagonal or six-sided shaped parcel of land as appears in the plan, exhibit A. 'The parcel described in the first schedule in the summons is a relatively small one and is claimed under a deed of exchange which for some inexplicable reason was tendered in two parts, the whole of the contents except the schedule as exhibit N, and the schedule containing the descriptions of the lands, as exhibit C. The parcel described in the second schedule in the summons is a much larger one and is claimed under a customary sale and purchase. At the trial, however, the evidence appears to have been directed, for the most part, to the question of the customary sale and purchase of that larger plot. The magistrate gave judgment for the

defendants against the plaintiff, holding, with regard to the small plot, that the deed of exchange was of no valid effect by reason of default in obtaining the concurrence of the local council in control of the area or district where the land is situate under section 75 of the Local Government Ordinance;1 and with regard to the large plot, that the plaintiff did not prove or establish a completed or perfected customary sale and purchase.

The plaintiff thereupon appealed to the High Court, Accra, where the appeal came to be heard by Ollennu J. (as he then was). He held that the transaction embodied in the instrument, exhibits N and O did not come within or under the purview of section 75 of the Local Government Ordinance; and that the evidence available at the trial sufficiently established a customary sale and purchase. He therefore set aside the magistrate's decision and substituted a judgment for the plaintiff granting him the recovery of possession and the £G50 damages for trespass claimed. Against that judgment the defendants have brought this appeal, and filed a number of grounds which were argued collectively as amounting, in substance, that the appellate court was wrong in setting aside the findings of fact made by the trial court on available relevant evidence, and that its decision is against the weight of the evidence.

As already indicated, the claim to the small plot under the instrument, exhibits N and O engaged very little of the trial court's attention, and indeed of the parties, with the result that the issue which substantially occupied the attention of all concerned, i.e., the parties, witnesses, and the magistrate, was whether or not there had been a completed or perfected customary sale and purchase of the large plot. As to that issue, the plaintiff's case was that about 20 years before the action, he negotiated with Beponghene Kwadjo Agyare for the purchase of the land, and the Ohene deputed his elders, including the fourth defendant, Asiedu Kwaku, in particular, who went and demarcated the land for him and put him in possession; that subsequently, at a time when he had completed payment of the purchase price in the lifetime of Beponghene Agyare, the latter directed that the ceremony of cutting guaha should be performed for him in the house of Kwaku Asiedu and this was done.

Turning then to examine the expressions of views, and firstly the view that it is doubtful whether there was a complete demarcation of the whole area of the larger of the two parcels claimed: there would appear to be justification for it. There can be no doubt that upon the plaintiff's claim to a customary purchase, the first essential element to be established is the demarcation of a clear and definite area, the subject-matter of the transaction. So in Sarbah's Fanti Customary Laws (2nd ed.) at pages 86-87, the learned author dealing with the essentials or requirements of a customary transfer of land on sale or purchase, refers to this particular requirement at page 86, saying:
" . . . there must be the marking out or inspection of the land and its boundaries required on a customary sale of land, no formal transfer of boundary marks."
Again in Ntrama v. Attia, it was held that:
"as there was no evidence that there had been the public demarcation of boundaries, required on a customary sale of land, no formal transfer of title to the plaintiff had taken place."
In the instant case therefore, it was undoubtedly part of the onus, upon the plaintiff, there being no document available in which the area of the land, the subject-matter of the sale or purchase transaction, is acknowledged by the Bepong stool, and notwithstanding that he had set out the boundaries in his summons, to give evidence himself as to how the boundaries so described by him in his summons were demarcated for him, and then to adduce confirmatory evidence of witnesses such as boundary owners or others who have knowledge of the boundaries demarcated for him. He himself, however, did not say a word about demarcation of the land for him, and the only witness he called who testified that the land was demarcated for him did not give the boundaries of the area demarcated, and, worse still for him, testified unfavourably when, under cross-examination by the defendants, he stated as follows:

"I remember you telling me at the time I came to inspect the land at the request of Beponghene, that you could not complete the demarcation of the land to be sold. I do not know the extent of the land sold to the plaintiff. I remember there are no pillars shown on the land sold to the plaintiff."

It is also to be observed that the plaintiff gave no particulars at all either in his summons as amended, or in his evidence, of the dimensions of the area the subject of the sale and purchase transaction. That an undetermined and indefinite area cannot be the subject of a completed and perfected customary sale and purchase is exemplified by the case of Angmor v. Tei where Kingdon C.J. (Nigeria) delivering the judgment of the court stated as follows:

"The custom is that, after the bargain of sale and purchase is complete, the purchaser's 'bottom' boundary . . . is demarcated and the direction of the two side boundaries indicated but the points to which they respectively extend are not fixed then; when payment of the purchase price has been completed the 'top' boundary . . . is demarcated between two points which are then fixed, and Guaha is then cut, and that has the effect of passing ownership."

Passing on to the second expression of view as to the deed of exchange, exhibit N, being of no effect for lack of concurrence of the local council, assuming the magistrate was right in his view that the instrument required the consent of the local council to validate it, he was obviously not right in his further view that because it is ineffectual to transfer title, it is, or must be, also ineffectual, in so far as passages in it might provide evidence on some of the controversial facts in the case. It may be void in so far as transfer of title is concerned, but nevertheless quite valid and operative, in so far as it provides evidence by means of statements contained in it made by representatives of the Bepong stool, which may be relevant to some of the questions in controversy in the case; for, as explained in Phipson on Evidence (9th ed.) (1952) at page 236, under heading "Form of the Admission" ". . . Even statements in Cancelled or Invalid Instruments are receivable." See Breton v. Cope. In these circumstances it cannot be said that the learned appellate judge's criticisms of the trial magistrate's expressed views as to the evidentiary effect of the deed of exchange, exhibit N, were unwarranted. The point has now been raised, however, that the instrument, exhibit N, is, in fact, legally inadmissible; so that on grounds other than those advanced by the magistrate, it is submitted that his view that the instrument, exhibit N, affords no support to the plaintiff's case, happens to be correct and sound. This undoubtedly is one of the major points for decision in the appeal, but it will be more convenient to deal with it at a later stage in this judgment. With regard to the third expression of views as to certain flaws in the customary purchase, the most important flaw mentioned without doubt, is that, "the guaha custom which finalises sale of land according to Akan custom was not performed." By that decision the magistrate appears to have rejected the plaintiff's evidence when he stated, under cross-examination by co-defendant, as follows:

"I performed every necessary custom in the house of Kwaku Asiedu, the fourth defendant herein. It was the co-defendant's predecessor who directed that the necessary custom of guaha be performed in the house of the fourth defendant. When the necessary custom of guaha was performed I had paid the full cost or the purchase price."

The question arises whether the trial magistrate had any good or sufficient reasons for the rejection of the plaintiff's evidence. The answer must depend on whether or not the sum total of the evidence adduced by and for the said plaintiff conformed to, or reached, that standard of proof which is required for "demonstrating beyond reasonable doubt that the title to the disputed land is in him," as Lord Alness pointed out in Kponuglo v. Kodadja performance of the ceremony or the custom of cutting guaha is the crucial and decisive act among the set of acts or performances which cumulatively constitute the ceremony of transfer of absolute ownership or title according to customary law. So in Sintim v. Apeatu, Lord Maugham delivering the judgment of the Board of the Privy Council referred to,

"the ceremony of cutting the 'Guaha,' a very important ceremony which, according to the evidence would have the result of transferring the property in the land to the purchasers, providing that the persons who performed the ceremony were properly authorised so to do . . ."
In a subsequent case, Ababio v. Darkwa, Korsah J.A. (as he then was) also referred to it as, "the ceremony of 'Cutting of Guaha' without which no sale of forest land can be deemed to vest title in the purchaser." (See also Sasraku v. David and Angmor & Co. v. Yiadom. As therefore proof of the performance of that custom or ritual is equivalent to proof that title in the land has been transferred, it would seem to follow that the pronouncements as to the standard of proof required to establish title, necessarily apply to proof of this special custom or ceremony of cutting guaha. With regard to the question of the standard of proof required to satisfy the court of a transfer of ownership, in United Products Ltd. v. Afari: Adumea (Claimants) a case in which the question arose as to the standard of proof required to satisfy the court as to a customary transfer of ownership of land in the presence of witnesses by way of gift, Deane C.J. has provided us with some guidance by his pronouncement as follows:
"It is contended . . . that claimant has called no witness to support her statement as to this gift and that that being so the gift is not proved. . . . It appears from the evidence that of the many people present when the gift was made only one is still alive and therefore we must take it that a witness who might have been called in support of claimants' case was not called . . . [However] I do not consider that the fact that she has not called an eye-witness who was present when the gift was made is ipso facto sufficient to defeat her case and that in fine a gift cannot be proved as contended unless a witness to it is produced. The proving of a gift before the Court must in my opinion be proved as any other fact is proved and when a person who alleges a gift made in the presence of a witness does not call that witness that is a fact that merits most serious consideration but when the other circumstances in the case all most strongly support the allegation and are in fact only explicable on the basis of the allegation being true the Court is I conceive quite entitled to come to the conclusion that the allegation is proved."

ANKRAH v. OFORI AND OTHERS [1974] 1 GLR 185-194
COURT OF APPEAL, ACCRA
15 JANUARY 1974

AZU CRABBE C.J., LASSEY AND HAYFRON-BENJAMIN JJ.A.

AZU CRABBE C.J.
The appellant caused of summons to issue against the respondents the following reliefs:
(1) A declaration of his title to a piece of land forming part of the Kokomlemle lands in Accra;
(2) Four hundred and eighty cedis (¢480.00) damages for trespass;
(3) Recovery of possession of the said land; and
(4) Perpetual injunction.
The First Defendant Respondent in his defence claimed that in 1965 he was desirous of building for his children—the first and second defendants—and he therefore contacted one Wilkinson Sai Annan, the defendant's first witness, who was then the acting head of the Osu Tetteh family. Annan could not sell Ofori Atta any plot of land. He rather introduced Ofori Atta to the father of Mr. E. A. L. Bannerman. The said father agreed to sell the plot of land in dispute to Ofori Atta subject to the approval of his son, Mr E. A. L. Bannerman, who was at that material time in Tanzania.
A cablegram was dispatched to Mr. E. A. L. Bannerman, asking for his approval. Mr. Bannerman cabled back to say that he was agreeable to the sale of the plot to Ofori Atta. A price of ¢600.00 was then agreed upon and this amount Ofori Atta said he paid to the defendant's first witness on the advice of the father of Mr. E. A. L. Bannerman; and Annan was to hold on to this purchase price of ¢600.00, pending the preparation and the signing of

the formal deed of conveyance by Mr. E. A. L. Bannerman on his return from Tanzania. This was never done.

In this case, the respondents claim to have acquired the disputed land through sale from Mr. E. A. L. Bannerman, the original legal owner of the land. The parties are all Ghanaians. The sale was conducted through Mr. Bannerman's caretaker, Mr. W. S. Annan, and the evidence shows that the sum of ¢600.00, the full purchase price, was paid to Mr. Annan by the respondents. The evidence further shows that Mr. Annan put the respondents into possession, and that the respondents immediately and openly started to construct a building on the land without opposition from anybody. A deed of conveyance of the land was prepared to be executed subsequently between the respondents and Mr. Bannerman, but this event never took place. I do not think that the omission to execute a deed of conveyance could affect the respondents' title, for as Ollennu J. (as he then was) said in Bruce v. Quarnor [1959] G.L.R. 292 at p. 297, "Conveyance of land made in accordance with customary law is effective as from the moment it is made. A deed subsequently executed by the grantor for the grantee may add to, but it cannot take from' the effect of the grant." And in Cofie v. Otoo [1959] G.L.R. 300 the same learned judge said at p. 301:
"Her [defendant's] main point is that she has been in active possession of the land in dispute as owner thereof long before the date of her deed; and that even though the deed does not recite the fact that it was executed to evidence a fact already in existence, that omission to recite the original sale does not affect the transfer already completed, or make the deed more than a mere written evidence of a transfer of land already effected as between natives."
The crucial question in this case, therefore, is whether the sale of the disputed land was valid according to customary law. The first and most essential requirement for any alienation of land by customary law is publicity. During the trial a plan (exhibit X) was prepared on the order of the court, and whilst the appellant claimed the area edged red on exhibit X, the respondents claimed the area edged green. It was agreed that it was that area coloured yellow, red and green that formed the subject-matter of the dispute in the action. The plan showed that the appellant had already built a house on another plot of land which formed the northern boundary of the land in dispute, and there was a fence-wall which divided the two plots. Soon after the payment of the purchase price, the respondents went into possession of the disputed land and started the construction of buildings which took about nine months to complete. In my judgment, this act of taking possession constituted sufficient publicity to the appellant, who owned a house nearby, and to the whole world, that the disputed land had been sold to the respondents.

In ancient times, however, and, to a great extent, among the rural communities in some parts of contemporary Ghana, the customary law required the performance of some ceremonies before the sale of land was finally concluded: per Korsah C.J. in Tei Angmor & Co. v. Yiadom III [1959] G.L.R. 157 at p. 161, C.A. Among the Gas the ceremony was known as sikpon yi baa foo; as Ziba yi baa pom among the Adangbes, as guaha or trama among the Akans, and as Ahatutu anyigba dzi among, the Ewes. In Ollennu, Customary Land Law in Ghana at p. 116, the learned author, dealing with the alienation of land in the area where the disputed land in the present case is situated, writes:
"The demarcation having been completed, the purchase price or a portion of it is paid on the spot, if not already paid; a sheep is then slaughtered. By the custom of some lands, e.g., Kokomlemle lands a goat is slaughtered followed by the real ceremony of transfer, the cutting of guaha or of yi baa foo."
Then, after describing the full ceremony and the rationale underlying it, the learned author continues at pp. 117-118:
"In these days of literacy, and with the services of legal practitioners available, documents are generally prepared to serve as lasting evidence of any transfer or alienation of land and the

nature thereof. It may therefore seem unnecessary that the cutting of guaha or the yibaa foo should be performed by children or younger members of the family. It must, however, be borne in mind that documents which are prepared after the alienation by customary law serve merely as documentary evidence of the transaction, they do not alter the nature of the transaction: see the case of Cofie v. Otoo."
In my view, the cutting of guaha or of sikpon yi baa foo is only of evidentiary value, for where the sale is disputed and satisfactory evidence is led that the custom was performed this would be conclusive that the transaction between the parties was nothing other than a sale.
In the present case, the assertion that the alienation of the land to the respondents was a sale was not challenged, and consequently I hold that the absence of evidence of the slaughtering of a goat or the performance of the custom of sikpon yi baa foo, did not affect the validity of the sale of the disputed land to the respondents. I would, in any case, echo the words of Lingley J. in Biei v. Akomea (1956) 1 W.A.L.R. 174 at p. 176, that "This court cannot allow local customs to override general principles and practice in these days of changing conditions." It seems clear to me beyond doubt that the respondents were "purchasers" within the definition of the Land Development (Protection of Purchasers) Act, 1960, and that the learned trial judge was right in giving them protection under the Act.
In view of the conclusion I have arrived at, I think the other grounds of appeal must equally fail, and in the result I would dismiss this appeal.
DECISION
Appeal dismissed.

ASIAMA AND OTHERS v. ADJABENG AND OTHERS [1971] 2 GLR 171-185
IN THE COURT OF APPEAL
17 MAY 1971
SIRIBOE J.S.C., ANIN AND ARCHER JJ.A.

ANIN J.A.
The plaintiffs, members of a land syndicate, instituted this action in the Accra High Court for a declaration of title to a tract of land known as Akwamu Kotoku land situate at Worobong near Begoro. They also claimed recovery of possession of the area trespassed upon, damages for trespass, and injunction against the defendants.

The plaintiffs' case, as appearing from the statement of claim, is that, as members of a land syndicate, they purchased the land in 1924 from the Begoro stool during the reign of the late Nana Twum Antwi. They entered into possession after the alleged purchase and cultivated cocoa and food crops on the land. Later, between the years 1928 and 1929, the government acquired the land as part of a forest reserve, and they were prohibited from entering the reserve. During the ensuing inquiry conducted by the Reserve Settlement Commissioner, Mr. W. H. Beeton, in 1935 (hereinafter called the "Beeton inquiry" or "Beeton"), the alienation made to the plaintiffs' syndicate was not disputed either by the Begoro stool or by any other person. The plaintiffs further alleged that after the Beeton inquiry, their rights of ownership to the land were confirmed and demarcated on the inquiry plan by an order of the Governor, No. 17 of 1936 (exhibit B) without any objection. The plaintiffs disclosed that in December 1952 their farms were the subject-matter of another forest reserve inquiry (hereinafter called the "Cooke inquiry" or "Cooke"); and they eventually secured the release of their farms. They re-entered their property in 1953. From that date until the commencement of this action in 1962, the defendants, all subjects of the Begoro stool, and therefore bound by the acts of the stool, trespassed persistently on their land despite protests from the plaintiffs.

By an amendment to the statement of claim, the plaintiffs pleaded that the defendants are "estopped by conduct from challenging their title in that they sat by and acquiesced in the plaintiffs' proof of their title before the Beeton inquiry." They further pleaded that the defendants are estopped by record on account of the findings of the said commission of inquiry.
In their statement of defence, the defendants averred that they had been in continuous and undisturbed possession of the disputed land for a period of twelve to fifteen years and had cultivated farms out of virgin forest and established farming communities therein. They denied the alleged sale of the land by the Begoro stool to the plaintiffs. They alleged that in 1926 the Begorohene evinced an intention to sell the disputed land to the plaintiffs. But before the actual customary sale and payment of the purchase price could be made, the government incorporated the disputed land in a proposed forest reserve acquisition which came into force in 1927. With regard to the Beeton and Cooke inquiries, the defendants denied that the plaintiffs either laid any claim to the disputed land or were prohibited from entering it or secured its release as alleged. The defendants contended that the release of the said land in 1952 was not due to any representations made by the plaintiffs. The land was in fact released to the Begoro stool for the benefit of the subjects of the stool generally. As subjects, the defendants asserted their native customary right of entering the land and cultivating farms on unoccupied virgin forest land. In the circumstances, they denied having trespassed on the disputed land, and contended that it was rather the plaintiffs who had trespassed on their farms since 1961.

By a later amendment of their defence, they pleaded that the plaintiffs were estopped by conduct from challenging their title to the disputed land. Additionally, they claimed protection under the Farm Lands Protection Act, 1962 (Act 107), and contended that any defect in their title had been cured by operation of law under section 2 (1) of the Act.
The plaintiffs led evidence about their alleged purchase of the land in dispute; the farms they cultivated on the land; the forest reserve acquisition by the government; the Beeton and Cooke inquiries; and finally, about the alleged acts of trespass. The defendants, for their part, adduced evidence in support of the main averments in their statement of defence. They highlighted the non-performance of the guaha custom by the plaintiffs and maintained that there was consequently no valid alienation of the land to the plaintiffs under customary law.

The learned judge devoted virtually the whole of his ten-page judgment to a consideration of the rival pleas of estoppel raised by the parties, and upheld the plaintiffs' pleas.
The next important ground of appeal relied on by learned counsel for the appellants was that the learned trial judge erred in law and on the facts by decreeing title in favour of the plaintiffs despite their failure to prove a valid alienation of land under native customary law, and in particular, the non-performance of the custom of cutting guaha. It will be recalled that the gist of the plaintiffs' claim was that the plaintiffs' land syndicate purchased the land in dispute in 1924 from the Begoro stool, whereas the defendants contended that there had been no sale in favour of the plaintiffs but mere inchoate negotiations for a sale.
Mr. Dua-Sakyi argued that the onus was on the plaintiffs to establish all the essential ingredients of customary purchase, such as competent contracting parties; mutual assent of such parties; the marking out or inspection of the land and its boundaries, and, if necessary, the planting of boundary trees and fixing of boundary marks; valuable consideration either paid, given or promised; and the cutting of guaha to the vendor stool in the presence of witnesses. On this last ingredient, the law is clear. Reference may be made to Sarbah's Fanti Customary Laws (1968 ed.), pp. 86-87 and Danquah's Akan Laws and Customs, pp. 216-219 for the propositions (a) that "the important thing is the cutting of guaha (or paying trama in case of a chattel) for 'guaha cutting' is the customary way of giving livery of seisin . . ."; (b) "In Akan land sale, the earnest-money or guaha is evidence that the sale is both complete

and valid"; and (c) To prove any legitimate purchase of land, the courts have constantly, and rightly, sought to satisfy themselves as to whether this custom has been observed. It is in fact a sine qua non in the system, and where it is not observed, the sale is considered null and void. Ollennu in his Principles of Customary Land Law in Ghana also stresses the need for the performance of a special custom (called by the Akans generally as the "cutting of guaha'; by the Ashantis trama; and by the Ga-Adangbes as 'yibaa foo' or, 'yibaa pom'). While Professor Enchill in his Ghana Land Law at p. 354 acknowledges "the importance of trama and other title transfer ceremonies by saying that their performance is required and must usually be complied with," he makes the further point that: "the essence of their importance lies in the fact that they serve the primary function of providing conclusive evidence of the character of a transaction as a sale where that is disputed." And he cites in support of this statement the important dicta of Ollennu J.(as he then was) in Akomea v. Biei (1958) Ollennu,C.L.L. 186 at p. 188, C.A. that,

"'guaha' is a custom performed in certain parts of Ghana upon sale of land. It signifies the 'cutting off' of the title of the vendor from the land and vesting that title in the purchaser. In cases of uncertainty of the nature of a transaction between two persons in relation to land, evidence that the guaha custom was performed is conclusive . . . "

In the case of Paintsil v. Aba [1964] G.L.R. 34, S.C. where there was a controversy whether the transaction in issue was a sale or a pledge, the court held that it was a pledge. Among the reasons given for their conclusion at p. 39 was the one that "there is no evidence of guaha (delivery of seisin) having been cut, and as such, nothing was conveyed."

In the West African Court of Appeal case of Ababio v. Darkwa (1956) 1 W.A.L.R. 124 at p. 126, W.A.C.A., the plaintiffs claimed title to the Owuram forest land which they asserted had been purchased by their predecessor in 1913 from the Akanteng stool. They were, however, unable to adduce any evidence to show that there had been any public demarcation of boundaries required by custom to establish a sale of land, but they relied on a deed of conveyance made in 1927. Among the reasons given by the court in dismissing the plaintiffs' claims was their failure to adduce any evidence of sale "as required by native customary law, such as the ceremony of cutting of guaha,' without which no sale of forest land can be deemed to vest title in the purchaser."

In the Court of Appeal case of Tei Angmor & Co. v. Yiadom III [1959] 1G.L.R. 157 at p.161, it was held, in a case dealing with the alleged sale of Nkwatia (Kwahu) stool land, that:

"In order to conclude a contract for the sale of land in native customary law certain ceremonies have to be performed before ownership in the land can be transferred to a purchaser. That custom [p.180] is known as the Guaha custom.... After the conclusion of negotiations, if the parties intend the ownership to pass from vendor to purchaser, they agree on a date when the customary ceremony will be performed. They then invite witnesses for the purpose, and proceed to the land. There representatives of each party collect some twigs or branches of trees on the land, and come before the witnesses. The parties face each other, the vendor holding one end, and the purchaser the other end, of the twigs or branches. They then declare the purpose of the ceremony, i.e. that the contract of sale is now being finally concluded, and they break the twigs into two. After this the witnesses receive witness fees, and this concludes the ceremony."

To the same effect is the description of the ceremony of the cutting of Guaha in Dr. Danquah's Akan Laws and Customs at p. 317; but it is a piece of string instead of a twig or branch which is broken into two; and he describes the customary fee paid—usually to two witnesses—as domefa (four shillings).

As has been pointed out by Ollennu in his Principles of Customary Land Law in Ghana at p. 116, the mode of performance of the custom of cutting of guaha differs from place to place. It would therefore be necessary to the party alleging customary purchase of stool land in a

particular locality to describe the ceremony of guaha actually performed, where, as in this case, issue is joined on the due performance of the custom. In the present case, Mr. Dua-Sakyi drew our attention to the bare and solitary assertion of the second witness for the plaintiffs that guaha was performed, and submitted that this bare, unsubstantiated, allegation was not a sufficient discharge of the burden of proof of due performance of the custom, especially since the defendants denied that the guaha custom was performed. He contended that a full description of the custom actually performed was called for to enable the trial court decide that issue. Mr. Olaga, on the other hand, referred us to pieces of evidence on record in support of his contention that there was ample evidence of the due performance of the guaha custom. He further submitted that it was incumbent on the trial judge to make primary finding of fact on the contested issue of guaha; but since he had failed to do so, this appellate court which had neither seen nor heard the witnesses could not supply that omission. We agree.

It is unfortunate that the learned judge omitted to make findings of the material facts in issue, especially whether the plaintiffs bought the land in dispute under the native customary law and whether the guaha custom was performed. Had he done so, we could have evaluated the evidence to determine whether the facts were properly found or the correct inferences drawn of the law, especially the customary law of guaha and sale, had been properly applied to the primary facts found. Since these material facts in issue have not been resolved by the learned trial judge, we have no option but to hold that the trial is unsatisfactory.

"In all cases in which the party pleading relies upon a native law or custom, the native law or custom relied upon shall be stated in the pleading with sufficient particulars to show the nature and effect of the native law or custom in question and the geographical area and the tribe or tribes to which it relates."

Section 67 (1) of the Courts Act, 1960 (now repealed and replaced by the identically worded paragraph 65 (1) of the Courts Decree, 1966 (N.L.C.D. 84)), enacts as follows: "Any question as to the existence or content of a rule of customary law is a question of law for the Court and not a question of fact." (The emphasis is mine.) Article 126 (1) (e) states that the "common law" is one of the components of the laws of Ghana. And article 126 (2) enacts that, "The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature." (The emphasis is mine). Article 126 (3) defines "customary law," as "the rules of law which by custom are applicable to particular communities in Ghana."

Order 19, r. 31 was enacted in 1954 at a time when a customary law rule relied on by a party in any proceedings had to be proved by evidence and was therefore to be treated as a question of fact. The prevailing rule was that native law and custom material to a case must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them: see Angu v. Attah (1916) P.C. '74-'28, 43; and Amissah v. Krabah (1931) 2 W.A.C.A. 30 at p. 31 both decisions of the Privy Council. With the introduction of the first Republican Constitution, 1960, and the establishment of courts manned almost entirely by Ghanaians, section 67 (1) of the Courts Act, 1960 (C.A.9), was enacted making the existence or content of a rule of customary law for the first time, a question of law for the courts and not a question of fact. Henceforth, the courts are deemed to have judicial knowledge of the customary law, as they are deemed to have judicial notice of any other of the laws of Ghana. A special procedure was at the same time provided under section 67 (2) and (3) of the Courts Act, 1960 (C.A. 9)—(see now paragraph 65 (2) and (3) of N.L.C.D. 84)—for a form of judicial inquiry to be invoked by the courts as and when the need is felt during the hearing of a suit for the ascertainment of the existence of or content of abstruse or lesser-known rules of customary law.

It is common ground between both counsel in this court that the learned judge should have made primary findings about the alleged performance of guaha, as indeed about all other material issues of fact, such as completed customary sale; possession and the respondents' acts of ownership; whether the land allegedly trespassed upon by the appellants was virgin forest or not; and whether the land was in the effective occupation and ownership of the plaintiffs prior to the acquisition of the forest reserve by the government and the two inquiries. Although, sitting in this apellate court, we are not debarred from evaluating the facts as found by the trial judge, yet we cannot in this present case discharge the function assigned to the trial judge of resolving matters in controversy between the parties. The perception and the resolution of the facts in issue are within his sole and exclusive jurisdiction. In the circumstances, we are driven to the conclusion that the trial of the case was unsatisfactory and that there must be a re-trial. We would therefore allow the appeal and set aside the judgment appealed from, together with the order as to costs and damages. We hereby remit the case to the court below for a hearing de novo by a different judge. The successful appellants shall have their costs in this court, assessed at N¢631.75. Costs of the abortive trial to abide the result of the rehearing.
DECISION. Appeal allowed.

NORQUAYE-TETTEH (EMMANUEL) v. MALM & ANOR. AND NORQUAYE-TETTEH (DAVID QUAO) v. MALM & ANOR. (CONSOLIDATED) [1959] GLR 368-376
IN THE HIGH COURT (LAND DIVISION), ACCRA
9TH NOVEMBER, 1959

See Usufruct supra

NSIAH v. ASARE & ORS [1959] GLR 17-21
IN THE HIGH COURT (LANDS DIVISION), ACCRA.
17TH JANUARY, 1959.

BRUCE v. QUARNOR & ORS. [1959] GLR 292-299
IN THE HIGH COURT (LANDS DIVISION), ACCRA
10TH SEPTEMBER, 1959

See Usufruct supra

AHMAD v. AFRIYIE AND OTHERS [1963] 2 GLR 344-348
IN THE HIGH COURT, KUMASI
14TH OCTOBER, 1963
APALOO J.

APALOO J.
In this action, the plaintiff claims a declaration of title to a cocoa farm said to be situate at a place called Nyebiammoawo on Keniago stool land, damages for trespass and an order of perpetual injunction restraining the defendants from dealing with the said farm.
The plaintiff, who I should judge to be in his late sixties is a native of Domi, Keniago. He is educated and between 1925-1950 lived away from home. He must have been employed in some sort of clerical job either at Bekwai or Kumasi. The Abotendomhene of Keniago, Kwame Yamoah, said he returned home with a deficit and settled down to making farms. The plaintiff is somehow connected with the Keniago stool. I prefer the evidence that he is a royal of the paramount Keniago stool not merely as the defence suggested, the Krontihene stool. Nana

Owusu Afriyie the present Keniagohene admitted that the plaintiff at one time contested for the stool and lost. The plaintiff says that he was employed as a stool clerk by Nana Yaw Barimah in 1950 and that he worked in this capacity without remuneration for a period of nine years. He says the chief said as he was one of the royals of the stool, he should sacrifice for it. In about 1959, Nana Barimah took ill and in order to find time to receive medical treatment, he abdicated. He was succeeded on the stool by one Kofi Agyei whose stool name is Nana Kwame Yamoah Ababio. The evidence shows that at an unspecified date in 1959, the stool elders met to render an account of the stool properties and formally hand them over to the new chief. According to the plaintiff, at this meeting, he told the elders that he had served the stool for nine years without remuneration and that there was a stool cocoa farm which had almost become a farmstead. He requested that a gift of the farm be made to him in recognition of his devoted services to the stool. The plaintiff testified that the elders unanimously agreed and he acknowledged the gift by the payment of a customary aseda. Thereafter the plaintiff said, he entered into possession and plucked the cocoa for two seasons without interruption. In December 1960, Nana Yamoah Ababio was detained under the Preventive Detention Act. He was succeeded on the stool by the first defendant who was installed on the 1st April, 1961. The latter interfered with the plaintiff's rights to the farm and thus gave rise to this action.

The defendants for their part say that no such gift as the plaintiff alleges was ever made of the farm in dispute to the plaintiff. Although they admitted that the plaintiff was at one time in possession of the farm, they say he was merely a caretaker of it and took charge of the farm as caretaker at his own request and with Nana Yaw Barimah's consent. The defendants say further that the plaintiff rendered accounts to Nana Yaw Barimah and when Nana Yamoah Ababio came on the stool, the farm in dispute was one of the farms handed to him as stool property. The farm retained its public character when the first defendant came on the stool and was one of the farms handed to him as stool property. The defendants tendered in evidence an inventory of the stool property bearing the date the 30th September, 1961. At page one of it appears "four cocoa farms at Domi-Keniago." The defendants also deny that the plaintiff was at any time employed as a stool clerk and say if the stool needed the services of a literate person, they got one at random.

The plaintiff said when the gift was made to him, he acknowledged it by paying aseda. Yaw Kubi, a very elderly man who was a boy during the Yaa Asantewa War and who from looks is much past seventy, said he was present when the gift was made and took part in the drink which the plaintiff gave as aseda. When a man of this venerable age gives evidence as to what he saw, I should have very good reason before I reject it. I certainly have none in this case. I think his evidence, like that of the plaintiff, is the truth.

The plaintiff has of course not been able to substantiate his case by any written record of the gift. That fact gives me no trouble. It is not reasonable to expect one where the donee is the only literate person in town. The gift was made in public before witnesses and was similarly accepted. That satisfies the requirement of customary law and I am satisfied that good title to the farm passed to the plaintiff in 1959.

The present Keniagohene was not present when this gift was made, and relies on his elders to dispute it. Two of the elders who the plaintiff said were present when the gift was made gave evidence for the defence. They are Kwame Yamoah, the Abontendomhene, and Kwame Donkor the chief linguist. Both denied that a gift was made. I reject their evidence. Although it is not for me to ascribe motives, I cannot lose sight of the fact that they both collectively had cause to be aggrieved about the plaintiff. When all the elders elected and installed the first defendant on the Keniago stool, the plaintiff was bold enough to put up a rival candidate

who eventually lost. The elders were naturally dissatisfied with the plaintiff's conduct especially as he was the recipient of the stool's bounty. I think that is the reason why those two elders denied the gift of the farm which was made to the plaintiff in their presence. The view which I have just expressed is fortified by the first defendant's undisputed conduct. Although on his own showing, the plaintiff was lawfully in possession of the farm as [p.348] the stool's caretaker, the Keniagohene did not adopt any method approaching anything like constitutionality in removing him. He merely went to the farm with a number of labourers and removed the cocoa which was then drying on a mat and when the plaintiff complained, he gave him in custody to the Antoakrom police on a charge of threatening. When pressed in cross-examination, the Keniagohene said, "I admit I was not in good terms with you, that is why I took the cocoa farm from you. I just removed you as caretaker." Accordingly, as I said, I am satisfied that a valid customary gift of this farm was made to the plaintiff by the Keniago stool in 1959. The plaintiff having duly accepted it by the payment of aseda and entering into possession, I hold that the gift is irrevocable.

I find on the undisputed evidence that the first defendant by himself and his hirelings trespassed into the farm in the cocoa seasons in 1961 and 1962 and plucked and carried away ripe cocoa beans from the plaintiff's cocoa farm. In my judgment, all the defendants are liable to the plaintiff for his undoubted trespass. The evidence shows that the average yearly yield of the farm varies between ten to fifteen loads. In all the circumstances, I adjudge that the defendants shall pay to the plaintiff £G75 damages for trespass. The plaintiff is also entitled to restrain these acts of trespass in the future and ought to get the order of perpetual injunction which he seeks.
In the result, I make as prayed, a declaration that the plaintiff is the owner of the cocoa farm fully described in the writ. I award, the plaintiff against the defendants jointly and severally, £G75 damages for trespass. There will also be an order of perpetual injunction restraining the defendants, their servants or agents from trespassing into the said farm or in any manner whatsoever interfering with the plaintiff's peaceful enjoyment of that farm.
The defendants are ordered to pay the costs of this action which I assess at £G35.

DECISION. Judgment for the plaintiff.

ANAMAN v. EYEDUWA [1978] GLR 114-117
COURT OF APPEAL, ACCRA
3 NOVEMBER 1977
APALOO C.J., LASSEY AND ANIN JJ.A.

APALOO C.J.
The Respondent instituted an action against the head of her deceased husband's family for a declaration of title to a cocoa farm, the self-acquired property of her deceased husband. The respondent testified at the trial that the farm was gifted to her by her husband during his lifetime. The gift was made neither in the presence nor with the knowledge of the husband's immediate relations. She however stated that her husband told two persons of the gift in her presence, one of them being the owner of a farm contiguous to the one gifted to her. This person corroborated her statement. She said that between four and six months after the gift, it was agreed between her and her husband that in lieu of aseda, she should pay an amount of £G8 being the balance of a debt which he owed to the local council. According to her evidence, she paid the amount to the council. She also stated that after the gift when the local council revenue officers went to take measurements of the farm for tax purposes, her husband directed them to her as the owner of the farm and accordingly she was made to pay the tax levied on the farm. When later she defaulted in paying survey fees to the local council, the latter sued her. She said that she was in possession of the farm for three years before

her husband's death. The appellant on the other hand claimed that no such gift was made. He however produced no evidence to contradict the respondent's statement. The court gave judgment in favour of the respondent. On appeal it was argued on behalf of the appellant that the respondent's evidence showed that none of the essential requirements of a valid customary gift, namely: (i) that there must be a clear intention on the part of the donor to make a gift, (ii) publicity must be given to the gift and (iii) the donee must accept the gift by giving thank-offering — aseda, was met.

The only issue in this case is whether the late Kwesi Buabin made a valid customary gift of his cocoa farm at Mborbor village, Kyebi, in his lifetime to the respondent, his widow. There is evidence both direct and circumstantial that such a gift was made and was accepted by the respondent. The appellant who is the head of the deceased's family claimed that no such gift was made. He was in no position to know apparently, because the deceased had not told him. So he produced no evidence to contradict the respondent's positive evidence in the court below. The learned judge Edusei J. (as he then was) reviewed the evidence at some length and examined the customary law requirements of a gift. He felt satisfied that such a gift was made and that it was valid according to customary law.

The appellant disputes this and invites us to say that the evidence led and the circumstances relied on were insufficient to make the gift, even if one were intended, valid in the eyes of customary law. Our attention was drawn to the case of Krakuwah v. Nayenna (1938) 4 W.A.C.A. 165 in which Sarbah's formulations of the requirements of a customary gift were cited and accepted. The customary law requirements of a valid gift have been laid down in many judicial decisions. It is trite learning and no object will be served by reproducing them in this judgment beyond stating the bare essentials, namely, (i) there must be a clear intention on the part of the donor to make a gift, (ii) publicity must be given to the gift and (iii) the donee must accept the gift by himself giving thank-offering — aseda, or by enjoying the gift. It is said by counsel for the appellant that the respondent's evidence shows that none of these essentials was met. I cannot agree. The evidence that the donor evinced an intention of making a gift of this farm to his wife was precise. In addition to the respondent herself, a witness whose evidence the judge believed swore that the deceased himself told them that he had made a gift of this farm to the respondent. He was Kobina Nyarko. The latter said in evidence:
"Buabin now deceased called me to his house. The plaintiff's first witness [meaning Kwesi Halam] and the plaintiff were also there. In the house, Kwesi Buabin told the three of us that he had gifted the cocoa farm to the plaintiff."

The witness himself owns a farm contiguous to the one in dispute. There is no reason why he would wish to perjure himself in this case. The fact deposed to by this witness is buttressed by another act which the deceased did. When the local council revenue officers went to take measurement of the farm for tax purposes, the deceased gave the respondent's name as the owner of this particular farm. On this account, she was made to pay the tax levied on the farm. The deceased retained in his own name other farms which he owned and which he intended to keep for himself. The respondent's ownership of this farm became notorious, at least to the local council officers, because when she defaulted in paying survey fees to the council, the latter sued her. The council's act in suing her makes sense only if it knew that she was the owner of the farm in question.

It was also urged on behalf of the appellant that the gift was not publicised and that it failed on that account. The only sense in which this contention can be said to be true, is that Buabin did not make the gift in the presence of his immediate relations and apparently omitted to inform them of it. But there was nothing clandestine about it. He told his boundary owners

of the gift. The local council officers also knew of it. The survey of it was made in the deceased's lifetime and at the deceased's own request, was made in the name of the respondent. The object of the customary requirement of publicity is to prevent allegations of secret alienations—claims which would invariably be made when the donor was no more. I think the evidence led in this case met the requirement of publicity. It is in fact the very reverse of secrecy. The fact that the deceased's relations were not present and apparently did not know of it, does not make it any less public. The farm was the deceased's own self-acquired property and he could alienate it to whomever he pleased. In this case, the evidence shows that he alienated it to his wife and made this gift public.

It was next argued on behalf of the appellant, that the respondent did not accept the gift in the manner required by custom because she failed to give thank-offering, i.e. aseda. It is true the respondent did not give aseda in conventional form. She did not immediately, in acknowledgment of the gift, make an immediate present to her husband. But she did an act which amounts to the same thing. According to the evidence, the deceased owed the local council £G34. When he did not pay, he was sued for this amount but was only able to raise £G26. There was still a balance of £G8 and it was agreed that the respondent should pay this debt on his behalf to the council in lieu of aseda. This, she paid. According to the evidence, she made this payment between four to six months after the gift. Accordingly, although the respondent did not hand over £G8 to her husband as aseda, she did an act which fulfils the objective which the giving of aseda is meant to fulfil, namely, expression of gratitude and the symbolic acceptance of the gift. Furthermore, the respondent entered possession of the farm and was in enjoyment of it for three years before her husband's death. She deposed in evidence: "The gifted cocoa farm was in my possession and control for three years before my husband died." As I said, no contrary evidence was led by or on behalf of the appellant. The user of the gift is one of the customary modes of acceptance, and even if her payment of her husband's debt did not amount to aseda, she customarily accepted the gift by using and enjoying it.

I think the conclusion of the court below was right and ought not to be disturbed. I would dismiss the appeal with costs.

YOGUO AND ANOTHER v. AGYEKUM AND OTHERS [1966] GLR 482-520
SUPREME COURT
13 JUNE 1966
SARKODEE-ADOO C.J., OLLENNU AND LASSEY JJ.S.C.

See Acquisition of Family Property supra

IN RE OHENE (DECD.); ADIYIA v. KYERE [1975] 2 GLR 89-99

COURT OF APPEAL, SUNYANI
11 JULY 1975
SOWAH, ANIN AND FRANCOIS JJ.A.

FRANCOIS J.A.
The suit from which this appeal springs originated in the High Court, Sunyani, where the plaintiff, on behalf of the children of the late J.E. Ohene, sought inter alia, a declaration of ownership of a half-share of the deceased's cocoa farm at "Nyamebekyere-Kookookrom" on Akrodie stool land.

The plaintiff urged in the court below that his late father Ohene had acquired virgin forest and cultivated it extensively into a cocoa farm and that in 1967, a year before his death, being mindful of providing for his children, had made a gift of half the farm to them in the presence of his family.
It was the plaintiff's further case that prior to the 1967 gift, the late Ohene had in 1962 made an inter vivos gift to his wife, Elizabeth Nyanta, of part of the said farm; consequently the death-bed disposition or samansiw of 1967 should relate to the deceased's farm excluding what had already been gifted. The failure of the defendant's family to honour the death-bed wishes of late Ohene had led to the action.
The matter was heard by Anterky J. Who rejected the plaintiff's contentions. The learned judge of the High Court expressed the view that for plaintiff to succeed on the issue of a gift inter vivos, he had an onus to:
"establish that before and at his father's death the demarcated portion had been vested in the plaintiff's first witness (Elizabeth Nyanta) and that she had been enjoying beneficially, before his father's death in 1968, the proceeds from that portion."
The learned judge further postulated that there should have been a prior family inspection of the farm earmarked for Elizabeth Nyanta before the family could give its consent, which in his view, was a sine qua non of validity. He said: "It was necessary for them to know the subject-matter and the extent of the gift in question." In the course of the trial the defendant was also most vehement in his challenge of an inter vivos gift, contending that the only gift disclosed to the family was that which was declared at a family meeting in 1967. Accordingly the best complexion to be placed on the plaintiff's argument of an earlier gift in 1962, was that it was an inchoate gift sought to be perfected by the death-bed declaration of the late Ohene in 1967.
Before considering this crucial issue, it is desirable to state now that nothing in this appeal turns on the nuncupative will of 1967. There is the consensus that a valid death-bed disposition had been made by the deceased; all that was to be ascertained was the quantum of the estate to be apportioned whether it should include or exclude the area claimed by Elizabeth Nyanta.
The defendant in his evidence relating to the 1967 samansiw said, inter alia:
"In 1967 late Ohene summoned a family meeting in which he told the members that he was seeking their permission to grant a portion of this farm to his wife and children. And we, the family, gave our consent to his doing so. The late Ohene died before the members of his family of whom I am one, granted the portion of the farm to his wife and children."

There is no dispute that the family thereafter attempted to comply with the deceased's behest. It is to be regretted therefore that the trial court held that the samansiw had not been proved. In my view the learned judge fell in error in chasing the will-o'-the wisp of a document which purported to set out the deceased's bedside wishes which he castigated as spurious. Even if this document were suspect, it could not detract from the overwhelming evidence of samansiw, which it only purported to confirm.

Turning then to the issue of the 1962 gift, it must be noted that it was an off-shoot of the main action for the enforcement of the samansiw. It arose thus: In paragraph (5) of his statement of claim, the plaintiff described the land to which he sought a half share for his brothers and sisters as: "having boundaries with the farms of Adjoa Kuma, Kwame Nsuapim, Kyei, Elizabeth Nyanta, Anto Osei Yaw and Kofi Abiri." In his answer in paragraph (5) of the defence, the defendant referred to the land in issue with the same boundary neighbours but significantly omitted the name of Elizabeth Nyanta as a boundary owner. The plaintiff's oblique assertion that Elizabeth Nyanta was a boundary owner of the land available for sharing out was thus challenged by the defence.

The plaintiff was compelled in his reply to state as follows:
"(5) In further reply to paragraphs (8) to (11), the plaintiff says that it was some time in 1962 that the late J.E. Ohene made a grant of part of his farm to his wife Elizabeth Nyanta who gave an aseda of one sheep, two cases of Fanta plus £G8 in the same year to the knowledge and in the presence of Ama Dapaa, Mansah Akoto, Afua Manu, Yaw Asante, Kwasi Baafi (all members of the defendant's family) Akyeamehene Yaw Boateng, Kwasi Adae, Kwame Mensah and Kofi Fofie.
(6) The plaintiff says that the grant of the portion of the farm made to Elizabeth Nyanta is separate.
That was a gift inter vivos, and that took effect and vested in the donee during the lifetime of the late J.E. Ohene, who made a plan for the farm."
As far as this earlier gift is concerned clearly an onus lay on the plaintiff to establish it. The plaintiff could only succeed, if he could show a perfected gift distinct and separate from the farm that remained for sharing out. It is thus indirectly that proof of the earlier gift has been brought in these proceedings, and has become the crucial issue for determination.
It is true that a claim of a gift from a deceased person must always be approached with caution if not suspicion. In this respect the customary law is no different from the common law. For as was said by Brett M.R. in In re Garnett; Gandy v. Macaulay (1885) 31 Ch.D. 1 at p. 9, C.A.:
"The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any Judge who hears it out to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine [of corroboration] becomes absurd."

This was a case where beneficiaries executed a release of all suits and causes of action in favour of an aged aunt, in respect of their share of valuable residuary property in ignorance of its true worth. Twenty years after, the beneficiaries having learnt of the true value of what they had given away, sought an impeachment of the release. It was held, after a careful scrutiny of the evidence (in view of the demise of the aunt) that the release was invalid and must be set aside as all the parties were ignorant of the true value of the stocks that constituted the residue. Thus also in Thomas v. Times Book Co., Ltd. [1966] 2 All E.R. 241, the court scrutinized with great suspicion evidence of a gift of a manuscript of the late Dylan Thomas to a B.B.C. producer. Plowman J. asserting at p. 244:
"I am enjoined by authority to approach their story with suspicion having regard to the fact that the other actor in this story, the late Dylan Thomas, is dead and cannot therefore give his own version of what took place."
This disability arising from the death of a donor also inspires the concern of our customary law to ensure the impeccability of evidence relating to a gift. The customary law achieves this by insisting on formal acceptance and due publicity. The late Bentsi-Enchill J.S.C. in Hausa v. Hausa [1972] 2 G.L.R. 469 C.A. puts this in incomparable language in the following passage at pp. 474 - 475:
"So far as oral gifts inter vivos go, our courts have for a long time insisted, rightly in my view, on a requirement for acceptance . . . This is the requirement that the acceptance of a gift, especially of land, must be made by the presentation to the donor of some token of acknowledgement and gratitude in the presence of witnesses. This requirement serves many purposes, and solves many problems relating to gifts. In the first place, a proffered gift which the donee does not accept is hereby prevented from becoming a gift. Secondly, where no gift was intended by a putative donor, a purported acceptance in the presence of witnesses affords an opportunity for express denial of a donative intent. Thirdly, the requirement of acceptance in the presence of witnesses ensures publicity and makes the gift not only impossible or

difficult to deny afterwards, but operates as a double check preventing the donor from making a gift of what is not his own, namely, family property, and preventing fraud. As a device which solves the problem of proving donative intent, it neatly obviates some of the uncertainties surrounding the issue of delivery in Anglo-American law . . ."

Turning now to the fount and inspiration of all the formulations on this aspect of acceptance of a gift we find Sarbah saying in his Fanti Customary Laws (3rd ed.) at p. 81 as follows:

"Acceptance is made—

(i) By rendering thanks with a thank-offering or presents, alone or coupled with an utterance or expression appropriating the gift; or

(ii) Corporeal acceptance, as by touching or;

(iii) Using or enjoying the gift; or

(iv) Exercising rights of ownership over the gift."

A donee who proves acceptance by any of the four modes is entitled to demand that the seal for validity be placed on his gift.

It must also be stated that consent by members of a family to a gift inter vivos of the self-acquired property of a donor is no longer necessary. The position remains as Sarbah stated in his Fanti Customary Laws (supra) at pp. 97-98.

"The owner of self-acquired property can in his lifetime deal with it as he pleases, and where he intends to give the whole or a portion of it to his child by a freeborn wife, Adihiwa, or to any person not a member of his family, he does so before his death."

A number of recent decisions in the superior courts has questioned the power some judges have vouchsafed members of a family to the participation as witnesses and sometimes extending to a veto in the disposal of a donor's self-acquired property: see the recent case of In re Armah (Decd.); Awotwi v. Abadoo [1975] 1 G.L.R. 374, C.A. To oblige a donor to summon members of his family to ascertain their consent or to witness a gift ceremony is to impose an undesirable fetter on the free exercise of a donative power. It has been pointed out elsewhere that the donor, donee and even the family may well be embarrassed by this procedure and all parties must be spared the ordeal.

The greatest proponent of the contrary view is Ollennu who in his Principles of Customary Land Law in Ghana and the celebrated case of Summey v. Yohuno [1960] G.L.R. 68 made remarks which implied that the presence of members of the family at the gift ceremony was necessary to ensure its validity. Six years after the Yohuno case the learned judge expressed the same view in Yoguo v. Agyekum [1966] G.L.R. 482, S.C. In that case Ollennu J.S.C. (as he then was) said at pp. 493 - 494:

"A valid gift, under customary law, is an unequivocal transfer of ownership by the donor to the donee, made with the widest publicity which the circumstances of the case may permit. For purposes of the required publicity, the gift is made in the presence of independent witnesses, some of whom should be members of the family of the donor who would have succeeded to the property if the donor had died intestate and, also, in the presence of members of the family of the donee who also would succeed to the property upon the death of the donee on intestacy. The gift is acknowledged by the donee by the presentation of drink or other articles to the donor; the drink or articles are handed to one of the witnesses—preferably a member of the donee's family, who in turn delivers it to one of the witnesses attending on behalf of the donor; libation is then poured declaring the transfer and the witnesses share a portion of the drink or other articles. Another form of publicity is exclusive possession and the exercise of overt acts of ownership by the donee after the ceremony . . ." (The emphasis is mine.) In Yeboah v. Tse (1957) 3 W.A.L.R. 299 Ollennu J. (as he then was) stated that such alienation "must take place in the presence of witnesses, some of whom may be members of his family." It would seem therefore that the essential validity of a gift inter vivos no longer depended on the presence of witnesses from the donor's family. One is tempted to think of this as a modification of the learned judge's views on the matter until one realises that the judgment in Yeboah v. Tse (supra) was given in 1957. It seems therefore

that the learned judge's views were rather crystallising in a direction opposite from those of his learned brethren. Yoguo v. Agyekum (supra) therefore represents a retraction and a recantation of the freedom to dispose of self-acquired property without the family shackles advocated in the Tse case.

However the 1957 view that the presence of members of the family was not obligatory was commended and approved in Atuahene v. Amofa, Court of Appeal, 5 August 1969, unreported; digested in (1969) C.C. 154 in which the learned judge and author participated and concurred. This is the present state of the laws, which in my view is the more progressive approach to an area of law which is fluid with the rapid social changes experienced in this country.

In Quashie v. Baidoe, Court of Appeal, 5 August 1969, unreported; digested in (1969) C.C. 153 Akufo-Addo C.J. reading the judgment which was concurred in by Lassey J.A. said:

"With the rapid development of the concept of absolute ownership in property, has also developed a gradual whittling down of the traditional principles of custom relating to the disposition of property by property owners. When a person has acquired an absolute ownership in property, that is, one that is not in any manner incumbered by a family claim, it sounds unrealistic to require that such an owner, when he is disposing of his property by sale or gift, should do so in the presence of his family. The rationale for any such publication has completely disappeared and the common practice now is that an absolute owner of property is entitled to do with his property as he wishes without any reference to his family."

We must respectfully endorse this and the further passage in the learned Chief Justice's judgment, that:

"Thehe requirement that the family must necessarily witness the transaction has ceased to have any meaning in present day Ghanaian society in cases where the property involved is self-acquired property, and has therefore ceased to have any juridical significance."

It is clear therefore in view of the powerful judicial criticism alluded to, that the old view that members of the donor's family must participate in a gift either by attesting as witnesses or giving their consent no longer retains any credibility. With respect, therefore, the learned trial judge erred in elevating to the pinnacle of an essential requirement of a gift inter vivos, the consent or prior viewing of the subject-matter of the gift by members of the donor's family.

A further criticism of Yoguo v. Agyekum (supra), which must be dealt with in passing, appears in the passage quoted. There is the implication that additional to the aseda ceremony there must be proof of exclusive possession and that the formulation of Sarbah should be read conjunctively rather than disjunctively. The answer to this is also provided by Quashie v. Baidoe (supra), where it was said per Akufo-Addo C.J.:

"It will be observed that the validity of a gift depends initially on the intention of the donor to part with the property in the subject-matter of the gift to the donee. This intention no doubt must be expressed at the time of making the gift. The gift must be accepted in one of a number of ways one of which is by 'rendering thanks with a thank-offering'."

(The emphasis is mine.) And again later in the judgment he said: "Sarbah lists four alternative ways of accepting a gift, one of them being the rendering of thanks with a thank-offering."

Having disposed of this preliminary error in law, into which the learned trial judge fell, I will now turn to the central issue for determination in this case, which is the validity of the 1962 gift inter vivos. It may be useful to refer to authority for some guidelines as to proof of a gift. In Mensah v. Kyei, Court of Appeal, 5 May 1969, unreported; digested in (1969) C.C. 97, it was said:

"The donee's primary duty is to lead evidence to show that it was the intention of the donor to make a gift of the land to him. This onus is discharged by calling witnesses who were present at the gifting ceremony to say that the gift of the land was made voluntarily to the donee by the donor, or by giving evidence of subsequent declarations of the donor of having made a gift of the land to the donee at the same prior date."

There is overwhelming evidence of a gift to Elizabeth Nyanta and her children of part of the deceased's farms made between 1962 and 1964, with the accompanying aseda or acceptance drink and token, sealing the gift. It is corroborated by the evidence of the defendant's first witness, the caretaker of the deceased's farm who of all people should know the state and correct history of the deceased's farms. There is also the documentary evidence of a plan showing Elizabeth Nyanta as an owner of adjoining property; a plan attested to by the surveyor who drew it and the caretaker, as having been commissioned by the deceased and consequently is against his interest. On such prolific evidence any attempt to impeach the gift would fail unless the defence could prove a recall of the gift or its revocation: see Quashie v. Baidoe (Supra). There is not a scintilla of evidence in support of either. In my view the plaintiff's case was made out and judgment should have been entered in his favour.
For the above reasons, I would allow the appeal and declare the plaintiff and his brothers and sisters entitled to a half-share of their late father's cocoa farm at Kokookrom, as described on the plaintiff's writ. As to the second relief, for an order for payment of amounts due from proceeds on the farm, I would dismiss the same as not proved.

OMANE AND ANOTHER v. POKU AND ANOTHER [1972] 1 GLR 295-316
IN THE HIGH COURT, KUMASI
27 NOVEMBER 1971
ANNAN J.A.

ANNAN J.A.
The dispute in this action revolves around one Kofi Boakye, a national of the Ivory Coast, who came to Ghana more than 60 years ago, lived here and married here and also acquired property and died here. Kofi Boakye, it is admitted, died in about August or September 1965. He left property including cocoa farms. Two of these cocoa farms form the subject-matter of this action.
Almost immediately after his death, rival claims were made in respect of his estate and since the contestants were unable, after certain preliminary skirmishes, to settle their differences, one of them, Opanin Kwaku Omane sued the other Barima Kwasi Poku, claiming as successor of the late Kofi Boakye, a declaration of title to the two cocoa farms, particulars of which appear on the writ of summons, and also for a perpetual injunction and for further reliefs. The plaintiff says in his statement of claim that he lives at Kona, where the late Kofi Boakye lived for many years and up to his death.

He claims to be a cousin of Kofi Boakye and that they both hailed from the Ivory Coast. The statement of claim states further:
"(4) The said late Kofi Boakye and the plaintiff have lived in this country for over 60 years and have become part of the family of the Bretuo clan in Kona.
(5) The said Kofi Boakye died about four months ago and by a unanimous decision of the entire family plaintiff was elected customary successor.
(6) Accordingly plaintiff was given possession of the estate of the late Boakye including the two farms the subject-matter of this action.
(7) Plaintiff paid the customary drink of £G4 13s. to seal his successorship."
These paragraphs in the statement of claim set out the basis of the plaintiff's claim to title. The claim admits that Kofi Boakye was an Ivory Coast national at all times and the plaintiff's own position is no different. The plaintiff contends, however, that Boakye lived in this country for over 60 years and both of them became part of the family of the Bretuo clan in Kona. It was that family that appointed the plaintiff successor to Kofi Boakye.

The defendant in his pleadings denies all the material averments of the plaintiff and puts the plaintiff to strict proof of these averments. He admits that Kofi Boakye came to Ghana from

the Ivory Coast "about 60 years ago." He came with two brothers, Kwasi Kan and Dwobeng. They came to live in Ashanti and stayed with the defendant's predecessor at Mpankrono. They later moved to Kona. Dwobeng later returned to the Ivory Coast. Kofi Boakye and Kwasi Kan acquired many cocoa farms including the two farms in dispute. They received financial support from the defendant's predecessor. Kofi Boakye survived Kwasi Kan. He died "about four months ago." The defendant then sets out the basis of his case in the following paragraphs of the statement of defence:

"(5) Before his death and in gratitude for the assistance given to himself and Kwasi Kan by the defendant's said predecessor the late Kofi Boakye made a gift of the two cocoa farms to the defendant herein. The said gift was made in the presence of many people including the Mpankronohene Kofi Kontoh, Dediakohene Nana Boateng and Opanyin Owusu Ansah. In their presence the defendant paid the customary aseda of £G4 13s. to the donor.

(6) The defendant went into possession of the said cocoa farms after the said gift and remained in possession till the death of the late Kofi Boakye."

The defendant therefore maintains that these gifts inter vivos took the farms out of the estate of Kofi Boakye. He counterclaims therefore for a declaration of title to the two cocoa farms.

Upon these pleadings issues were agreed for trial "as upon the summons for directions," namely:

(1) Whether or not after the death of Kofi Boakye the plaintiff was appointed customary successor.

(2) Whether or not before the death of Kofi Boakye he gifted the farms in dispute to the defendant.

(3) Whether or not as a result of this alleged gift the defendant went into possession of the farms before the death of Kofi Boakye.

On the pleadings of the plaintiff and the defendant there does not appear to be any dispute that Kofi Boakye was a foreigner and that he came to live in this country in or before 1906. It seems to me also to be admitted by both sides that Kofi Boakye settled in this country and as the defendant put it "he emigrated from the Ivory Coast to Ashanti." It is not however contended that Kofi Boakye became a citizen of this country or ceased to be a citizen of the Ivory Coast. It seems to me clear from the pleadings and the evidence itself that the effect of both demonstrates conclusively that Kofi Boakye acquired a domicile of choice in this country which he had at the date of his death, which I put at August or September 1965, in terms of the similar averments in that respect in the pleadings. The writ was taken out on 6 December 1965, the statement of claim filed on 15 December 1965 and the statement of defence on 20 January 1966. It is also admitted that Kofi Boakye came to this country with two relatives. The plaintiff, however, contends that he was one of the party. This is denied.

I turn now to the issue of title raised by the plaintiff, the defendant and the second defendant as to the two cocoa farms now in dispute. The plaintiff, not being the lawful successor, has no justifiable claim to title. The co-plaintiff is in no better position. The issue then as to title falls to be determined as between the second defendant and the defendant. The defendant relies on a case of a gift inter vivos. The second defendant denies the gift. The burden then is on the defendant to prove the gift. The second defendant himself relies on the rules of intestate succession of the Ivory Coast, the national law of the deceased. His case seems to me doomed to failure on that basis. Ivorian law seems to me to have no application to this case. It is the national law of the deceased and is neither the law of the domicile of the deceased at death nor the law of the lex situs. Since the deceased's domicile of origin, Ivory Coast, had given way to one of choice, Ghana, before he died, I see no basis for the application of the law of the Ivory Coast as the national law. The subject-matter of the dispute is immovable property in the Ashanti Region of Ghana—farms made on land of an Ashanti stool. The deceased was in any case indisputably domiciled in Ghana. By the rules of private international law of this country whether or not he was domiciled here has to be determined

by the law of Ghana. Per Lord Lindley M.R. in In re Martin [1900] P. 211 at p. 227, C.A., "The domicil of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicil which are recognised in this country and are part of its law." By that law intestate succession to immovable property is governed by the lex situs and not by the national law. Accordingly the Ivorian law of intestate succession cannot apply on the basis that it is the national law of the deceased, and since that is the avowed basis of the second defendant's claim to title that claim cannot succeed on that basis. What then of an assessment of the position of the second defendant in terms of the lex situs? I see here some problems as to choice of law since the deceased was not a Ghanaian national and, as I have found, was not so identified with a Ghanaian family as to have become a member of that family and therefore subject to the same customary law. The deceased was not subject to customary law as his personal law. What then is the lex situs for the purpose of intestate succession to his immovable property? That is the law of the country where the property is situated. Intestate succession in Ghana for our present purpose is governed by the rules of the customary law or by such English statutes of general application as are in force and relevant. The position as to such statutes and their application was set out in the case of Coleman v. Shang [1959] G.L.R. 390, C.A.

If the defendant's case as to a gift should fail in its turn then the curious position will be that all parties would have failed on their specific claims as to title and the matter will have to be determined on the basis of possession and the applicable English statutes of general application as to intestate succession.

The defendant's case as to a gift depends on his own evidence and that of a number of witnesses called to support that case. The evidence is that the deceased Boakye, about two months or so before he died, went to Pankrono from Kona where he lived and there in the presence of the chief and some elders of Pankrono made a presentation of the farms in dispute to the defendant. Upon that evidence Boakye did go to Pankrono and there before the chief and his elders presented two farms in dispute to the defendant in appreciation of the services of the predecessor of the defendant to Boakye and his relatives. The evidence is that Opanin Nsafuah who brought Boakye to Ghana and who must have cared for him in his youth was connected with the defendant's stool. The evidence of the gift is in my view not free from difficulty. There are certain conflicts in it and the accounts of the defendant and his witnesses do not tally in all respects. Thus there are conflicts in their accounts as to the matter of the aseda and how much of it was given out to Kofi Boakye and as to statements made by the persons present at the meeting. Again Boakye went alone to Pankrono unaccompanied by any close associate or a member of his patrilineal family or even a friend. Again one may well ask why the purported gift was made at Pankrono and not at Kona where Kofi Boakye lived. Again although the defendant pleaded that he went into possession before Boakye's death and remained in possession his evidence shows that he sent one Yaw Nsiah a former linguist of Boakye who knew the boundaries to go to inspect the farms on his behalf. The evidence of Yaw Nsiah himself shows that although he says he went to inspect the farms before the death of Boakye he did not do anything about the farms in Boakye's lifetime. Apart from inspection of the farms before the death of Boakye he actually started to look after the farms and to take actual charge and control of them after Boakye's death and according to Nsiah Boakye plucked the cocoa until he died. With regard to the conflicts in the evidence it is my view that these conflicts as to matters of detail do not have the effect of discrediting the evidence of the defendant and his witnesses on the matters of substance as to the case of a gift inter vivos. The witnesses were all united in their evidence that Boakye did go to Pankrono to the house of the Odikro where the presentation was made and aseda provided by the defendant at the request of the Odikro. I do not think that the Odikro and his elders had conspired with the defendant to put up a false case as to the gift and these conflicts

notwithstanding I accept their evidence as to the presentation at Pankrono of the two farms at Apatriatem by Kofi Boakye to the defendant as gifts as I believe that their evidence is in substance the truth of the matter. As to the matter of the absence of any persons on the side of Kofi Boakye and the fact that the presentation was made at Pankrono and not at Kona these matters at first would appear to lend a suggestion of lack of probability to the defendant's case as to a gift. However, on further consideration I come to the conclusion that this need not be so. Kofi Boakye, as I have found, had no relatives in Ghana, and he had ties of residence and close association with Pankrono because of the circumstances attendant upon his arrival in Ghana. Nsafuah his original guardian had ties with Pankrono and clearly before Boakye went to live at Kona later on in his life, he did live at Pankrono with Nsafuah. Boakye had already given a farm to his eldest son, the second defendant, and in any case the second defendant need not be present. In the particular circumstances of the position in which Boakye was I do not see that the fact that there were no witnesses present on his side detracts from the probability of the gift. In my judgment I find it established that the presentation of the two farms at Apatriatem, the subject-matter of this dispute, by Kofi Boakye to the defendant was made as claimed by the defendant and his witnesses, at Pankrono about three or two months before Boakye died.

What then in law was the effect of that presentation? The gift was said to be a gift inter vivos in terms of customary law. I do not think that on the evidence there is a case of a gift in contemplation of death made out. I see no evidence of samansiw or a donatio mortis causa. It is true Boakye died two or three months after the gift. He was no doubt advanced in age at the time. There is, however no evidence of indisposition or that death was contemplated by him. Indeed if he had been in that physical or mental state he could hardly have travelled to Pankrono for the ceremony. The gift therefore stands or falls depending on whether its presentation satisfies the rules of customary law. In this connection the paramount issue for consideration is the matter whether or not the gift was accepted in the lifetime of the donor by the donee. Whether or not there has been acceptance is a matter of law. In my consideration of the principles and case law on the issue of acceptance I do not think it right to say categorically that in customary law there can be no case of acceptance of a gift inter vivos of immovable property without proof of actual possession. In my view what is required to be proved is the matter of acceptance of the gift, and this may be proved in a number of ways. Sarbah (supra) says at p. 81. that:

"Acceptance is made—

(i) By rendering thanks with a thank-offering or presents, alone or coupled with an utterance or expression of appropriating the gift; or

(ii) Corporeal acceptance, as by touching; or

(iii) Using or enjoying the gift; or

(iv) Exercising rights of ownership over the gift."

Ollennu in his Principles of Customary Land Law in Ghana at pp. 112-113 puts it rather differently in that he appears to draw a distinction between acceptance of the gift and delivery of the land by the donor to the donee, and he puts down both matters as separate conditions for validity. Bentsi-Enchill in his Ghana Land Law (1964) at pp. 364-365, however, seems to adopt a stand nearer the stand of Sarbah than that of Ollennu. He states:

"[T]he functions of formal public acceptance outlined above serve to minimise the significance of delivery as the test of a donation. Delivery may take place, in fact usually takes place, before formal acceptance; ... Accordingly, in the event of any major gift likely to arouse envy or opposition—such as a house, land, a farm and significant movables—the essential gift-perfecting requirement, we submit, is the aseda or thank-offering made in the presence of witnesses."

Bentsi-Enchill cites in support of his submission another view of Danquah in his Akan Laws and Customs at p. 219 that:

"Whenever a gift is made, and especially when the thing given is in the form of landed property, it is always customary to give drink or money thank-offering to the person making the gift in the presence of witnesses. When this is done the transaction is complete."
The case law on the subject is revealing. The leading case often cited in this respect is Summey v. Yohuno [1962] 1 G.L.R. 160, S.C. where the law is set out. The fourth condition set out in that decision at p. 164 by the Supreme Court per Azu Crabbe J.S.C. is, "(4) that the donee accepted the gift and went into possession of the land either physically or constructively, during the life-time of the donor." He then went on to state at p. 165 that "an essential attribute of a gift inter vivos is that the donee must enter into possession during the life-time of the donor. In other words the gift must be accepted."
The position was however again considered by Azu Crabbe J.A. in the later case of Osmond v. Hughes, Court of Appeal, 9 June 1967, unreported; digested in (1967) C.C. 108, where he referred to Summey v. Yohuno (supra) and also to the case of Nartey v. Nartey (1953) 14 W.A.C.A. 295 and to the judgment of Coussey J.A. therein at p. 297 where he said:
"Mr. Sarbah, states several forms of acceptance as necessary to evidence a valid gift of immovable property but it must be observed that if one of them is supplied it is sufficient. In this case there is evidence of publicity in making the gift and user by the donee in that the deceased erected a building for her on the land before his death."
The emphasis is mine. It seems to me that taking together the later views of Azu Crabbe J.A. (as he then was) in Osmond v. Hughes (supra) and the approval therein of the dictum of Coussey J.A. in Nartey v. Nartey (supra) the position now is that the original statement of Sarbah as to the various modes of acceptance of a customary law gift of real property must be held to be firmly reinstated as the dominant and true view of the law. On that basis the aseda in the presence of witnesses and in public is sufficient to constitute acceptance of the gift and the matter of possession becomes a matter of evidence to test the probability of what the donee says. Obviously if a donor remains in possession for a number of years after a purported gift is alleged to have been made that fact is as matter of evidence inconsistent with the case as to a gift. On the other hand if a donor dies suddenlytwo or three months after a gift is alleged to have been made, and while still in possession, the issue of gift or no gift ought to be determined on the basis whether or not the gift was accepted in any of the several modes set out by Sarbah.
As to the fact of acceptance by the defendant there is clear evidence of an aseda and acceptance of his share of it by Boakye. I find therefore that the defendant accepted the gift that was made to him by Boakye publicly in the presence of witnesses. Did the defendant go into possession? He says he did in the lifetime of Boakye. His stand, however, finds no support in the evidence of Yaw Nsiah who was called to furnish this support. Nsiah at first said he went to take charge before the death of Boakye. Later, however, he said it was after Boakye's death that he actually took charge. Clearly Nsiah's performance as a witness leaves me with no alternative but to rule him out as a reliable witness since he contradicted himself in cross-examination on the issue of actual possession. That leaves the defendant's case as to possession in a precarious state, since he himself did not say that be went on the land personally, and there is evidence that Boakye remained in possession till he died. I find however that the defendant accepted the gift and gave an aseda for it in the presence of witnesses. In my view that was enough and since Boakye died a few months after the gift, the fact that he continued in possession till his death ought not, as matter of evidence, to detract from the probability of the defendant's case as to a gift. I accept that case both on the facts and on the law. I accordingly find that the farms in dispute were given to the defendant as a gift by Boakye in his lifetime and that the defendant accepted that gift.
In conclusion then the plaintiff must fail against both defendants and judgment is entered against him on his claim. The second defendant fails on his counterclaim, for title, and judgment is entered against the second defendant on his counterclaim. The defendant

succeeds on his counterclaim and judgment is entered for him against plaintiff and the second defendant for a declaration of his title to the two farms in dispute.

MAAKYE KORKOR AKUNSAH Vrs. NAI ASHALLEY BOTCHWAY [NO. J4/22/2009] 19TH MAY 2010 (Unreported)

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA

CORAM: ATUGUBA, JSC (PRESIDING)
DATE-BAH (DR), JSC
YEBOAH, JSC
BAFFOE-BONNIE, JSC
ARYEETEY, JSC

CIVIL APPEAL
NO. J4/22/2009
19TH MAY 2010

MAAKYE KORKOR AKUNSAH … PLAINTIFF/APPELLANT/APPELLANT

VRS

NAI ASHALLEY BOTCHWAY
(CHIEF OF AWUTU OF AADAA FAMILY STOOL, AWUTU) … DEFENDANTS/RESPONDENTS/ RESPONDENTS

JEI RIVER FARM LIMITED

J U D G M E N T

ARYEETEY, JSC:-

The plaintiff/appellant/appellant whom we shall refer to as the plaintiff in this appeal is the biological mother of the 1st defendant/respondent/respondent whom, together with the 2nd defendant/respondent/respondent, we shall refer to as defendants. This matter first went to court when the 1st defendant, as chief of Ofaadaa, sold a piece of Ofadaa stool land to the 2nd defendant for its farming enterprise, which was followed by a claim of ownership by the plaintiff. She based her claim of ownership of the 212 acres of stool land on a gift to her in 1947 by the reigning chief of Awutu Ofaadaa after which she performed the necessary rites of Akan custom in thanking the chief for the gift. By the year 2000 she, her children and tenant farmers had cultivated approximately 212 acres of the land by shifting cultivation as

reflected in a site plan which she tendered in evidence. Even though by the year 2000 she had acquired a customary freehold interest in the land, the 1st defendant made a grant of a lease of her land to the 2nd defendant company for commercial farming purposes in September 2000 without her consent or concurrence in any form. Being completely dissatisfied with the trend of events, on 5th February 2001 she caused a writ to be issued against the defendants claiming some reliefs, including damages for trespass and perpetual injunction. Following the death of her counsel the action was discontinued. After exchange of letters between the parties the 2nd defendant company commenced its commercial farming activities on the land which resulted in the total destruction of cassava, corn, oil palm trees and other crops under cultivation without compensation to the plaintiff, her children and tenant farmers. Therefore on 10th April 2002 the plaintiff caused to be issued a writ of summons claiming the following reliefs against both defendants:

A declaration of title in respect of all that piece and parcel of land situate at Awutu Ofaadaa in the Central Region as per the site plan attached containing an area of approximate of 212.06 acres and or

A declaration that the plaintiff is the customary freehold owner of all that piece and parcel of land containing an approximate area of 212.06 acres as per the site plan attached.

Damages for trespass.

An order for the recovery of possession of all that area of land containing an approximate area of 212.06 acres as per the site plan attached.

A perpetual injunction restraining the defendants, their agents and privies and or assigns from further alienation of the plaintiff's land as per the site plan attached.

A perpetual injunction restraining the defendants, their agents and privies and or assigns from registering the land subject matter of this dispute at any Land Commission in Ghana.

Costs and any further orders as this Honourable Court may seem fit.

The defendants deny that the chief of Ofaadaa, Nai Otabil Ashalley II made a customary grant of stool land in his lifetime to the plaintiff. It is the stand of the 1st defendant that during the period 1945 to 1956 the reigning chief of Ofaadaa who was the custodian of Awutu Ofaadaa stool lands was ill and a nine member committee was put in place to superintend over Awutu Ofaadaa stool lands. That means Nai Otabil Ashalley II was not in the position to make a gift of stool land to the plaintiff in 1947 personally. According to the 1st defendant, the plaintiff who is her mother, had inherited other farm lands from at least six deceased relatives which she controls. He also contends that a ruling of the Awutu Traditional Council confirms his right as chief of Ofaadaa to hold all Ofaadaa stool lands in trust for the lineage of Okomfo Ashalley, the originator of Ofaadaa village. The defendants counterclaim for the following reliefs:

A declaration that the first defendant as chief of Ofaadaa and as confirmed by the several rulings of the various fora before whom he was made to appear by plaintiff either personally or through disguised agents is proper custodian of Ofaadaa lands inclusive of what is being claimed by plaintiff and the only one who can grant any valid lease to farmers.

An order that the agreement reached between the 1st defendant and 2nd defendant is valid as it was contracted by parties at equal lengths appropriately seized with the legal capacity to contract and therefore should not be disturbed.

A perpetual injunction restraining the plaintiff, her privies, agents and assigns from interfering in any dealings in Ofaadaa lands as custom demands.

Plaintiff must be mulcted in punitive and exemplary costs for the multiplicity of actions – not a single one of which she was successful.

The trial High Court dismissed the plaintiff's claim and entered judgment for the defendants in respect of their counterclaim. At pages 74 and 73 of the record of appeal we have the concluding portion of the judgment which made pronouncement on some findings of fact which could be considered as crucial to the determination of the suit. That portion of the judgment is reproduced below as follows:

"There is evidence before me that the 1st defendant consulted the plaintiff about the lease to the 2nd defendant together with elders of the family and they all agreed. Counsel for the plaintiff referred the court to the case of Golighty vrs. Ashrifi (supra) that a stool cannot alienate land in possession of a subject without her consent. That, being the law, I think has been satisfied because there is uncontroverted evidence that the plaintiff was informed and she consented to the same. That is if she was in possession of the land at all. I say so because there is evidence before me that she was not even in actual possession of the land in issue. All the defence witnesses who are plaintiff's own sisters gave evidence to the effect that the land in issue was never gifted to her. The 1st defendant gave evidence as to why there was the need for the lease i.e. to renovate the palace. He is the chief and as the custodian of the stool land can lease out a portion for that purpose with the consent and concurrence of the elders and principal members of the family. This I think he did. He even gave portions of the proceeds to the members of the family. This piece of evidence is not denied.

I do not also believe the plaintiff's evidence that she together with her children and the tenants farmed 212.06 acres of land. Her own witness could not tell the size or acreage he farmed, from 60 to 40 to 10 and then finally 2 acres. On the preponderance of probabilities I think I believe the defendants' story against the plaintiff. I do not think that that the plaintiff is entitled to the reliefs set out in her statement of claim and her writ is hereby dismissed as unmeritorious. I believe the [1st] defendant as the chief of the village and custodian of the stool lands subject to certain conditions can lease off the stool lands and he has fulfilled those conditions to my satisfaction. I therefore grant him his reliefs in his counterclaim."

The plaintiff appealed and before the Court of Appeal she filed the following grounds of appeal:
Judgment is against the weight of the evidence adduced by the plaintiff.
The learned trial judge erred in law when he failed to sufficiently consider whether or not the plaintiff was in possession of the land as against the defendants who could not show a better title.
The learned trial judge erred in law by not sufficiently considering whether or not compensation was paid to plaintiff after she was dispossessed of the land in dispute by the defendants.
The learned trial judge erred in law by not sufficiently considering whether or not a grantor of land can eject the grantee without the grantee's consent.

The unanimous judgment of the Court of Appeal hit the nail right on the head when it identified the core issue of the litigation which could be dealt with in the first ground of appeal namely: "The judgment was against the weight of evidence". When the issues raised in respect of that ground of appeal were determined in favour of the defendants the remaining grounds of appeal became irrelevant. At page 133 of the record of appeal this is what came out of the judgment of the Court of Appeal:
"Having then examined the pleadings and evidence on record, the fundamental issue in controversy in the suit was whether or not the land in dispute was gifted to the appellant by Nai Otabil Ashalley II, the late Chief of Awutu Ofaadaa in or around 1947. This being the core issue to be determined, grounds (b), (c), (d) as stated above are all misconceived"
The conclusion of the judgment of the Court of Appeal is at pages 135 and 136 of the record of appeal as follows:
"The legal principles enunciated in the above cases all relate to customary gift of land individually owned as against land owned communally by a family or stool as in this suit. For such land owned by a family or a stool, I think that a further essential requirement to validate the gift would be for the donor to secure the consent of the principal family members for the grant. The presence of such principal members to witness the ceremony will thus be paramount to validate such a gift.

At the trial of this suit, the appellant led no evidence to prove any of the essential requirements a gift made under customary law. No evidence was led as to the "aseda" performed. Was it in the form of drink or money? All the appellant said was that her father, mother and uncle were present when the gift was made to her, were all dead.

The respondent led credible evidence through DW1 and DW2, to demonstrate that no such gift was made to the appellant. At the time she testified she was 68 years, she denied any gift of the stool land to the appellant. She testified that applicant and her children were all present at the family meeting when a decision was taken to lease the land to the 2nd respondent. DW2 was Kofi Nyarko. The appellant was the sister of DW2's mother. DW2 testified that he was in Ghana in 1947. At the time he had grown beard, so if the chief ever made a gift of the stool land to the appellant, he would have been invited. The combined effect of the evidence of DW1 and DW2 was to the effect that no gift was made to the appellant. Their evidence corroborated the evidence of the 1st respondent, the Chief of Awutu Ofaadaa. …
From the record of appeal, there is credible evidence adduced by respondents demonstrating that the appellant's claim or case was not reasonably probable and as such should lose the contest. The ground that the appeal is against the weight of evidence is thus unsustainable since, the appellant failed woefully to prove the gift to her. The appeal therefore fails and it is hereby dismissed."

Again the plaintiff was not satisfied with the verdict of the appellate court and appealed to this court. Her grounds of appeal before this court are as follows:

Judgment is against the weight of the evidence adduced by the plaintiff.
The Court of Appeal erred in law when it failed to sufficiently consider whether or not the plaintiff was in possession of the land as against the defendants who could not show a better title.
The Court of Appeal erred in law by failing to sufficiently consider whether or not compensation was paid to plaintiff after she was dispossessed of the land in dispute by the defendants.
The Court of Appeal erred in law by not sufficiently considering whether or not a grantor of land can eject the grantee without the grantee's consent.
The Court of Appeal erred by failing to find that the land was indeed gifted to the plaintiff/appellant/appellant.

In dealing with the issue of the alleged gift by Nai Otabil Ashalley II to the plaintiff, it must be emphasized that there is a distinction between a gift from an individual owner of land to a beneficiary and a gift of stool land by an occupant of a stool, which is more appropriately described as a grant. In the case of a personal gift the owner's decision is not subject to approval or consent from anyone. The only condition is that it should not be done in secret. It should be witnessed by others, preferably by members of the immediate family of the donor who are not entitled to question his decision provided they have no interest in the property which he intends to give away. It does not end there. The beneficiary of the gift expresses his acceptance and gratitude for the gift by payment of "aseda" in any form depending on the circumstances of each case. In the case of Yoguo & Anr. V. Agyekum & Ors. Ollennu JSC explained the law on the essential requirements of customary gift as follows:
"A valid gift, under customary law, is an unequivocal transfer of ownership by the donor to the donee, made with the widest publicity which the circumstances of the case may permit. For purposes of the required publicity, the gift is made in the presence of independent witnesses, some of whom should be members of the family of the donor who would have

succeeded to the property if the donor had died intestate and, also, in the presence of members of the family of the donee who also would succeed to the property upon the death of the donee on intestacy. The gift is acknowledged by the donee by the presentation of drink or other articles to the donor; the drink or articles are handed to one of the witnesses — preferably a member of the donee's family, who in turn delivers it to one of the witnesses attending on behalf of the donor; libation is then poured declaring the transfer and the witnesses share a portion of the drink or other articles. Another form of publicity is exclusive possession and the exercise of overt acts of ownership by the donee after the ceremony: see Kwakuwah v. Nayenna, (1938) W.A.C.A. 165, Asare v. Teing, [1960] GLR 155, Addy v. Armah, (1960) Oll. C.L.L. 240 and Asante v. Bogyabi. [1966] GLR 232. Sarbah emphasizes these principles of acts of transfer and acceptance and proof of those two acts when he says in his Fanti Customary Laws (2nd ed.) at pp. 80-81: "Gift consists in the relinquishment of one's own right and the creation of the right of another, in lands, goods, or chattels, which creation is only completed by the acceptance of the offer of the gift by that other . . .
To constitute a valid gift, an intention of giving or passing the property in the thing given to the donee by the donor, who has power so to do, is necessary . . .
The giving and acceptance must be proved and evidenced by such delivery or conveyance as the nature of the gift admits of." See also Anaman v. Eyeduwa [1978] GLR 114, Adamu v. Administrator General [1987-88] 2GLR 460."

However, in the case of a grant of stool land by the occupant of the stool, the chief or the head of family in case of family land which is communally owned, such grant is always made subject to the approval and consent of the elders of the stool or the principal members of the family. See France v. Golightly; France v. Addy (Consolidated) [1991] 1 GLR 74, Odametey v. Clocuh & Anr. [1989-90] 1 GLR 14, Republic v. High Court, Accra, Ex Parte Lands Commission, [1995-96] 1 GLR 208. In this case we have to examine the totality of the evidence adduced at the trial before us and to ascertain the category in which we are to place the supposed gift of the late chief of Awutu Ofaada to the plaintiff in 1947.

It is not disputed that the land which is the subject matter of this litigation is Awutu Ofaadaa stool land. It would be expected therefore that a grant of that land to a stool subject would follow a laid down customary law principle of alienation of stool or family land. In the instant appeal when the plaintiff gave evidence on oath at the trial she testified as to how the land in dispute was gifted to her at page 5 of the record of appeal as follows:
"I got this land when my uncle Otabil Ashalley II gave it to me to farm on. Otabil was the chief of Ofadaa stool. There were witnesses present when Otabil gave me the land. Though they are now deceased, they were my mother Tetewah, my father Kojo Teiko and Kofi Ashong. After the presentation custom was performed. I presented a bottle of schnapps as aseda to my uncle. That took place during that … eclipse of the sun. The size of the land is measured and my lawyer can tell the exact figure. I planted cassava, maize and palm on the land , the second defendant destroyed all these crops."

Our first observation is that the details of the plaintiff's sworn evidence quoted above do not answer to the requirements of customary law respecting grant of stool land by a stool to a subject. There is no evidence of approval and consent by elders of the stool. The description of what supposedly happened was at best a representation of a private donation of what was indisputably stool land in the presence of close family members, including the plaintiff's father. That answers more to a disposal of a personal and not stool property by the then chief of Ofaadaa as a gift to the plaintiff.

The conclusion by the trial court which was confirmed by the Court of Appeal to the effect that no gift of stool land was made by Nai Otabil Ashalley II to the appellant should mean that

any claim whatsoever based on the supposed ownership of the land in dispute cannot be sustained. Indeed the Court of Appeal had no cause to disturb the findings of the trial court. Its decision confirmed the vital finding of the trial court that the plaintiff failed to discharge the evidential burden placed on her by her pleading to the effect that the land in dispute was given to her as a gift by her late uncle, Nai Otabil Ashalley in 1947 when he was chief of Ofaadaa.

It is in this context that we ought to look at the grounds of appeal before this court. In the first place Grounds (a) - (d) of the grounds of appeal are a virtual reproduction of the grounds of appeal before the Court of Appeal with the necessary modifications. The only addition is Ground (e) of the grounds of appeal before this court, that is "The Court of Appeal erred by failing to find that the land was indeed gifted to the plaintiff/appellant/appellant." In any case we do not think that that additional ground (e) makes any difference. It is not surprising therefore that the appellant's statement of case in this appeal in respect of Grounds (a) – (d) of this appeal is a replica of the written submissions of appellant's counsel before the Court of Appeal. Since the Court of Appeal in its judgment assigned detailed reasoning to its conclusion that Ground (a), that is, "The judgment is against the weight of evidence", is unsustainable, it would be expected that in this appeal the written submissions of the appellant's counsel would at least devote some attention to the analysis by the Court of Appeal of the evidence adduced at the trial for its decision, which is the subject matter in this appeal. That was not done. In our view, therefore, there is no effective challenge to the ruling of the Court of Appeal's judgment before this court. For the reasons given in this judgment we dismiss the appeal as being without merit.

B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

DR. S. K DATE-BAH
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

COUNSEL:

GEORGE AGBEKO, JAN CHAMBERS FOR THE PLAINTIFF/APPELLANT/APPELLANT.

MAXWELL KOFI AMOAKOHENE FOR THE DEFENDANTS/RESPONDENTS/RESPONDENTS.

PASTOR YAW BOATENG v KWADWO MANU & ANOR. [28/5/08] CA NO. J4/24/2008 [Unreported]

IN THE SUPERIOR COURT OF JUDICATURE

THE SUPREME COURT

ACCRA.

CORAM: ATUGUBA, J.S.C. (PRESIDING)

BROBBEY, J.S.C.

ANSAH, J.S.C.

ADINYIRAH, J.S.C.

ASIAMAH, J.S.C.

CIVIL APPEAL NO. J4/24/2008

25TH MAY 2005

PASTOR YAW BOATENG

VRS.

KWADWO MANU & ANOR.

ATUGUBA, J.S.C.

In this case the Plaintiff/appellant/appellant hereinafter referred to as the plaintiff originally sued only the 1st defendant/respondent/respondent in the Assem/Kumasi Circuit Court claiming:

"(i) a declaration of title to all the 50 building plots bounded by Sisirasi land, Atakyem land and Kwaku Duah's oil palm plantation;

(ii) Special damages;

(iii) General damages for trespass;

(iv) An order of perpetual injunction restraining the defendant, his servants and or agents from in any manner whatsoever interfering with the property in dispute; and

(v) And for such further Order or Relief as the Honourable Court may find appropriate to make.

In the course of the proceedings the 2nd defendant/respondent/respondent (since deceased) was joined to the suit upon the plaintiff's application. The plaintiff lost in the trial Circuit Court and on appeal to the Court of Appeal.

He has further appealed to this court upon special leave. His grounds of appeal are as follows:—

"1. That the Court of Appeal erred in law in holding that the allocation note (Exhibit "B") issued in favour of the Appellant by the 2nd defendant/respondent was null and void for non-registration.

2. *That the Court of Appeal erred in law in holding that the Arbitration before Ejisu Traditional Council was valid and thereby estopped the Appellant from initiating the present suit.(e.s.)*

3. That both the trial Circuit Court and the majority of the Court of Appeal erred on the facts when they held that the land in dispute is the family property of the 1st defendant/respondent herein in the face of the incontrovertible evidence that such land as belonged to the 1st respondent's family had been lost through an auction as far back as 1944.

4. That the Court of Appeal erred in holding that the 2nd defendant/respondent could not on the basis of the principle of *nemo dat quod non habet* have validly granted the Appellant the disputed plots without the consent of the 1st respondent when there is unchallenged evidence on record to show that it was the whole Oman of Bosore duly represented by all the family heads including the 1st respondent's family who consented and decided to allocate the dispute plots to the Appellant.

5. That the judgment of the Court of Appeal is against the weight of evidence adduced at the trial".

Of these grounds of appeal ground 2 has preliminary effect, for if that ground fails then as Amissah J.A. said in *Akunorv. Okan* (1977) 1 GLR 173 C.A. at 177: *"If the validity of the arbitration is upheld, as I think it must, then the other points made by counsel for Madam Akunor with respect of the trial do not arise. For in that case there ought not to have been a trial".*

<u>The attack on the award as (1) not resulting in arbitration</u>

It is not disputed that the subject-matter of this case was decided by a panel of elders of the Ejisu stool pursuant to a complaint by the respondent. At p.6 of the record of appeal the plaintiff testified thus: *"I paid impiiso at Ejusu Traditional Council. There was arbitration and I stated my case. 1st defendant who was the complainant then also gave evidence. Our witnesses also gave evidence. The Bosore chief gave evidence for me. The claim before the Ejisu traditional council related to the land in dispute".* All this has been confirmed at pp. 118-121 of the record by the evidence of DW2, Okyeame Kwasi Ansah, an independent witness. This witness went further to add at p.12l of the record that *"Both parties agreed at the commencement of the proceedings that the arbitrators went into the matter.The parties paid some monies before the commencement of the proceedings. It was both parties themselves who jointly hired and provided the means of transport for the inspection team to visit the locus".* The costs awarded was also paid. What constitutes a valid customary arbitration is well settled. However, the statement of the principles thereof which best fits the facts of this case is that of Osei-Hwere J (as he then was) in *Adai v. Anane* (1973) 1 GLR 144 which was approved in *Kwaw v. Awortwi* (1989-90) 1 GLR 19 C.A. at 193 where the court states that: "Osei-Hwere J (as he then was) dealt with the matter at some length. At 146 holding (6) the principle was set down thus: *"when both partiers to an arbitration voluntarily submitted to an arbitration, had given evidence with their witnesses, paid the customary fee as well as the*

inspection fee and costs awarded, a valid arbitration had been held and the award would be binding on the parties to it ....." The plaintiff contends that there was no customary arbitration in this case since the proceedings at the Ejisu chiefs palace were commenced by a summons. He relies on *Republic v. Akrokere Sub-Traditional Council Ex parte: Carr* (1980) GLR 925 in which Roger Korsah J said at p.930: *"A summons threatens that if you do not appear in answer to it, judgment may be given against you or you may suffer some penalty. In so far as any proceedings begin with the issuance of a summons they cannot be classified as customary arbitration"*. The summons in this case did not contain any of the threats referred to by Roger Korsah J, supra, but it is exhibit 1 at p.223 of the record. I set it out in full:

"EJISU TRADITONAL COUNCIL

ETC/JM/6/165

Post Office Box 14

Ejisu-Ashanti

30th October, 1995

IN THE MATTER OF:

Abusuapanin Kwadwo Mensah }

Per his Lawful Attorney } Plaintiff

Kwadwo Manu }

All of Bosore }

Versus

Mr. Yaw Boateng } Defendant

Alias Osofo of Bosore }

SUMMONS

You are summoned to appear before the Omanhene, Nana Aboagye Agyei II and his Elders at the Palace-Ejusu on 9th November 1995 at 9.30 am to answer charges that have been preferred against you by the above-named Plaintiff.

Charge

To explain why you gave trespass

unto their land at a place known

and called Asikasuum.

Dated at Ejisu this 30th day of October 1995

Yours faithfully

for: REGISTRAR

(SARPONG BISMARK)

MR. YAW BOATENG

ALIAS OSOFO

OF BOSORE.

cc: Mr. Kwadwo Manu of Bosore

SUMMONS = ¢ 4,000.00

SUMMONS = ¢ 2,000.00

SUMMONS = ¢10,000.00

¢16,000.00

=========="

Surely the effect of the issuance of a summons on proceedings claimed to constitute a customary arbitration depends on the facts of the particular case. In the *Ex parte Carr* case, supra, the circumstances showed that the summons had a compulsive effect. So also the like proceedings in *Republic v. Ga Traditional Council, Ex parte Damanley* (1980) GLR 609 which were consequently denied the status of a customary arbitration by Mensa Boison J (as he then was). The body that decided the instant case was not a statutory traditional council. But even statutory traditional councils which normally operate through a summons are known to be alive to the difference between their purely statutory and arbitral functions and in this they have been judicially supported, see *Aduasiah v. Addae* (1982-83) GLR 226 and *Republic* v. *PNDCSecretary*, *Ex parte Oti* (1992) 1 GLR 471. In the instant case the evidence of DW2 Okyeame Kwasi Ansah, (earlier set out supra) an independent witness has clearly shown that despite the issuance of exhibit 1, the purported summons, the Ejisu chiefs panel of elders did in fact obtain the consent of the parties to the proposed arbitral proceedings. Thus any compulsive notion of the proceedings had been effectively dispelled. This shows that the description of "summons" given to exhibit 1 was purely colloquial. In any case it is notorious that the courts in Ghana, even though proceedings before them are initiated by writ of summons, are nonetheless consistently given jurisdiction to try amicable settlement of cases before them at any stage of the proceedings with the consent of the parties and it has never been heard of that the initial element of summons vitiates any such ensuing settlements.

The courts have determined from early times and consistently maintained that they will not allow form to defeat substance. Thus in *Republic v. Ve Traditional Council; Ex parte Atsu* (1968) GLR 784 at 788 Kingsley-Nyinah J said: *"it is not for nothing, -… that equity is said to pay more attention to the substance of things rather than to the mere form thereof. See the*

case of Parkin v. Thorold (1852) 16 Beav., 59 at pp.66-67 where it was stated that: "But Courts of Equity made a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance". This lays to rest the arguments based on the summons used to initiate the arbitration process in this case. It is clear that the plaintiff is fishing for grounds upon which to impeach the Ejisu chief's award which he finds distasteful. He never pleaded nor led evidence to show that he did not voluntarily submit to those proceedings. Though the plaintiff made no alternative pleas on this matter he pleaded and has urged all along that the said award should be set aside for fraud. If there was no customary arbitration award in the first place, how could the court be called upon to set it aside on grounds of fraud? To this plea of fraud I now turn.

<u>The attack of the arbitration award as (2) vitiated by fraud.</u>

The basis for this attack is that the deceased chief of Bosore (the former 2nd defendant in this case) made a statement to the police in which he stated that the appellant was allocated 50 plots of land but before the panel of elders of the Ejisu stool he said that only one plot was allocated to the appellant.

It has been firmly established from early times, as stated by Lord Cairns L.C. in *Thomson v. Eastwood* (1874-77) 2 A.C. 215 H.L at 233 that a finding of fraud is not to be made *"without clear and cogent evidence upon the subject"*. See also Nti v Anima (1984-86) 2 GLR 134, C.A. Definitely it is easier to prove certain types of fraud than others, for example the fraudulent transfer of a huge debit from the private account of a person into a partnership account, as in *Barclays Bank* D.C.O. v. Heward-Mills (1964) GLR 332. When it comes to false evidence in a case the case of *Reginav. Ashford, Kent, Justices, Ex parte Richley* (1956) 1 Q.B. 167 C.A is very instructive. As stated in the headnote:

"In affiliation proceedings, the alleged father called as a witness a man who, he understood, had associated with the mother of the child. *In the witness box, however, the man denied having had sexual intercourse with the mother*. The justices made an affiliation order. On appeal to the appeals committee the man refused to answer material questions. The committee dismissed the appeal. *The man was subsequently tried for perjury and called the mother in support of his defence. He was convicted*. The alleged father thereupon applied for an order of certiorari to quash the order of the justices on the ground that the order had been procured by fraud:—

Held, that the court, in the exercise of its discretionary jurisdiction, would not quash by certiorari an order of an inferior court on the ground of fraud *unless the fraud was clear and manifest; in the present case, the court was not satisfied beyond doubt that if the mother had been tried for perjury it would have been proved by admissible evidence against her and*, accordingly, the application would be refused.

Dictum in Colonial Bank of Australasia v. Willan (2874) J.R. 5 P.C. 417, 450 applied.

Rex v. Recorder of Leicester [1947] K.B. 726; 63 T.L.R. 333; [1947] 1 All E.R. 928 and Reg. v. Gillyard (1848) 12 Q.B. 527 distinguished.

Per Jenkins L.J. Without attempting to lay down any general rule, I think that an order of certiorari to quash proceedings on the ground that they were procured by fraud or perjury should seldom if ever be made *unless the facts regarding the alleged fraud or perjury have either been the subject of a conviction in regular criminal proceedings against the person to whom the fraud or perjury is imputed, or else have been admitted by something amounting to a confession by such person.*

Decision of Divisional-Court affirmed".

The question is whether the falsity of the "evidence" of the chief of Bosore in this case has been established and that to a fraudulent degree. It must be noted that though the plaintiff produced certain documents at the arbitration proceedings to support his claim the arbitrators accepted the explanation of the Bosore chief that the document he thumbprinted related not to grant of land to the plaintiff but to an electricity project. There is therefore no guarantee that the arbitrators would have held that the Bosore chief's alleged inconsistent statement to the police made him a liar. It has to be borne in mind that there is no indorsement that the said statement was read and explained to the Bosore chief before he thumbprinted it.

In these circumstances it cannot be said that the "evidence" of the Bosore chief at the arbitration practiced any fraud on the minds of the arbitrators.

If the plaintiff had raised the matter of the said police statement before the arbitrators the Bosore chief might have satisfactorily explained it away, as he did in respect of the document he thought related to electricity.

In any event it is very ill of the plaintiff who called the Bosore chief as his witness not to have drawn the attention of the arbitrators to the said inconsistent statement of the Bosore chief nor to have called evidence of it. If any fraud was therefore practiced on the arbitrators, the plaintiff by his default was *particeps delicti* and having thus conduced to the alleged fraud, it would be an abuse of the process to entertain his action. The evidence does not suggest that the plaintiff was unaware of the alleged inconsistent statement of the Bosore chief when he participated in the arbitration proceedings.

A persons cannot take advantage of his own wrong, see *Acquah v. Oman Ghana Trust Holding Ltd/ (Ltd.) (1984-86) l GLR 157 C.A.* Thus in *Greenwood v. Martin Bank* (1933) AC. 51 H.L. it was held that a man who knew of forgeries by his wife but did not disclose them could not sue for wrongful payments out of his account.

I need not multiply the reasons.

For the foregoing reasons the appeal is dismissed,

W.A. ATUGUBA

JUSTICE OF THE SUPREME COURT

BROBBEY, J.S.C.

The appellant who was the plaintiff at the Circuit Court issued a writ against the defendants. The initial writ was amended and so his final claims on which the trials were based were for

"(i) A declaration of title and beneficial ownership of 50 building plots at Basore/Ashanti bounded by Sirasi land, Atakyem land and Kwaku Duah's oil palm plantation.

(ii) An order setting aside the arbitral proceedings between plaintiff and 1st defendant before Nananom at Ejisu.

(iii) Special damages.

(iv) An order of perpetual injunction restraining the defendants, their servants, and agents from in any manner whatsoever interfering with the property in dispute."

Against the reliefs, the first respondent who was the first defendant when the case was initiated, filed his defence which was accompanied by the following counterclaim:

"(a) A declaration that all that piece or parcel of land situate and lying at Basore on the Ejisu stool land and bounded by Asukese Stream, Basore township, Opanin Osei Tutu and Atakyem land is the defendant's family property.

(b) Damages for trespass

(c) An order for injunction restraining the plaintiff, his agents, servants and workmen from, in any manner, interfering with the defendant's possession and occupation of the aforesaid land."

The appellant lost the case at the Circuit Court. He appealed to the Court of Appeal where he lost for the second time. He then appealed to this court after obtaining leave from here. The appellant argued the instant appeal on five grounds which will be considered seriatim.

The first ground of appeal read as follows:

"That the Court of Appeal erred in law in holding that the allocation note (Exhibit B) issued in favour of the appellant by the second respondent was null and void for non registration."

According to the appellant, he acquired fifty building plots for church and school purposes and that acquisition, he was issued with an allocation paper which was tendered as Exhibit B. Relying on Act 22, s. 24(1), the Court of Appeal took the view that exhibit B was invalid because it had not been registered. Allocation paper is the initial process to evidence that land has been acquired by an individual or corporate body. That kind of paper cannot by itself represent the acquisition. It therefore does not need to be registered in order to be valid. There are three main reasons why they cannot represent the fact of acquisition: Firstly, the allocation paper may or may not state the nature of the acquisition, ie whether it is a lease, a sale, a pledge, mortgage, a gift etc.: Secondly, it may not specify the duration of the acquisition and thirdly it may not give details of the extent of the land acquired. On its face, exhibit B, the Allocation Paper in the instant case, was in the following terms:

"BOSORE STOOL LAND

NANA BOSOREHENE –

Owusu K wame Ababio II

P. O. Box 26072, Kumasi.

Rev. Yaw Boateng

Box 2607

Kumasi

Dear Sir/Madam,

ALLOCATION OF 50 PLOTS AT BOSORE/KENYASI-ASHANTI (KWABRE)

LET IT BE KNOWN BY PUBLIC THAT, The Bosore stool land headed by Nana Owusu Kwame Ababio II have allocated fifty (50) plots at Bosore/Kwabre to:

Mr. Yaw Boateng

P. O. Box 2607, Kumasi.

Since all the necessary rites and other commitments have been met by the allottee, the Bosore stool land have formally allocated these plots to Mr. Yaw Boateng of P. O. Box 2607, Kumasi, H/No BE 19, Bosore/Kwabre and becomes the rightful owner accordingly.

Dated in Kumasi this 11th May, 1990.

Yours faithfully,

RTP

Nana Owusu Kwame Ababio II

RTP

ELDER VICE CHAIRMAN

BOSORE COMMITTEE

(OPANYIN KWASI TAWIAH)"

It is apparent from exhibit B that the allocation given to the appellant did not indicate the nature of the allocation, for how long the land was allocated, the terms of the allocation and even the consideration for the allocation. Registering a document like that would not validate it to be able to give it any more probative value. At best it may be stamped for the sake of its admissibility. When admitted in evidence, it can only show that some transaction had taken place to signify that the owners or holders of land had purported to give some land to an individual or a corporate body. The grantee will thereafter proceed to perfect his title by obtaining the appropriate documents which will have to be registered. The allocation paper per se cannot pass title to the grantee. The conclusion of the Court of Appeal on the probative value of exhibit B was correct but not for the reason of non registration. The first ground of appeal failed and should be dismissed.

The second ground of appeal read as follows:

"That the Court of Appeal erred in law in holding that the arbitration before the Ejisu Traditional Council was valid and thereby stopped the appellant from initiating the present suit."

The circumstances that gave rise to this ground of appeal were that in the course of the trial the appellant and the respondents agreed that there was an arbitration at the Ejisu Traditional Council on the same land which is the subject-matter in the instant appeal: Judgment was entered for the respondents in that arbitration. The Court of Appeal therefore took the view that the appellant was estopped from re-litigating on the same subject-matter.

From the record of proceedings, there was no doubt that what took place was a customary arbitration. In the judgment of the Court of Appeal, the essentials of customary arbitration as enunciated in the celebrated case of ***Budu v. Caesar*** [1959] GLR 410 were relied upon before the court arrived at its conclusions on the issue. In addition to that case, this court elaborated on the requirements for valid customary arbitrations as follows in ***Dzasimatu v Dokosi*** [1993-94] 1 GLR 463(in the head note):

"1. A purported arbitration is binding if (a) the submission of the dispute was voluntary; (b) the parties agreed to be bound by the decision whichever way it went; (c) the rules of natural justice were observed, although the arbitrator did not need to follow any formal procedures; (d) the arbitrator acted within jurisdiction; and (e) the decision or award was made known."

The arbitration in the instant case was evidenced by exhibit 2 which seemed to sum up the record of proceedings and the award. Exhibit 2 showed that the appellant consented to the arbitration and participated in its proceedings. The parties called witnesses in support of their respective cases. The arbitration concerned the very land which was the subject-matter of the case in the circuit court which has culminated in this appeal. The award of the arbitration was publicized. The award went against appellant. He nevertheless proceeded to pay the costs awarded against him. By all indications, the arbitration was valid.

There was no evidence of any protest by the appellant after the arbitration until he was confronted with the effect of the award. It was then that the argument was raised on his behalf that the chief of Basore perjured himself in the arbitration proceedings by telling the arbitrators that he gave only one plot to the appellant when he had previously given a statement to the police that he gave fifty plots to him. The trial court and the Court of Appeal rightly rejected the arguments because the ingredients of perjury were not established on the facts.

Apart from that failed attempt at impugning the arbitration on the grounds of perjury, the appellant by all indications accepted the customary arbitration and never questioned it in any guise or form. The appellant was bound by the award at the arbitration. The well established rule is that where parties consent to an arbitration and they participate in it, they are estopped from re-litigating over the subject matter of the arbitration: There are countless authorities on this principle which included **Attah v Lagos** [1960] GLR 42 and **Akunor v Okan** [1977] 1 GLR 173, CA. In the latter case, it was held that since the parties were heard and were allowed to call witnesses, the arbitration could not be faulted.

Two cases that turned on facts similar to the instant case were **Aduasiah v Addae** [1982-83] GLR 226 and **Kwaw v Awortwi** [1989-90] 1 GLR 190, CA. In the former case, the parties went through arbitration and an award was pronounced. When the dissatisfied party took action in court, it was held that he was estopped from raising the same issues that have been raised before the customary arbitrators. In the latter case, the plaintiff accepted the arbitration and paid part of the award. He later changed his mind and instituted action in the circuit court for the same reliefs determined by arbitration. It was held on appeal that the arbitration was binding on the parties and they could not re-litigate on the issues already determined.

From the principles of estoppels raised by the customary arbitration, the appeal should fail.

Grounds four and five are couched in different words but they raise similar issues and will therefore be considered together. The two grounds are based on the allegation that the entire township of Basore gave the disputed fifty plots of land to the appellant for which he paid an amount of two hundred and fifty thousand Cedis. In the alternative, he claimed to have bought it and paid that price for it, although he had stated in his pleadings that he paid aseda for the portion given to him.

To my mind, one of the most serious questions raised in this case is whether in this day and age of constitutional rule with all the talk of fundamental human rights to own property, the Oman could just get up and grab any land that belongs to a family because the town has to be developed, as was alleged by the appellant in his evidence at the trial court.

My view is that the Oman could do that if the land was stool land which had not been reduced into the possession or ownership of any citizen or family within that Oman. In the instant case, the land seemed to belong to the family of the 1st respondent who had had judgments in his favour at the customary arbitration and a previous circuit court litigation. The Oman could not just get up and allocate fifty building plots to an individual where the evidence suggested that the plots formed part of land which was not stool land. That could only be done with the consent of the family because of the elementary principle that *nemo dat quod non habet* or that no one can give what he does not have. If land is to be given away, that could be done if it is established that the land is undoubtedly stool land or state owned. In the instant case, there was no evidence that the land belonged to the stool.

In any case, the onus was on the appellant as the plaintiff to have proved that the land belonged to the stool so as to justify the stool allocating it to him. There was no such evidence on the record. Throughout the trial, the onus remained on the appellant to have shown how he acquired the land. That he failed to do by the inconsistent sources he described as to how he acquired the land. In the allocation paper, exhibit B, no indication was given as to the nature of the grant. In court, he testified that he bought it. There is evidence that the appellant claimed to rendered thanks or gave "aseda" for the land he acquired. By the use if the word "aseda" which he said he gave after the land had been given to him, he undoubtedly gave the impression that he acquired the land by a gift. At customary law, no one who buys land and proceeds to make a thanksgiving to the seller. "Aseda" is given where there has been a gift and not otherwise.

There was no merit in the third and fourth grounds of appeal. Both failed and I would dismiss them.

The last ground of the appeal is that

"The judgment of the Court of Appeal is against the weight of the evidence adduced at the trial."

In arguing this ground, counsel for the appellant invited this court to reverse the findings of fact made by the trial court and those of the Court of Appeal for various reasons. There is no doubt that this court has the power to reverse the findings of the trial court or even those of the Court of Appeal: There are however established grounds on which this court will interfere with the findings of facts. Many of these were ably reviewed by counsel for his respondent. In ***Macaja v Ibok*** (1946-49) 12 WACA 148, it was held that where the trial judge had made findings of fact and there was evidence in support of those findings, the appellant court will not interfere with them. The appellate court is not to set aside the findings of the trial court unless there is clear evidence of some blunder or error is seen on the face of the record which results in miscarriage of justice: ***Obrasiwa v Otu*** [1996-97] SCGLR 618, SC and ***Achoro v Akanfela*** [1996-97] SCGLR 209. In the instant case, there was no evidence of such a blunder on the record. Another peculiar nature of this case is that the findings of the trial court were based on the observations of the trial judge on the demeanour of the parties and their witnesses. There are numerous authorities supporting the proposition that the findings of a trial judge who had the advantage of seeing parties and witness should ordinarily not be interfered with by the appellate court which is at a disadvantage as against the trial judge: See ***In re Okine*** [2003-2004] SCGLR 582. In Exceptions to this principle would be made where the trial judge failed to use or misused the advantage, failed to observe inconsistencies or made obvious illogical deductions. In view of the fact that the findings of the trial judge which were upheld by the majority justices of the Court of Appeal were clearly supported by the evidence on the record and no serious blunder on the part of the trial judge and the majority decision of the Court of Appeal, I find no merit in ground five of the ground of appeal. That ground also failed and I would dismiss it.

In sum, I find no merit at all in this appeal which should not have been pursued to this court, considering the fact that the appellant has lost on more than two occasions in his fight for the fifty plots of land.

S.A. BROBBEY

JUSTICE OF THE SUPREME COURT

J. ANSAH

JUSTICE OF THE SUPREME COURT

S.O.B. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

S. K. ASIAMAH

JUSTICE OF THE SUPREME COURT

COUNSEL

Stephen Sondem for the Appellant.

Kwasi Afrifa for the Respondent.

FKA COMPANY LTD v. EFFAH SARKODIE [27/10/2008] CA NO. J4/33/2007 [Unreported]

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – GHANA

CORAM: MRS WOOD, CJ (PRESIDING)

ADZOE, J.S.C

BROBBEY, J.S.C

ANSAH, J.S.C

ASIAMAH, J.S.C

CIVIL APPEAL

NO. J4/33/2007

27TH OCTOBER, 2008

FKA COMPANY LTD ... PLAINTIFF/RESP/RESPONDENT

- VRS –

EFFAH SARKODIE ... DEFENDANT/APPLT/APPELLANT

JUDGMENT

WOOD C.J

BRIEF FACTS

The Plaintiff/Respondent/Respondent (hereinafter known as the Plaintiff) issued out an Amended Writ of Summons and Statement of Claim on the 27th May 2003 for the following reliefs:

1. Declaration of title to all that land situate, lying and being at New Weija-Accra and containing an approximate area of 95.194 acres more or less and bounded on the Northwest by a proposed road measuring 2891.70 feet more or less, on the Northeast by a proposed road measuring 2656.39 feet more or less, on the Southeast by Weija lands measuring 1889.36 feet more or less and on the Southwest by Weija lands measuring 2068.55 more or less.

2. Recovery of possession

3. Damages for Trespass

4. Perpetual Injunction

5. Further or other orders

Plaintiff's case is that its Managing Director had acquired a large swathe of land from the Weija stool by way of customary grant in or about 1980. He immediately went into possession by clearing the land and erecting boundary pillars.

In 1998, when Plaintiff was incorporated, its Managing Director requested the stool, acting by its Chief Nii Anto Nyame II that the documents in respect of the land be made out in the name of the Plaintiff Company.

It is also the case of Plaintiff Company that a cadastral plan prepared by the Government to delineate the precise boundaries of the stool and family lands of Weija clearly defined Plaintiff's land in the plan, except it was marked as "FAK" instead of "FKA"

It was Plaintiff's further contention that its grantor, the Weija Stool had had its title confirmed in various judgments e.g. Manche Anege Akwei v Manche Kojo Ababio IV (Accra Water Works Acquisition) dated 24th July 1948 and another judgment of the Full Court dated 1924. Further, that various portions of the land acquired for public use by the then Gold Coast Government paid compensation to the Weija Stool and no one else.

Plaintiff says the Defendant has illegally entered onto portions of its land and causing damage and loss to Plaintiff consequently necessitating the Writ and Statement of Claim.

The Defendant conversely denies the Plaintiff's claim and asserts that he acquired the property from his grantors the Ngleshie Amanfro stool who took him to the Chief of Weija Nii Anto Nyame II and his elders since they are "allied families" and the Weija Chief agreed to make a grant to him of the land. Defendant further says that he made an initial payment to the Ngleshie Amanfro Family and subsequently made further payments to the Weija Chief and his Elders for the land. The Defendant further contends that even though Weija Stool was adjudged owner of the lands, the Government has nonetheless not released the land to the Stool and therefore Plaintiff cannot claim the land as the land is still plotted in the name of the Government.

The trial judge after hearing entered judgment for the Plaintiffs on all the reliefs endorsed on his writ.

Aggrieved by the decision of the trial court the Defendant filed an appeal in the Court of Appeal.

1 GROUNDS OF APPEAL

1. The judgment is against the weight of the evidence

2. Having regard to the state of pleadings and the evidence adduced during the trial, the court erred in entering judgment for the Plaintiff.

3. Further grounds will be filed on receipt of record of proceedings

The Court of Appeal dismissed Defendant Appellant's appeal and affirmed the decision of the Court below.

Further aggrieved, the Defendant filed a further appeal to the Supreme Court.

2 GROUNDS OF APPEAL

The Judgment is against the weight of the evidence.

As held by their Lordships in **Tuakwa v Bosom [2001-2002] SCGLR 61,**

"an appeal is by way of re-hearing, particularly where the Appellant alleges in his notice of appeal that the decision of the trial court is against the weight of the evidence... In such a case, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on a balance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence".

3 It is also provided in the **Evidence Decree, 1975 (NRCD 323)** Sections 11 and 12 as follows:

11(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence

12(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

12(2)"Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.

4 EVIDENCE

On the evidence, the Plaintiff acquired the tract of land customarily in 1980 from the Weija Stool. Defendant tries to counter this in his statement of case in the Court of Appeal as to the age and financial background but led no evidence in the trial Court to show that the circumstances of the Plaintiff witness was such that it was impossible for him to acquire such a large piece of land.

Defendant on the other hand admits in his evidence that he initially acquired the land from the Amanfro Stool who later led him to Weija to have the conveyance affirmed or regularised.

5 The **main issue** for the Court to determine will simply be that on a preponderance of the probabilities, whose story is more probable than not.

It is not surprising that the trial Court found for the Plaintiff.

Firstly, Plaintiff testifies that its Managing Director was granted the land customarily in 1980 by Weija Stool. This was not challenged in any particular by the Defendant, who also admitted that the land belonged to Weija by his being led there by the Elders of the Amanfro Stool to have his conveyance regularised. If Plaintiff's Managing Director was granted a customary conveyance, then even the Weija Stool had no more claim to the land and therefore had nothing to give to the Defendant Appellant.

Case of **DOVIE & DOVIE v ADABANU [2005-2006] SCGLR 905** by their Lordships as follows:

"An effective Customary conveyance divested the grantor of any further right, title or interest in the land to convey or grant to a subsequent grantee"

6 Further, pertaining to the issue of the identity of the land, the Court appointed Surveyor in his report tendered to the Court on the 7th of April 2005 testified that about 85% of the land being claimed by Defendant fell within land being claimed by Defendant, that the Cadastral Plan submitted by the Plaintiff conforms to what he surveyed whilst that of the Defendant had huge displacements. This is a crucial piece of evidence coming from an independent witness.

7 Plaintiff also obtained judgement against the elders of the Amanfro Stool as evidenced by Exhibits C,D & E. All these exhibits were tendered without objection and in Exhibit C, the Judge states that he ordered hearing notice to be served on the Defendants to contest the proof of title and assessment of damages and this was duly done but Defendants failed to appear to challenge the title. These judgements still stand as they have not been set aside and these judgments therefore proves a good title to the land.

8 Also Plaintiff tendered through Defendant witness Exh O which is a letter of consent to sublet and assign dated 31st July 2000. And recited in this letter is the schedule of the land of Plaintiff measuring 95.149 acres. If Plaintiff had not been granted this land, it is difficult to surmise how the Chief and elders would have given approval to sublet and assign the land.

9 It is also noteworthy that the dispute over the land began only after the death of the Chief of Weija and the conveyance to the Defendant was made by the acting Mankralo of the Weija Stool. The Wulomo of the Stool as Defendant Witness gave evidence that the only reason for the Plaintiff being on the land was because he had been made a caretaker of the lands by the stool. With all due respect, this beggars belief, and as was put to him in cross-examination by Plaintiff Counsel, this was highly improbable as Plaintiff MD was a stranger to the stool and could not have been made a caretaker for such a large tract of land. The only reasonable inference to be drawn here is that some Elders of the Weija Stool colluded with the Defendant after the death of the Chief to deprive Plaintiff of the land.

10 The Defendant in the Court of Appeal argued that the Plaintiff witness's testimony was full of inconsistencies and therefore must be discredited. An example of the inconsistencies he gave was the fact that Plaintiff testified that he had acquired 64 plots from the Chief himself which later turned out to be 60 plots. As stated by the Court of Appeal, that inconsistency cannot be fatal to Plaintiff's claim as it does not detract from the fact that Plaintiff bought the land in dispute from the Chief and elders of Weija.

In the case of **EFFISAH v ANSAH [2005-2006] SCGLR 943**, the Court speaking through Wood JSC (as she then was) held as follows:

"In the real world, evidence led at any trial which turned principally on issues of fact, and involving a fair number of witnesses, would not be entirely free from inconsistencies, conflicts or contradictions or the like. In evaluating evidence led at a trial, the presence of such matters per se, should not justify a wholesale rejection of the evidence to which they might relate. Thus in any given case, minor, immaterial, insignificant or non-critical inconsistencies must not be dwelt upon to deny justice to a party who had substantially discharged his or her burden of persuasion. Where inconsistencies or conflicts in the evidence were clearly reconcilable and there was a critical mass of evidence or corroborative evidence on crucial or vital matters, the court would be right to gloss over those inconsistencies."

Finally, in the Supreme Court, Defendant's appeal is based on the solitary ground that the Appeal is against the weight of the evidence.

The Defendant especially argues that as it was never established that the Plaintiff i.e. F.K.A Company had a prior grant in 1980, the trial judge and the Appeal Court were in error in holding that the land belonged to the Plaintiff. He further cited the case of **Salomon v Salomon [1897] AC 22** to buttress his point by saying that the Company had a separate legal entity from that of its Managing Director, and since Plaintiff Company was not incorporated until 1998, it was wrong to hold otherwise.

The evidence on record shows that the Defendant acquired two separate tracts of land from the Amanfro Stool in 1993 and 1996. From the report of the Surveyor, these two tracts fell squarely in the cadastral plan of Plaintiff. In 2000, he acquired another tract from the Weija Stool. For this land, it was only 8% of it which fell within Plaintiff's land. Inferentially, it could be said that since the land did not belong to the Amanfro Stool, they could not know

what had been alienated and what had not been but the Weija Stool were aware of what had been granted that was why what they granted to the Defendant had an error of only 8%.

It was found by the trial judge that indeed all the lands belonged to the Weija stool so the principle of *nemo dat non quo habet* comes into play here. The Amanfro stool could not have alienated lands it never had in the first place.

On the evidence, as Plaintiff witness had acquired the land customarily in 1980, there was even no need for him to go back to the Stool to have the Conveyance drawn up in Plaintiff's name.

Dovie & Dovie v Adabanu relying on **Hammond v Odoi** [1982-83] 2 GLR 1215 @ 1304 held thus:

"No document is necessary to effectuate the customary purchase, given that customary law knows no writing. And the conveyance made in accordance with customary law is effective as from the moment it is made. A deed subsequently executed by the grantor to the grantee may add to but it cannot take from the effect of the grant already made at customary law"

Effisah v Ansah [2005-2006] SCGLR 943

"It was well settled that an appellate court might interfere with the findings of a trial tribunal where specific findings of fact might properly be said to be wrong because the tribunal had taken into account matters which were irrelevant in law; or had excluded matters which were crucially necessary for consideration; or had come to a conclusion which no court, instructing itself in the law, would have reached; and where the findings were not inferences drawn from specific facts, such findings might be properly set aside. As a corollary, a second appellate court had power to restore primary findings of fact and right conclusions which might have been unjustifiably set aside by a first appellate court."

On an evaluation of the evidence as a whole, the judgment of both the trial court and the Court of Appeal cannot be disturbed as the evidence supports the findings made. In the circumstances the appeal fails and the same is accordingly dismissed.

G. T. WOOD (MRS)

(CHIEF JUSTICE)

ANSAH JSC.

This is an appeal against the judgment of the Court of Appeal dated 6th March 2007 which affirmed the judgment of the High Court, Accra, dismissing an action by the plaintiff therein, the appellant before us. The action was by its nature, one for a declaration of title to land coupled with the ancillary

The facts which gave rise to the action in the High Court, as well as the evidence and the issues at stake have been stated in the judgment read by the learned Chief Justice which I agree with. I only wish to add a few words of my own by way of contribution to the judgment aforesaid. I may not repeat them here except as and when it becomes necessary for me to do so.

The duty of an appellate court in an appeal on this ground was stated by this court in its unanimous judgment delivered by our esteemed sister, Akuffo JSC, in *Tuakwa v Bosom[2001-2002] SCGLR 61* where she said at page 65 of the report:

"..an appeal is by way of a re-hearing particularly where the appellant….. alleges in his notice of appeal that, the decision of the trial court is against the weight of the evidence. In such a case, although it is not the function of the appellate court to evaluate the evidence for the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyze the entire record of appeal, take into account the testimonies of all documentary evidence adduced at the trial before it arrived at its decision, so as to satisfy itself that on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence."

The issue was could the criticism against the judgment of the Court of Appeal be justified? The answer lay in the strength of the submissions in support of or against the appeal.

The appellant submitted the recital in the plaintiff's document of title in Exhibit B was false for in 1980, the Company had not been incorporated and was not in existence by then. Therefore the Court of Appeal committed an error when it affirmed the finding of fact by the trial court that the grant was made to the plaintiff respondent company in 1980.

The evidence led by both sides must be examined to see whether or not it supported the decision by the Court of Appeal.

In its amended statement of claim the plaintiff pleaded that:

"3 Plaintiff company says that long before Plaintiff Company was incorporated, its Managing Director, namely, Frederick Kofi Asare acquired a large tract of land by way of customary grant from the Weija Stool represented by its chief Nii Anto Nyame II."

The defendant denied this averment and pleaded that when the plaintiffs Managing Director went to the land he had been there already.

What did the Exhibit B say in connection with all this?

The recital had it that:

"And whereas in 1980 the Weija Stool made a customary grant of the land hereinafter described to he lessee but no deed was executed in favour of the lessee: AND WHEREAS the lessee has now made a request to the Weija Stool for a deed of conveyance to evidence the said customary grant…"

The lessee in Exhibit B was F.K.A. Company Ltd., the plaintiff respondent herein.

In his evidence in chief, the plaintiff gave evidence through its Managing Director and said it was in 1980 when he paid ¢60m to the chief of Weija and his elders for 95,194 plots of land. When in 1998 he formed a company he told the chief to prepare documents in the name of the company; that was how Exhibit B came to be prepared in the name of the company as the lessee.

Reading the evidence on record as a whole, the chronology of events was that in 1980, the Managing Director of the company took a customary grant of the plots of land from the Chief of Weija and paid for it. No documents were prepared for him. In 1998 he incorporated his company and requested the Chief to prepare a deed of conveyance for him but in the name of the company. Exhibit B was accordingly prepared. In other words what was begun in 1980 towards the acquisition of the land was consummated when Exhibit B was prepared. There was no variation of the contents of Exhibit B by the evidence led by the respondent for the evidence sought only to expatiate on the circumstances surrounding the acquisition of the land the first step for the plaintiff to take to discharge the onus on him to be entitled to the declaration he sought from the court. The criticism by the appellant to the effect that the plaintiff varied the contents of Exhibit B was not justified and is rejected.

The plaintiff also tendered Exhibit O through the DW1, Nii Kofi Okine II, the Seitse or Stool father of Weija, a signatory to the document, relevant portion of which document was that:

"The Weija Stool hereby grant (sic) consent to FKA Company Limited to assign portions of the land granted to the said company by a Lease which land is more or less more particularly described in the schedule below."

The lease was tendered in evidence as exhibit B

Laying the foundation for the tendering of the exhibit O, the DW1 said that the grant of the land was made to the company, (which was to say), the plaintiff. That would corroborate the evidence of the Managing Director and the case of the plaintiff company and the rule of law was:

"Where the evidence of one party on an issue was corroborated by a witness of his opponent whilst that of his opponent on the same issue stood uncorroborated even by his own witness, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good reason (which must appear on the face of the judgment) the court found the corroborated version incredible or impossible: see the dictum of Ollennu J (as he then was) in *Tsrifo v Dua VIII [1959]GLR 63 at 64-65 as applied in cases like Osei Yaw v Domfeh [1965] GLR 418, at 423, SC; Asante v Bogyabi [1966]GLR 232 at 240-241, SC and In Re Ohene (Decd); Adiyia v Kyere [1975]2 GLR 89 at 98, CA." see Banahene v Adinkra [1976]1 GLR 346 at* 350 per Anin JA (as he then was).

The case of the plaintiff was accordingly corroborated by the DW1 and the facts that emerged from the oral and documentary evidence were that the Managing Director of the plaintiff Company, in the person of Frederick Kofi Asare, took a customary grant of the land in dispute from the Weija Stool in 1980 and when he formed the company in 1998, he asked the Stool to prepare documents of title in respect of the land in he name of the company and what was done was the evidence in Exhibit B.

The Court of Appeal could not have erred when it affirmed the judgment of the trial court based on these findings of fact by the trial judge for they were supported by the evidence on record that the Weija Stool granted the land in dispute to the plaintiff company, in 1980.

Therefore, when the same stool purported to grant title to the same land to the defendant appellant in 1999, as per the indenture in Exhibit 1, it had divested itself of title to the land and had nothing to pass to the defendant appellant according to the "*Nemo dat quod non habet*" principle. Consequently, the defendant took nothing from the Stool.

In his judgment the late Kofi Akwaah J said considering a plan of the disputed land:

"Now this court ordered that a composite plan be prepared for the consideration by the Court. This was duly done and accepted by the Court. From the report submitted by the Survey Department, it is clear that all the three (3) different parcels of land shown on the ground by the defendant to be his actually fall squarely within the land shown by the plaintiff."

The learned judge, now of blessed memory, took pains to study the site plan and drew inferences from it. He went on to make decisive holdings, namely, that the Weija Stool exercised suzerainty over the Amanfro Stool and secondly, a grant by the Weija Stool is superior to any grant by the Amanfro Stool.

Furthermore, he held that:

"I hold further that plaintiff has a valid grant from Weija Stool and that the Weija Stool by its registration, has divested itself of this land in favor of the Plaintiff and thus cannot validly make any grant of any portion of this land to anyone else, defendant included. Defendant therefore cannot lay any claim to any part of this land."

The appellant has not challenged the validity of this material statement of the law in this appeal and I affirm it.

The trial judge had both oral and documentary evidence before him to guide him to determine the pivotal issue as to which of the parties was better entitled to the area in dispute and also whether or not the plaintiff was entitled to the remedies he sought from the court.

He carefully considered the evidence before him and made his findings of facts and concluded that the plaintiff succeeded on his claims and entered judgment for him accordingly. The Court of Appeal concurred in the judgment of the trial court.

As a matter of law, where the Court of Appeal confirmed the judgment of the trial court the principle of law which has guided this court in considering appeals against concurrent judgments of lower courts has been stated several times over so that it is well ossified into the judgments in cases like *Ntiri & Another vEssien & Another [2001-2002] SCGLR451* where Bamford-Addo JSC said at page 459 that:

"In this case, there has been concurrent finding of fact by two lower courts and in such circumstances an appellate court would not interfere with concurrent findings of fact unless

it can be shown that there has been a patent error on the facts which had resulted in a miscarriage of justice. As to when an appellate court would overturn the concurrent findings of fact made by the lower courts: see the following case which sets out the conditions under which the Supreme Court will interfere with concurrent findings of fact made by lower courts. The case of *Obrasiwa v Out [1996-97] SCGLR 618*, where the Supreme Court held (as stated in the head note), in dismissing the appeal from the decision of the National House of Chiefs, that:

"where the lower court appellate court had concurred in the findings of the trial court, especially in a dispute, (the subject matter of which was peculiarly within the bosom of the lower courts or tribunals,) a second appellate court would not interfere with the concurrent findings of the lower courts unless it was established with absolute clearness that some blunder or error which had resulted in a miscarriage of justice was apparent on the face of the way the lower tribunals had dealt with the facts. The errors would include: an error on the face of a crucial documentary evidence; and a misapplication of a principle of evidence and; finally, a finding based on n erroneous proposition of law such that if that proposition was corrected the finding would disappear. However, it was not enough that the blunder or error per se was established; it must further be established that the said error had led to a miscarriage of justice. *Achoro v Akanfela [1996-97] SCGLR 209 …"*

Koglex Ltd (No.2) v Field [2000] SCGLR 175 was a further explanation of the principle governing appeals against concurrent findings of fact by lower courts.

A reading of the record shows the findings of fact made by the trial court were amply supported by the evidence on record and therefore an appellate court must be loath to interfere with a judgment based on those facts. A second appellate court must be satisfied there was or were errors in the judgments of the lower courts before it might allow an appeal premised on the ground that they were against the weight of evidence. The appellant did not succeed in discharging this burden on him.

The judgments of the lower court are affirmed. The appeal is dismissed.

J. ANSAH

(JUSTICE OF THE SUPREME COURT)

I agree

T. K. ADZOE

(JUSTICE OF THE SUPREME COURT)

I agree

S. A. BROBBEY

(JUSTICE OF THE SUPREME COURT)

I agree

S. K. ASIAMAH

(JUSTICE OF THE SUPREME COURT)

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Cases Referred to in this Book

Statutes Referred to in this Book:

[i](1954) 14 W.A.C.A. 554 at p. 557.

[ii](1951) 13 W.A.C.A. 164.

[iii]Supra.

[iv](1956) 1 W.A.L.R. 62.

v See discussion of this in Allott, *Essays in African law*, Chap. 10 (1960):

"Writing and Title to Land in Ghana."

vi Act 63 s. 82. See also s. 76 *re* number of personal representatives necessary where there are infant beneficiaries

vii See Immigration Ordinance (Cap. 48). A new Aliens Law is in course of preparation.

viii See Chap. 10, p. 336.

[5]
ix See also Administration of Lands Act, 1962, s. 12 quoted in Chap. 2 *re* stool lands.

[6]
x *Cf.* Sarbah F.C.L. 86-87; Rattray, *Ashanti Law and Constitution*, 358.

[7]
xi See Chap. 9, *supra.*

[8]
xii Trama is explained by Rattray as follows: "*Tramma* means literally cowries, the small shells from the Indian Ocean which, by the route from the north, found their way all over West Africa, and to this day may be seen used for small change in the native markets. The word came to be applied to a sale of movable or immovable property in the following manner. No contract of sale was valid in olden times unless a payment called *tramma* had been made. *Tramma* was the name derived from that sum, additional to the selling price which was set aside and given to the witnesses of the transaction," *Ashanti*, 234 (1923).

[9]
xiii Sarbah F.C.L. 93.

[10]
xiv Cf. Judgment of Lingley J., in *Biei* v. *Akomea* (1956) 1 W.A.L.R. 174.

[11]
xv Cf. Dicta of Ollennu J., as he then was, in *Akomea* v. *Biei*, (reported in the cyclostyled "Written Judgments" January-June 1958, 98 at 99): "Guaha is a custom performed in certain parts of Ghana upon the sale of land. It signifies the 'cutting off' of the title of the vendor from the land, and vesting that title in the purchaser. In cases of uncertainty of the nature of a transaction between two persons in relation to land, evidence that the guaha custom was performed is conclusive that the transaction was a sale and nothing else."

Cf. Abatutu anyigba dzi among the Ewes, *ziba yibaa pom* among the Adangmes, *shikpong yibaa foo* in the Accra-area. The family likeness of the words *anyigba, yibaa, ziba* and *shikpong* (all meaning or referring to land) is striking, and suggests land apportionment as the crucial title transfer event here. Slaughtering a sheep "twa guan" provided solemnity to a range of solemn occasions among Ashantis and Fantis as in other communities; but they seem to have isolated the purely commercial *contract* sealed, by the evidentiary *trama*, from the symbolic guaha, described by Dr. Danquah for Akim Apuakwa. See A.L.C. 217-218. Compare with the Introduction to his *Cases in Akan Law* xxxii. Also Rattray, *Ashanti Law and Constitution*, 358.

[12]
xvi Sarbah F.C.L. 94.

[13] xvii Danquah, A.L.C. 217.

[14] xviii *Ibid.*

[15] xix *Cf. Jolowicz, Historical Introduction to the Study of Roman Law,* 525 (2nd ed. 1952): "The influence of Greek rules with regard to sale is also seen in the law concerning *arra* or earnest money. In the classical Roman law *arra* served purely evidentiary purposes; but as we have already noticed, in Greek law, where the rule of consensual sale is not so fully developed as at Rome, its object was the much more important one of serving as a forfeit in case the giver (normally the buyer) failed to fufil his contract, while the recipient, if he failed, had to restore the *arra* and as much again. The *arra* could thus be said to have a 'penetential' function, i.e., either party could withdraw from the bargain, provided he was willing to lose the amount of the *arra*. This penetential function Justinian tried to fuse with the Roman evidentiary function when he enacted what is precisely the common Greek rule that on failure to fufil the giver forfeits the *arra* and the recipient restores twice the amount."

Cf. Rattray, *loc. cit., supra*, (note 8) at 235: "This *tramma* may perhaps be called 'earnest money', but it was not originally paid to the vendor. If the transaction was afterwards repudiated, the receivers of the *tramma* were the witnesses to vouch for the transaction. The word therefore came to be used to designate a sale outfight as opposed to *awowa*, 'pledge', or in the case of land, 'mortgage'."

[16] xx See note 33, Chap. 7.

[17] xxi See note 31, Chap. 7; Ollennu J., took a position of impressive boldness in *Kwame* v. *Fio* when he made the following pronouncement: "It is true . . . that specific performance is an equitable relief. But it does not follow that every claim which a Ghanaian makes to compel another Ghanaian to fulfil a promise or an agreement is a claim for specific performance under English principles of equity. Long before the introduction of English law into this country a person could be compelled by the Council of Chiefs to fulfil his promise, or to comply with the terms of an agreement which he bad entered into with his neighbour, where such compulsion could be effectively carried out. Thus, where a person bargained to sell land to his neighbour out failed to put him in possession, the elders would compel the vendor to give possession or the land sold to the purchaser. Upon his default the elders themselves would go upon the land known to belong to the vendor, and out of it demarcate for the purchaser a portion equal in size to the dimensions agreed upon between the parties." (See his Lecture No. 8 entitled "Alienation and Transfer", p.70.) While respectfully agreeing with what must be taken to be his central contention here that there is equity to be found in the indigenous law, his actual illustration, it submitted respectfully, bristles with difficulties. He himself observes, citing his own judgment in *Donkor* v. *Asare*, that "where demarcation or the cutting of *guaha* (or both) are not performed, the sale is not complete and title does not pass." The illustration here is only of a *bargain* to sell land where none of these things have taken place and where possession has not been guaha. The problem of possible difficulties with adjoining owners is latent, as also is that of identifying land owned by the vendor. With the plentifulness of land in those days, would" substitutive approach not have been more likely? Contrast Danquah, A.L.C., 218. The Ollennu lectures now appear in *Principles of Customary Land Law in Ghana* (1962). See pp. 111 and 121.

[18] xxii Dr. Danquah writing in 1928 (A.L.C.) is able to say tersely: "Private property may be sold in one of two ways: (1) by the Akan custom as expounded above; or (2) by the English mode of sale and conveyance recently introduced."

> On "the sanctity attaching to written documents", quotation of the following lucid exposition from Allot, *Essaysin African Law*, 343 (1960) is irresistible: In Akan custom, practically every agreement, appointment, settlement or other transaction has to be customarily 'stamped' or 'sealed'. The 'stump' usually takes the form of some valuable thing given by the grantee or person benefitted to the grantor, which is often sheep, drink, or their value in money. Such a stamp is often termed *aseda* or 'thank-offering'. Stamping goes to the enforceability or irrevocability of the act stamped. Most transactions in native customary law must also be carried out in the presence of witnesses; and such witnesses share in the *aseda* given. The presence of witnesses is a most important element in the subsequent proof of the transaction. Witnesses are of two kinds, *important* and *partial.*
>
> Impartial witnesses merely testify to the transaction's having taken place. Partial witnesses are those who are themselves interested in the *res* of the transaction; they are thus subsidiary parties in the transaction, whose interest is bound by their presence and acceptance of part of the *aseda*, which signify their consent to the transaction where this is required. A written document plays a multiple function in native customary law. It goes to *enforceability*, since frequently I have been told that customary 'stamping' is not required if writing is used. It goes also to proof, since a document signed by witnesses is accepted as strong—if not conclusive—evidence by the native courts. It also *binds* those described above as partial witnesses; expressly, where they have subscribed the document as witnesses, and impliedly, where use of documents is held to abrogate the necessity for their evidence and at the same time their right of consenting or not consenting."

[19] xxiii See note 11, *supra*, for reference. The central justification for the judgment of Lingley J., which this judgment confirmed, rests on long possession, acquiescense and other consideration, as against the native court's formalism. But that the Court of Appeal should, in the "guaha" part of its judgment, have featured the above-quoted evidence as the only evidence adduced and yet shown no hesitation in accepting it as evidence of *performance*, is striking.

[20] xxiv *Land Law and Custom in the Colonies*, 171 (1946).

[21] xxv The French system of *notaires* is worth study in this respect.

[22] xxvi This is very common. The possibility of fraud in reciting earlier customary transactions that may never have taken place obviously requires watching. *Dowuona* v. *Assabil* (1914) D. & F. 1911—16, 72; *Brobbey* v. *Kyere* (1936) 3 W.A.C.A. 106; *Sasraku* v. *David* (1959) G.L.R. 7; *Cofie* v. *Quaynor* [1951] G.L.R. 300. *Bruce* v. *Quarnor* [1959] G.L.R. 292.

[23] xxvii See Chap. 6, note 40.

[24] xxviii See criticism of Fynn's and Fawcett's cares in Chap. 7.

[25] xxix *Cf. Irons* v. *Smallpiece* (1819) 106 E.R. 467; *Cochrane* v, *Moore* (1890) L.R. 25 Q.B.D. 57, in which previous English cases on the issue of delivery in connection with gifts were reviewed. The court concluded as follows: "This review of the authorities leads us to conclude that according to the old law no gift or grant of a chattel was effectual to pass whether by parol or by deed, and whether with or without consideration unless accompanied by delivery; that on that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery; but that as regards gifts by parol, the old law was in force when *Irons* v. *Smallpiece* was decided: that case therefore correctly declared the existing law." See also: Mechem, "The Requirement of Delivery, etc.," 21 Ill. L. Rev. 341, 457, 568 (1926): Rohan. "The Continuing Question of Delivery in the Law of Gifts" 38 Ind. L.J. I (1962).

[26] xxx (1938) 4 W.A.C.A. 165.

[27] xxxi *Cf.* Danquah, A.L.C. 219: "Whenever a gift is made, and especially when the thing given is in the form of landed property, it is always customary to give drink or money thank-offering to the person making the gift in the presence of witnesses. When this is done the transaction is complete."

[28] xxxii (1891) Sar. F.C.L. 137 at 142.

[28a] xxxiii See s. 87 (1) of the Courts' Ordinance 1935 (Cap. 4).

[29] xxxiv See Griffith's *Digest*, 90. *Adai* v. *Daku* (1905) Ren, 348, and 417; it also appears in Red. 231 in the collection of cases which, as Redwar tell us in his prefatory note, were supplied by Sarbah and Bannerman.

[30] xxxv 8th Lecture 75. This now appears in Ollennu, *Principles of Customary Land Law in Ghana*, 115 (1962).

[31] xxxvi (1958) 3 W.A.L.R. 475.

[32] xxxvii It is of interest to observe in this connection that in Roman law (under Justinian) all gifts might be revoked on the ground of serious acts of ingratitude on the part of the donee. (28 Inst. 2.7.2; Cod. 8.55.(56).10). The fact of ingratitude had to be determined in court.

Again under the French Civil Code there are three grounds specified for the rescission or revocation of gifts. The ingratitude of the donee is one of these. Such ingratitude also has to be established in court, and the grounds for so finding are—whether the donee makes an attempt on the life of the donor, or is guilty of a serious crime, cruelty or libel against the donor, or refuses him maintenance and care. (Code Civil Arts. 953, 955). A claim for revocation cannot be made by the donor against the heirs of the donee, nor by his heirs (except in certain circumstances) against the donee. (*Ibid.*, Art. 957).

Planiol evaluates this position as follows: The cases of the donee's ingratitude resemble very much the grounds for the unworthiness of an heir, listed in Art. 727. But simple comparison of the two articles shows that the statute is more severe in the case of the donee. This difference is justifiable on the ground of various considerations. The heir is called by law. He has a right, of which he is to be deprived only because of serious acts. By contrast, the donee would not have received anything except for the special benevolence of the donor, for which he must show gratitude. Also, the decedent could have disinherited, at least partially, a presumptive heir with whom he was dissatisfied; but a donor, who is irrevocably deprived of the donated property, cannot do anything against the donee. (Planiol, *Traite Elementaire de DroitCivil*, Part 2, 2642, 11th ed. Louisiana State Law Institute Tr.)

[33] xxxviii Consider springing and shifting uses and revocable trusts in equity.

[34] xxxix *Irons* v. *Smallpiece*, *supra*, note 25.

[35] xl See Chap. 6 and Sarbah F.C.L. 98; Ollennu, op. cit., 124

[36] xli Danquah, A.L.C. 219.

[37] xlii As was pointed out in Chap. 6. the Marriage. Divorce and Inheritance Bill would, if enacted in its present form, imply the abolition of the *samansiw*. This was probably an oversight.