Table of Contents

CUSTOMARY LAND LAW OF GHANA

INTRODUCTION

In Ghanaian land law, the existence of more than one system of law regulating land rights has unleashed adverse effects on the rights of many; with regards to access to land, equity and security of tenure. Certainly, the co-existence of different systems (customary, religious, statutory law, and constitutional) has resulted in complexity of land rights and insecurity of titles. And obviously, one can identify a hybrid of English Common Law rules and principles; the Ghanaian customary rules and principles, constitutional provisions as well as statutory provisions. This picture is made complicated by Article 11 of the 1992 Constitution which outlines the sources of law in Ghana, with Article 11(1) (e) mentioning “the common law” as one of the sources of law in Ghana and Article 11(2) defining the common law of Ghana as comprising the received common law and the rules of customary law. Customary law, on its own, is defined in Article 1 1(3) as “rules of law which are by custom applicable to particular communities in Ghana”. '

In general, therefore, property in Ghana may be divided into four classifications under customary law, namely; land the soil or earth, things savoring of land such as houses, huts and farms, movables as well as intangible property such as medical or magical formulae. According to Asante, 19691, 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 are substantially affected by the nature of the property in question. The learned author further indicated that

property may also be classified into three broad groom 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 ideas have drawn a sharp distinction between the subjects' right of beneficial user in stool land and the stool's absolute ownership thereof. Thus, the saying goes among the Ashanti's that '(t)he farm (meaning the farm Produce) is mine, the soil is the Chiefs" effect user, however long, can never ripen into ownership. As there is no equivalent of the Anglo-American idea of prescription, the resultant effect of this scheme is that no land could be ownerless '.

The land itself

Man is a land animal, and land matters mightily to him. His talents and energy indeed can take him far: but his roots are no less in the less in the earth than those of any tree, and his achievement is much affected by what he makes of the land he lives on, what it contains, the heat and light, the rain and air that fall to its lot. Whether he has any land for his own use, how he holds it, what he gets out of it these condition to a great extent the measure of a man's material wealth and also the character of his social relationships. Small wonder then that our ancestors viewed the land with such religious awe. For the land is the primary capital asset and generally the most durable, serving as an almost unlimited reservoir of sustenance for the man who has the use and enjoyment of a usable portion of its surface. He who land may use it for substance farming or for the production of cash crops, while being free at the same time to sell his own skill and labor for whatever wage, salary or profit he can get. Deprive him of his land,

and you confine his range of choices to wage-earning or starvation, especially if, as is the case in most underdeveloped countries, the skills and technology of the industrial entrepreneur are in short supply. Accordingly, it behooves us of the present generation to take careful though on the arrangement we make concerning our splendid heritage of land.

The function and Goals of the land law

It is tempting to think of the law generally as a forbidding catalogue of commands and prohibitions mostly unpleasant and intimidating. Pay your taxes; get permission before you build this house or drive that car; do not steal; do not commit murder. Viewed even as such a series of commands and prohibitions, it is possible to recognize its character as a necessary instrument for the harmonious conduct of human relationships, Which, of course, like all instruments, can be misused. Stealing and killing bring reprisals, and the road to harmony lies in the avoidance and prevention of conduct that leads to conflict. This facet of the law as a series of commands and prohibitions, with its accompanying threat of the use of force, is indeed hardly ever lost sight of, whichever way you look at the phenomenon. But it is only one facet of a many featured thing. From several other angles, the law can be seen as a system of facilities that enable life in society to be carried on, and which in fact ever expand the opportunities for the conduct of such life with assurance and understanding. The land law is part of this system.

Do you want to buy land? How are you to be sure that the title to the land you buy is reliable one that will keep you free from law suits, or prevail when challenged, or such that bank can accept it with confidence as security {or a loan you may seek? And even when you do not buy or sell land, you need to live somewhere; there have to be understandings concerning the basis on which you live there and the mean of ensuring that the understandings are observed by all

parties concerned or suitable compensation given to any party thereto whose reasonable expectations regarding such understanding have been defeated by the wrongful act of others. Not in your concern necessarily limited to your own lifetime. Are the interests in land owned by you to be seized by just anyone who is first to pounce upon them after your death? Clearly, thoughtful arrangement must exist concerning this sort of situation if conflict is to be avoided or minimized.

So it comes about that a wide am of the law relating to land exists in response to this need for assurance at security concerning interests in land and their enjoyment, transfer from need hand to hand and transmission upon death. Accordingly, principle and rules emerge, protecting individuals in the enjoyment of their land by preventing others from interfering with them. And the machinery of the Judicial process in instituted by the community to settle disputes and reactive conflict. Land may be vital to man; but man; lives in society and the use of land has to be divided somehow between members of the society and between a whole ranges of different possible uses. The providing and protecting of these facilities Which enable individual human beings to attain their private objectives is clearly a matter of group concern. Group concern, however, extends beyond these arrangements manifests itself in other measures imposing other restrictions on property rights:

> *To permit anyone to do absolutely what he likes with his property in creating noise smells, or danger fire would be to make property in general valueless. To be really effective therefore, the right of property must be supported by restrictions or positive duties on the part of owners enforced by the state as much as the right to exclude others which is the essence of property.*

The growth of cities with their congestion, bad housing and insanitary conditions creating dangers for the general health, safety, morals and welfare of the populace; some disease like the swollen shoot attacking the nation's cocoa plantations imposing a need for requiring each farmer to have any affected trees cut out; excessive cutting of timber threatening to destroy the nation's forests, and calling for control in the general interest; tenants in small tenements in towns or in countryside farms needing protection against unscrupulous landlords these and many other problems besides may call for regulations and the introduction of measures which necessarily restrict property rights; above all, to meet the cost of these and other community services, taxes have to be imposed on property. And so it comes about that there are introduced measures like the Town and Country Planning Ordinance which imposes restrictions on what a man may do on his own land, the Forests Ordinance which sets aside wide areas as forest reserves, the cocoa rehabilitation scheme introducing the compulsory cutting out of income-yielding trees, and the Rent Control Ordinance which imposes restrictions on the right to eject tenant and the methods of fixing or raising rents.

In all this there is to be discerned a common interest that the best arrangements possible should be established such as can help toward bringing about general contentment among the people, ensuring that the best use is made of the available land and its productivity increased for benefit of the whole community.

If the principal function of the land law is to be seen in the facilities it provides for obtaining certainty and security concerning interests in land and in the other arrangements 'and regulations which promote the general welfare, then we are entitled to ask of every rule of law what purpose it serves and to direct our endeavors towards ensuring that no rules or

arrangements are allowed to stand which either do not help towards these ends or cannot be justified on any other grounds that are worthy of acceptance.

What is Land?

It emerges from the foregoing that just as a political map of the earth's surface shows it to be divided among communities called states, so a detailed map of each state or polity would also show the land therein divided between groups and individuals who claim interest at various levels of generally, but always exclusively vis-a-vis others with respect to specific areas of land. This is a major part of the reason why the question of who holds what interest in what land is a fruitful guide to the land law and tenure system of a given polity. It underlines the importance of boundaries; for an interest is not completely defined if the confines of the land in respect of which it is held are unspecified.

There are indeed some communities where boundaries are so well organized or so well-known and knowable and accepted, that there is barely any dispute concerning them.

Fortes report a remarkable instance concerning the Tallenai, among whom he says disputes over farm boundaries or trespassing on another's land are almost unknown:

> ***The most remarkable proof of this occurred in 1936, when the Hill Talis returned to their ancestral homes after twenty-five years' exile. Several hundred men took possession again of their ancestors' farm plots without a single boundary dispute. if there was doubt about a particular plot the elders were consulted and settled the***

matter, not by the exercise of authority but by reason of their knowledge of where every member of the clan had farmed in the old days. Boys of thirteen or fourteen know in detail the ownership and boundaries of every farm plot in the settlement, or at any rate in their section, if it is a large settlement.

But alas, in most systems, especially where the economic value of land is high either through pressure of population, the discovery of minerals or the introduction of valuable agricultural crops, such desirable certainty is maintainable only with the aid of various public facilities of title registration and boundary settlement. The absence of such facilities together with a fairly common official failure to achieve the clarification and definition of the various types of interest in land have encouraged litigation and contributed substantially to the reluctance of financial institutions to accept landed property as security for advances. And yet the case law and numerous administrative decisions indicate that the interests as well as most boundaries were ascertainable and amenable to systematic adjudication and registration. The maxim which one encounters everywhere in Africa (and which has been borne out by inquiries in various places) to the effect that there is no land without an

owner, strongly underlines the feasibility of title registration machinery.

Dose land mean the same thing in African legal systems as it does in English law? It is often said that it does not. The principal ground advanced for this view is that in African systems the ownership of the soil may be in one person whilst the ownership of a farm economic trees or a house may be in another person. This, however, is a situation that dose frequently occur in English law. Different levels or floors of a building can be owned different people; and so can

different layers of the soil, as when title to seams of coal or other mineral is held by persons different from ownership of the soil. The English legal maxim quicquid plantatur solo, solo credit, which asserts that things affixes to the land pass with the ownership of the land, amounts to little more than the announcement of t presumption of law which only holds good in the absence of agreements and disposition to the contrary. And even a presumption, its range of application has been limited by law both statutory and decisional.

Similarly, them in no question but that the community that owns an area of land is presumed to own the minerals in it that strangers who plant commercial trees or build on such land without permission are liable to lose what they have put on it, and his indeed to be ejected. Nor is there any question that where an owning group can be shown deemed to

have made an outright grant of land to an individual such a grant carries with it whatever is in the soil or attached to it. Similarly, with outright grants by individuals. But permission to make a farm or to put up a building is not necessarily the grant of the soil. And allotments of group-owned land specially to guests or strangers, but also in many communities to members are not deemed to be outright grants conferring allodial ownership. This is what results in someone being acknowledged to be the owner of a farm or certain economic trees, and another being the owner of the soil. The question always is: what interest was granted? Mention has also been made of the fact that, in some land-owning communities, the minerals and certain species of wild (as opposed to deliberately grown) timber or thatch are reserved to the owning group as a whole, much as the nationalization of petroleum or coal in Britain reserves the exploitation of those resources to the nation as a whole. In fact, the language of the Latin maxim tends to obscure a crucial point in English tide theory, namely that is not the soil but estates and

interests therein that are owned. Title theory in many African systems can be said to arrive at this same position, albeit by a different route. 1he notion, prevalent in many places, that the earth is a deity or has a divine principle in it, or that it belongs to one's ancestors or to the community as a whole tends to generate the correlative notion that individuals and sub-groups have only specific interests in the land. Needless to say, the fact that both in England and Africa people speak of owing land rather than interests in land does not necessarily vitiate inferences and conclusions drawn on the basis of a juristic analysis of objective relationships. As the "thing" in which or with respect to which rights against each other are held by men, however, there many can be no great problem in supposing that people everywhere when they speak of land refer at least to the surface of the earth and the things that go with it such as the minerals in and below this surface, the vegetation and animal creatures on it, its water supplies and other advantages. Whether the formal law provides a definition which includes more or less of these features will, of course, vary from place to place.

In general, it is true to say that interests in land tend to vary with the type of land concerned, that rights in arable land or land for dwelling purposes are generally of a more exclusive kind than rights in grazing land and forests. This has influenced the approach of some students of land tenure to the classification of interests in land. This approach is well described by Dr. Sheddick in his study of Land Tenure in Basutoland as follows:

A possible escape from this terminological morass has been found in the approach which concerns itself with the sociological determination of how land is made available for human exploitation. The collective rights to land are studied through the institutions in the case of many African communities, the institution of Chieftainship in which they are embodied. Thus,

the Bemba's right to the use of any part of the bush depends on his political allegiances, first to a headman and then to a chief. He cannot cultivate as an isolated individual even though he has uncontested rights of ownership of any land he may have cleared' It is political affiliation that counts in that the chief looks upon a man as a subject and not as a tenant, although the status of the subject does actually confer the right to use land. In this way ownership resolves itself into administration, that is the trusteeship, apportionment and regulation of the use of land. Similarly, individual rights may now be considered as the way land is used by the individual members of the community. Thus we are told, in a recent study, that although throughout the whole of Nigeria the idea of communal ownership of land obtains; yet each community has rights of distribution among its members and rights of users... land becomes significant only in so far as it lends itself to human use. The land and its natural resources are significant in that they present certain opportunities for human utilization. Furthermore, people tend to be first interested in land and its latent resources for what they consider they can extract from it, that is, they are interested primarily in its productive potentiality. Viewed in this way, land and land parcels become a complex of production units. The problem of land tenure, at the same time, ceases to be a surveying “Oran and becomes the sociological problem of the tenure of production units. Schapera has demonstrated the utility of this fresh approach to the study of rights in land. He makes clear the need to the need consider, not land alone, but land with its resources, Land is considered as the sources of primary products and the primary products are inseparable attributes of the land. It follows from this that the rights that members of a community have over land vary am to t purpose for which land is used, that is, according to the propose for of which land is used, that is, according to its productive role, Schapera shows, in

his study of Tswana land tenure, that some natural products may be collected freely by all members of the community, while others such as trees, may be used subject to certain restrictions. Private rights are recognized in regard to residential land, arable land, Pasture land and to water sources. But in every instance the possessor of land is entitled merely to the use of the products of the land of the land not to absolute ownership of the land itself.

That much illumination is attainable from this approach is undeniable. Our more orthodox analytical approach, however, does not exclude any of the information obtainable along the lines indicated by Sheddick. What he calls "rights of administration" are the matters we have referred to under the category of the jurisdictional authority of the polity and managing authority of land own groups? What he calls rights of usufruct are what we have called interests in land, which we have suggested should be defined not in terms of the actual use to which the land happens to be put production units but in terms of the m which they fall short of a full freedom in the owner to use and dispose of the land in any way possible. What is more, our method requires an organization of the information in a way facilitates comparison between systems and the consideration of changes sum by such comparisons.

The use of expressions like rights of administration and rights of usufruct does not aching the hoped for escape from the terminological morass, as these expressions can themselves be explained only in the same sort of way as the ownership of interests in land; and if this so, then, there is no escape from the obligation to diagnose the situations in Which the relationship is involved. The interesting view of land as a complex of production units is only another way of saying that it has many uses, the right to enjoy, which can sometime be vested in different persons. But the view tends to stress present or actual uses and to produce a static and

enumerative description of current practices, a matter subject to changes as a result of technology or economic forces. By contrast our scheme of analysis is one that embraces any kind of user, actual or potential. Any given interest in land covers all uses actual and possible, except the specific ones excluded by the jurisdictional authority. It therefore has the necessary flexibility to handle the changes incident to a dynamic process. And this applies also to the concept of a jurisdictional authority as contrasted with the enumerative concept of rights of administration.

SCOPE OF THE LAW ON IMMOVABLE PROPERTY IN GHANA

The law on Immovable Property in Ghana is largely made up of Ghanaian customs and traditions as well as the common law of England and the doctrine of equity which is applicable here. These principles from the common law and equity substantially make up the law on immovable property in the country.

The study of the law of immovable property therefore involves a lot of principles and doctrines which are found in judicial decisions and also in statutes. In Ghana, the 1992 Constitution has also had a great influence on the development of the law on immovable property, apart from other statutory interventions from Parliament from time to time.

PROPERTY

In law, the word "property" means either a thing capable of ownership or ownership itself. In the first sense, property includes both physical (corporeal) and non-physical (incorporeal) things. Examples of corporeal things are land, motor vehicles, watches, etc. and examples of incorporeal things are rights in land such as easements, profits a prendre, licenses, restrictive covenants (agreements) etc. and intellectual property rights such as patents, copyrights, trademarks, etc. The goodwill of a business is also an incorporeal thing. Both corporeal and incorporeal things are inheritable, hence the terms "corporeal hereditament" and "incorporeal hereditament."

Blackstone stated the following distinction between corporeal and incorporeal things:

> "Hereditament, then, to use the largest expression, is of two kinds, corporeal and incorporeal. Corporeal consists of such as affect the senses; such as may be seen and handle by the body; incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind and exist only in contemplation. Corporeal hereditaments consist of substantial and permanent objects."[1]

Austin also stated the distinction between the two as follows:

> "A corporeal hereditament is the thing itself which is the subject of the right; an incorporeal hereditament is not the subject of the right; but the right itself."[2]

As stated earlier, the second meaning of the word "property" is ownership itself. In this sense, if one says "A has property in this car" this means "A is the owner of this car." Similarly, if one says "the owner of the house transferred property in the house to the purchaser," this means" the owner of the house transferred ownership in the house to the purchaser." This particular meaning of property is very important particularly in voluntary conveyances and contracts for the sale of goods. In voluntary conveyances, where a donor purports to make a gift of his land to a putative donee but fails to completely divest himself of the property, that is, retains property in the land concerned, the gift is imperfect. Similarly, in the contract for the sale of

[1] See Blackstone's Commentaries on the Laws of England, Volume II, page 17.
[2] See Austin's Jurisprudence, page 372.

goods, it is extremely important for the seller and the buyer to know exactly when property in the goods has passed from the seller to the buyer. This is very important because, after property in the goods has passed from the seller to the buyer, the goods are at the risk of the buyer, who must take the necessary steps to protect his interest in such goods.

What is Immovable Property?

All physical properties can generally be categorized into two based on their mobility, namely;

(I) Movable Property, and

(ii) Immovable Property

In Ghana, property is classified into "movable" and "immovable" property. Immovable property refers to land, interests in land and rights in land; movable property refers to other types of property including growing crops on land. A property is said to be immovable if a court would restore to the dispossessed owner the res (thing) itself pursuant to an action in rem (against the thing). For example, if A, the owner of land is evicted from or dispossessed of his land by B, A could bring an action in rem against B for the recovery of the land. A property is said to be movable if the only remedy available to the aggrieved owner is an action in personam (against a person) for the recovery of the specific movable property or its value. For example, if B took away a car belonging to A, the remedy available to A was a personal action against B to recover the car or its value. Besides the civil action, B may also be criminally Hable for his action.[3]

[3] For more discussion on "actions in rem" and "actions in personam", see standard textbooks on Equity.

What is Movable Property?

Movable property generally refers to any asset that can be moved from one place to another. This includes cars, Television sets, cash and liquid cash, that is shares, bonds or deposits that can easily be converted into cash. Its sometimes referred to as chattels, “Personal property” or “Personality”.

Movable property is subdivided into "choses in action" and "choses in possession." A chose (thing) includes debts, copyrights, patent rights, goodwill of a business, right in trademarks, stocks and shares, insurance monies and cheques. A "debt" is a chose (thing) in law, yet it has no physical existence. It is not possible to take physical possession of a debt, but it is possible to assert a right to it by taking legal action. The same argument applies to all the other examples given. All rights existing in the items listed can be protected or enforced or transferred at law, by taking action, if need be, in the courts. It is however important to distinguish between the thing itself and the rights which attach to it. A cheques, for example, is merely a piece of paper on which appears words and figures. That is the physical manifestation of a cheques. At law, however, it represents certain rights, the most important of which is the right (enforceable by action in personam) to the payment of money by a bank to the payee. This right, however, terminates as’ soon as the bank becomes aware of the death of the particular client (drawer) concerned.[4] A chose in possession, on the other hand, has a physical existence and can therefore be touched. Examples of choses in possession are motor vehicles, aircraft, furniture, ship, animals, machinery, etc. Each of these things has a physical existence. A chose in

[4] See Bills of Exchange Act, 1961 (Act 55), s 74(a).

possession is sometimes called a corporeal (material) movable so as to distinguish it chose in action.

Immovable property on the other hand refers to assets that cannot be moved from one place to the other without causing damage or destruction to it. Houses and land fall within this category. Immovable property is sometimes referred to as “real property”.

This distinction is problematic because in law, there are certain categories of items that may be seen as movables but may have become so attached to land that, they are regarded as part of the land, and for that matter, an immovable property. They are known as “fixtures.” This principle gave birth to the maxim, ***“quicquid plantur solo solo cedit”,*** meaning that whatever is fixed to the land becomes part of the land. This maxim is sometimes used in its wider sense to mean that the owner of the land is deemed to be the owner of the things and chattels on it.

THE CONCEPT OF LAND

This course would be concerned principally with the legal rules and principles governing land. In dealing with land law, however it is wide enough to deal with other subject matter like houses or structures on land, due to the peculiar definition of land. There are several definitions of land.

Definition of Land

In Ghana, the only statute which currently defines land is Section 45(1) of the Conveyancing Act, 1973(NRCD 175). It reads;

> ***"1) In this Decree, unless the context otherwise requires:***
>
> ***"land" includes land covered by water, any house, building or structure whatsoever, and any interest or right in, to or over land or water"***

This section gives the impression that there might be other things beyond this definition which also constitute land. This is understandable as the definition has been given in the context of conveyancing.

The Black's Law Dictionary defines land as:

> ***"An immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it."***

This definition introduces the element of the space above and below the earth as well as anything attached to it, inclusive of structures and crops. It is even said that he definition even includes the liquids and gasses which are found below the surface and also above it. This explains why a person who erects any structure which encroaches into the space above the another person's land may find himself liable for trespass. But does a person's right over land extend upwards indefinitely to an unlimited height? The courts have held that a landowner's rights extend to a reasonable height above the property. Thus if a landowner is unable to show

that there is an interference with his ordinary use of the land, or is likely to suffer any harm by the use of his airspace, the courts would not protect him.

Two classic cases illustrate this principle. The first is **Bernstein v Skyviews General Ltd (1978)1QB 479**. In this case, the defendant flew over the plaintiff's land and took aerial photographs. He then offered the pictures for sale to the plaintiff. The plaintiff sued him for damages for trespass. The court refused to do so, holding that the rights of landowners in the airspace above their land is restricted to such a height necessary for the ordinary use and enjoyment of his land and the structures upon it – above that height he has not greater rights than the general public.

This case must be contrasted with **Kelson v Imperial Tobacco Co [1957] 2QB 334** in which the defendant's advertising sign which projected 8 inches into the plaintiff's property above ground level was held to be trespass to land entitling the plaintiff to the award damages.

In the same way, one cannot do anything below another person's 'land' without his consent unless there is a law which authorizes him to do so. Section 1 of the Minerals and Mining Act, 2006 (Act 703) reads;

"**Minerals property of Republic**

> ***1. Every mineral in its natural state in, under or upon land in Ghana, rivers, streams, water-courses throughout the country, the exclusive economic zone and an area covered by the territorial sea or continental shelf is the property of the Republic and is vested in the President in trust for the people of Ghana."***

Section 9 of the same Act 730 reads;

> **"Mining activities require mineral rights**
>
> ***9. (1) Despite a right or title which a person may have to land in, upon or under which minerals are situated, a person shall not conduct activities on or over land in Ghana for the search, reconnaissance, prospecting, exploration or mining for a mineral unless the person has been granted a mineral right in accordance with this Act.***
>
> ***(2) Activities conducted under a mineral right shall be limited to the activities permitted by the mineral right.***
>
> ***(3) Subsection (1) does not prevent a government institution or agency from conducting geological activities in accordance with its powers under an enactment.***

Ollenu and Woodman gave a definition of land in customary law as follow;

"The term 'land' as understood in customary law has a wide application. It includes things on the soil which are enjoyed with it as being part of the land by nature, e.g., rivers, streams, lakes, lagoons, creeks, growing trees like palm trees and dawadawa trees, or as being artificially fixed to it like houses, buildings, and any structures 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, e.g. the right to collect snails or herbs, or to hunt on land."

This definition of Ollenu and Woodman just reinforces the definition of land in Section 45 of the Conveyancing Act, 1975 and Blackstone Law dictionary. It is believed that this is a universal definition of land and that the fact that he tags it as 'customary' creates confusion as to whether the definition of land varies from community to community and also creates an erroneous impression that the meaning of land customarily is different from its meaning in the broader context of the law.

Land is therefore made up of the land itself, waters that are found below and above it as well as all artificial and natural things in which a person has rights over lawfully, be they above or below such land or waters. The legal principle therefore is that the owner of the land also owns everything found on it, including buildings and chattels, **unless** he has divested himself of the ownership either by gift, sale, or abandonment. All crops on the land are therefore deemed to belong to the owner.

(See: Ahiable alias Vivor & others v Dosu & others [1971] GLR 127)

2. CHARACTERISTICS OF LAND

There are certain features of land which makes it stand out. These are:

(a) Indestructibility**:** Land may lose its value due to the activities of man. The land could be degraded, excavated, laid with mines, become contaminated with noxious chemicals or even be subjected to bombing, however, the land mass itself does not perish. It can always be reclaimed.

(b) Permanence**:** Flowing from the above is the issue of permanence of land. Due to its indestructible character, it is a permanent asset for the owners and their heir and successors, from generation to generation.

(c) Fixity: Land as a truly immovable asset, is fixed to one spot. It doesn't move. Because of this, every piece of land on this earth can be precisely described. Site plans are thus drawn to accurately locate the piece of land. Each land can also be described precisely. This is because the piece of land has a fixed address in terms of location. Cartographers are able to accurately draw maps; surveyors are able to draw site plans in respect of every piece of land.

(d) Secured Investment**:** Land is regarded as a very secured piece of investment for many. Generally, the value of land appreciates with time. That is why land remains the preferred collateral for many banking and lending institutions. It is seen as a primary capital asset.

(e) Survival of the human race**:** The whole survival of mankind thrives on land. The food we eat and the air we breathe is dependent on land. Cultivation of food, the rearing of livestock, the trees which provide us with oxygen, are all directly linked to land. Even all non-living things need land so that they can be placed on it.

(f) Limited Supply**:** No additional lands are being added to what we have. All generations in the past, present and the future are dependent on the same area of land. There is therefore pressure on land due to its limited supply. By basic economics, this limited supply creates great demand for land.

THE DOCTRINE OF NO OWNERLESS LANDS IN GHANA

It is a settled principle in Ghana that every parcel of land has an owner. It doesn't matter that the land is lying fallow or there is an activity going on in respect of that land. Any person therefore who enters upon a piece of land without the permission of the owner would be committing trespass. Ollenu remarked in his book, "Principles of Customary Land Law in Ghana" stated that:

> ***"…. the first basic principle of our customary law is that there is no land in Ghana without an owner. Every inch of land in Ghana is vested in somebody."***

This principle has been reiterated by other renowned jurists like Woodman and Bentsi-Enchil. This principle has been echoed over the years in many judicial decisions. This principle was stated by Mensah Sarbah as far back as 1897, when he stated that:

> ***"According to native ideas, there is no land without owners. What is now forest or unused land will, as years go by, come under cultivation by the subjects of the stool, or members of the village community, or other members of the family."***

In the case of ***Wiapa v Solomon (1905) Ren 405*** reference was made to this principle in passing (as an obiter). The court held that all lands could belong to the paramount stools, subordinate stools, families or individuals. It further held that any unoccupied land which does not belong to the subordinate stool, family or an individual would be attached to the paramount stool. This principle seems to have been applied in the cases

of **Ababio v Kanga (1932) WACA 253** and **Ameoda v Pordier & Ameoda v Forzi [1967] GLR 479**

It must be noted however that few persons have challenged this assertion. One notable personality is Prof A.K.P Kludze. He was of the opinion that this pronouncement by the court has no binding effect as it was a mere obiter and not the ratio decidendi of a case. He also argues that there were still ownerless lands in some parts of the country. In his context, all lands may be ultimately under the jurisdiction of a chief but this does not automatically mean that some person(s) are exercising any proprietary interest in every portion of the land. He therefore distinguishes between jurisdictional authority and proprietary interests.

(see: UGLJ (1974) Vol 11 pp 123-140)

It is however instructive that a provision in the Land Title Registration Law, 1986 (PNDC L 152) seems to lend credence to this assertion that there could be ownerless lands in Ghana. Section 19(2) (c) enjoins the Land registrar to register **"the State as proprietor of *all lands not held by any other proprietor*"**. (emphasis mine). But do we actually have any lands in the country that are not held by any proprietor? The provision may have been added, more out of abundance of caution and not because in reality there are any ownerless lands in the country.

quid quid plantatur solo, solo cedit

The maxim "Quid quid plantatur solo,solo cedit" has come to denote the fact that one who owns the surface of the land owns everything beneath the soil and the air space above the

land. Things on the surface of the land may include; houses, rivers, machines, crops, rocks, and among others. Also, minerals such as gold, ocean deep, down to the core of the Earth.

Man in a general sense is a land animal and do depend wholly on the produce of the land ranging from waters of various water bodies and food from different crops. It therefore stands to mean that if man is deprived of his land he is virtually subjected to starvation. The multipurpose usefulness of land has aroused the interest of every man to vie for a land, thus the interest of the land for many purposes.

The Ghanaian community before the periods of colonization had always resolved land disputes by the chieftaincy institutions where interests of a land becomes a dispute between two individuals or families. However, after the British colonised the Gold Coast, we adhere to some Common Law doctrines to help resolve disputes emanating from conflict of interest in land.

This has led to the hybrid sources of law in Ghanaian Land law. Article 11(2) recognises the common law of Ghana as a primary source of law for judicial decisions which definitely includes decisions pertaining to Land. Also, the Constitution in Article 11(3) recognises the customary law. The customary law of Ghana includes customs that are applicable to particular communities in Ghana. In light of this, the Chiefs of the various communities of Ghana are allowed to resolve land disputes. Also, the 1992 constitution of Ghana has also made provisions regulating certain areas of land law for example in Article 20, clauses 1,2,3,4,5, and,6 the Constitution gives provisions with respect to State lands. Statutory provisions cannot be left out; the Administration of Land Act, 1962(Act 123) and the State Land Act, 1962(Act 125) do serve as a reference point for resolving disputes.

In general, properties in Ghana can be classified under customary law as; Land, things savouring of land such as houses, huts and farms, movable as well as intangible property such as medical or magical formulae. For the purpose of the maxim, we will restrict ourselves to the surface of the soil and the tangible things on the surface and beneath it in some cases above the surface of the Earth.

In the traditional sphere the land can be owned by the stool/skin, families and individuals. The community makes sharp distinction between the subjects' right of beneficial user in stool land and the stools' absolute ownership thereof. It hereby means that, generally the lands of every community is entrusted into the hands of the Chief. This was resonated in the case of Akwei and Others v. Awuletey and Others (1960). Also, in the case of Kotey v. Asare Stool (1962) the Stool succeeded in suit over a piece of land. It is however worth noting that such allodial interest or ownership of the land and its encompassment can be vested in sub-stools as held in Jamestown Stool v. Sempe Stool (1989-90). Also, an interest in land may be vested in Families as decided in Sasraku v. David (1959) as well as in the case of Goliǵhtly v. Ashirifi (1961). In the above cases, the allodial interest was therefore transferred to the families.

The maxim reiterates an important aspect of Ghanaian law and will be of great challenge of not linked with the equally important saying in the Asante Traditional Areas which says " The farm is mine, the soil is the Chiefs". To link these statements, it is important to note that Customary land law do vary from place to place. However, within the confines of the Asante Kingdom it is establish always that the Chief owns the land who becomes the trustee on behalf of the subjects of the stool. In view of this, no land is ownerless.

Dwelling much on the maxim, let us look at the Common law view about its principle. The situation that does frequently occur in the English law is that, different layers of building can be owned by different people; and so can different layers of the soil, as when title to seams of coal or other mineral is held by persons different from ownership of the soil. The maxim can also be translated as whatever is affixed to the soil belongs to the soil. The English law recognizes the maxim and its principles with regard to fixtures and chattels. Fixtures are objects affixed to the land and considered as an integral part of the land. However, chattels are not affixed to the land. Consequently, he who owns the land owns things attached to it.

In the case of Holland v. Hodgson (1872), the distinction was made between chattels and fixtures with regard to the maxim. It was held that the physical degree of annexation will objectively determine whether or not the object in question is a fixture or chattel to determine it integration with the land. Blackburn J. commented that it is important to also look at the intent at the time the object was placed on the land with regard to any artificial object erected on the land. This will help determine if such object is subject to the maxim. The purpose of this maxim is to protect the interest of both lessor and lessee. But for the maxim, landlords will lose their possessions as well as susceptible tenants who might kept something not intended to be a permanent part of the land on a said land but will stand to mean that the owner of the land owns everything on and above the soil. The "intention test" was also applied in the case of Taff v. Hewitt and expounded in the case of Mitchell v. Cowie (1964).

Another potential meaning of the maxim is that, the owner of the land owns everything even to the core of the Earth, as indicated in the first paragraph, beneath the soil is minerals and sometimes crude oil. In such instances, the state assumes the trustee position. In Ghana, s. (7)(1) and s.10(1) of the Administration of Land Act provides that 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. However, compensations are paid under s.10(1) of the Administration of Lands Act Ghana.

In conclusion, the maxim quid quid plantatur solo solo cedit asserts that the one who owns the land owns everything beneath the soil and the air space above the land. It has been the doctrine of ownership of land for the past centuries, thus the maxim serves as a guide for the court to help people claim total ownership of things on the land and its encompassment. However, the maxim does not apply to instances where minerals or oil is found in a land, because the state will at that point assume a trustee position and automatically own such minerals or natural resources.

SOME TERMINOLOGIES IN LAND LAW

These are terms that are used frequently when dealing with land law. It is therefore necessary that one gets to know their meaning in law.

1. POSSESSION

This refers to actual physical occupation of land or the immediate right to do so, with the intention to exclude others from the property. In the case of **Brown v Quarshiga (2003-2004) SCGLR 930**, Kludze JSC @951 stated that;

> ***"Possession is a matter of law but is established by physical acts. Possession is generally regarded as implying physical control; but physical control cannot mature into possession in law unless accompanied by other facts…The physical control is usually actual control and includes the right to exclude others from the property…Secondly, there must be the animus possidendi or intention to possess which must be concurrent with the requisite physical control…"***

Possession in law is possession in fact. It involves two concepts, namely -

(a) the corpus possessionis, that is, the physical control over the thing itself, which may be exercised by the owner of the thing, his servant or his agent; and

(b) the animus possidendi, that is, the intention to exercise exclusive possession of the thing itself and thus to prevent others from owning it.

Possession of land means actual physical possession of the land or the right to immediate possession of the land. For example, a lessee may be in physical possession of the land of the lessor but such a lessor has an immediate right to possession of the leased land when the lease terminates either by expiry or by the occurrence of an event expressly provided for in the lease as terminating it. Possession is of great importance in land law. The rule of the English common law, which has been assimilated into the common law of Ghana, is that possession by itself gives a good title to land against the whole world except someone having a better legal right to possession.[5] In *Wuta-Ofei* v *Danquah*[6], the Privy Council held inter aha that:

"...the possession which the respondent sought to maintain was against the appellant who never had any title to the land. Hence the slightest amount of possession would be sufficient; and since there was no evidence that the respondent ever abandoned her possession, which she obtained by virtue of the 1939 grant and the only reasonable inference from the evidence is of an intention to retain possession, she had satisfied the test and was entitled to maintain an action for trespass."[7]

[5] See *Asher v Whitlock* (1865) LR 1 QB 1.
[6] Ibid, at 491.
[7] [1961] GLR 487.

In certain cases, exclusive possession which cannot be otherwise explained, is taken as evidence of ownership by the person in possession. In *Aidoo* v *Adjei*[8], the Court of Appeal held that a person in possession of land is presumed to be the absolute owner thereof.[9] The possession may be explained by showing that the person in possession is a lessee (tenant), a licensee or an agent of the true owner. This position does not however deprive the person in possession of land of his right to maintain an action in trespass against other persons who interfere with his possession. In *Thompson* v *Mensah*[10], Ollennu J said:

> "The defendant, on the plaintiffs own admission, was in possession of the land and thus, regardless of his [defendant's] own title, was entitled to be protected in that possession against all save the true owner."

In conveyancing practice, if a house or a building which a vendor had contracted to sell to the purchaser is in occupation of a person other than the vendor, the purchaser must find out the interest of that person in the property concerned as he will have had notice of the interest of that person in the property and be bound to give effect to that interest even if it is not specially mentioned in the contract of sale of the land. For as was affirmed by the West African Court of Appeal in *Kabba* v *Young*[11],"... a purchaser of a legal estate in land which was in the possession and occupation of a person other than the vendor is bound either to enquire what that

[8] [1976] 1 GLR 431.
[9] Ibid, at 432.
[10] (1957)3 WALR 240.
[11] (1944) 10 WACA 135 at 139.

[person's] interest is or give effect to whatever that person's interest is; for such a purchaser is bound by all the equities."

Also in *Boateng* v *Dwinfuor*[12], the Court of Appeal said:

> "... if the purchaser has, whether deliberately or carelessly, abstained from making those enquiries into the title of his vendor that a prudent purchaser would have made, he will be affected by constructive notice of what appears upon the title. Apart from investigating the deeds, a prudent purchaser will inspect the land itself. If any of the land is occupied by any person other than the vendor, this occupation is constructive notice of the estate or interest of the occupier, the terms of his lease, tenancy or other right of occupation, and any other rights of his, except... a mere equity."[13]

The quotations from *Thompson* v *Mensah* (supra), *Kabba* v *Young* (supra) and *Boateng* v *Dwinfuor* (supra) show the importance of the concept of possession in land law and conveyancing. Possession may be lawful or wrongful. Where a person wrongfully takes possession of land belonging to another, that person becomes a squatter on the land of the true owner of that land. The true owner has an immediate right of action against the squatter to recover possession of the land. However, owing to the law on limitation, the true owner

---

[12] [1979] GLR 360 at 366-7.

[13] "See also *Williams and Glyn's Bank Ltd* v *Boland* [1980] 2 All ER 408; *West African Enterprises Ltd* V *Western Hardwood Enterprises Ltd*, Court of Appeal, Civil Appeal No 86/93,18 April 96 (unreported); *Western Hardwood Enterprises Ltd* v West *African Enterprises Ltd*, Supreme Court, Civil Appeal No 8/96, 23 April 1997 (unreported).

must bring his action within the limitation period of twelve years. If the owner does not take any action within the limitation period, his right of action is barred and his title to the land is extinguished.[14] The Limitation Decree, 1972 (NRCD 54) is also applicable to customary law transactions.[15] The dispossessed owner's title does not pass to the squatter, but the squatter is protected against any claim or disturbance by such an owner. Meanwhile the squatter, by his possession, has a good title against the whole world except someone who can establish that he has a better right to possession.

There are two main types of possession.

These are;

(a) Actual possession

(b) Constructive Possession

(A). Actual Possession

This is sometimes known as “Possession in fact”. This is where a person physically exercises control over something. In land law, it refers to a situation of a person physically being on the land and exercising control thereon. This can be seen in having a structure on the land, like a building or having deposited building materials on the land. It could even be by using the land for farming, trading or as a workshop. Planting of economic trees like mango, cocoa, orange, are all evidence of possession

[14] See Limitation Decree, 1972 (NRCD 54), 810.
[15] Ibid, s30(3).

(B). Constructive Possession

This is also known as "Possession in law". In this case, a person hasn't got the physical control over an item but notwithstanding, he is deemed to be exercising control over I. In land law, this is where a person exercises control over land without physically occupying it. The owner may be vested with ownership but would not be physically present. He may however engage in certain activities in relation to the land to mean that he is in control. This may include paying bills, dues, or taxes in relation to the land.

Possession is not synonymous with ownership, but could play a very effective part in determining ownership.

Section 48(1) of the Evidence Act, 1975 (NRCD 323) reads;

> ***"1. The things which a person possesses are presumed to be owned by him.***
>
> ***2. A person who exercises acts of ownership over property is presumed to be the owner of it."***

Under the law, a person in possession of land is presumed to have a good title against the whole world except someone who is able to prove a better title. In the case of **Wuta-Offei v Danquah [1961] 1GLR 487**, the court quoting from an earlier case held that;

> ***"There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever, — as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is***

> ***so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."***

In the case of **Seraphim v Amuah -Sakyi [1962] 1GLR 328**, @ 331, Justice Ollenu stated;

> ***"A person in possession can successfully maintain action for trespass against the whole wide world except the person proved to be the true owner. But possession means effective possession; a person who enters upon land which is apparently in possession of another person cannot in law be said to have that possession which will entitle him to the benefit of the proposition of the law. Therefore, where the possession relied upon has not been effective or where it is one that is disputed, a plaintiff to succeed in an action for trespass against another person who also claims to be in possession cannot succeed unless he proves that as between him and that other person, the right to immediate possession of the land is vested in him."***

Therefore, where a squatter is proved to be in possession of a piece of land and another person sues him for the recovery of the land, the one suing would be successful only when he can show that he has a better title, like documents. If he fails to prove a better title, then the law would protect the squatter.

POSSESSION IS NINE (9) POINTS OF THE LAW

"The procedure by which an owner recovered his property was cumbrous, dilatory and inefficient. The path of the claimant shrewd with pitfalls, and he was lucky if he reached his destination without disaster. The part of the plaintiff in such an action was one of grave disadvantaged, and possession is nine (9) points of the law". Thus Salmond on Jurisprudence (London, 1936, pg 409)

Q1. Write a critical account of the importance of possession in customary law of Ghana.

Possession is the control or occupancy of something for which one does not necessarily have property right and it is considered to be strong evidence of ownership. This means that in the absence of clear and compelling testimony documentation, a person in possession of a property is presumed to be the owner of such property. This ushers us to saying "possession in fact is possession in law"

Possession in fact presumes that a person in physical possession of a property owns

property whiles possession in law means possession in the eyes of the law, thus possession

recognized and protected by law. The customary law of Ghana before colonization gave much preference to possession in fact. Physical possession of a property in dispute was a

prima facie evidence of ownership. The party physically possessing the property or is on the

land was presumed to be the rightful owner. This is not in any way rejected by the modern

day dispute resolution institutions; possession still remains an evidence of ownership unless

a party to the dispute proves a better title of the property.

Possession involves two main concepts, namely- the corpus possessionis and animus

possidendi. Corpus possessionis is the actual physical possession of a property, on the other

hand, animus possidendi is the intention of an individual to own a property as well as

defend his possessory right of the property against any adverse possessor. Possession is

deemed to be complete when an individual does have the intention to exercise exclusive right

of a property and has such property under his occupancy.

Possession of land is the actual physical possession of the land or the right to immediate possession of the land. Possession is of great importance in land law. The rule of the English

law that has found itself in the Common Law of Ghana is that possession by itself gives a good title to land against the whole world except someone having a better legal right to possession. This was expounded by the decision of the Privy Council in the case of Wuta Ofei v. Danquah (1961) where it was stated that “the possession which the respondent sought to maintain was against the appellant who never had little title to the land. Hence

the slightest amount of possession would be sufficient; and since there was no evidence that the respondent ever abandoned her possession, which she obtained by virtue of the

1939 grant and the only reasonable inference from the evidence is of an intention to retain

possession, she had satisfied the test and was entitled to maintain an action for trespass.”

In certain instances, exclusive possession which cannot be otherwise explained is taken as

evidence of ownership by the person in possession. It is held by the Court of Appeal in Aidoo v. Adjei (1976) that a person in possession of land is presumed to be the absolute owner thereof. However, the possession may be treated as a lease to the possessor or, the possessor may be regarded as an agent to the rightful owner. With regard to that however, a possessor of land still has full rights under law to defend his possessory right against any trespasser as espoused in the case of Thompson v. Mensah (1957) by Ollenu J., he stated,

"the defendant, on the plaintiff's own admission, was in possession of the land and thus, regardless of his (defendant's) own title, was entitled to be protected in that possession against all save the true owner.

In conveyance practice, if a house or building which a vendor is about to sell is in possession of another person other than the vendor, the purchaser in order to be prudent must find out the interest of that person in the property in question as he would have had notice of

the interest of that person in the property and be bound to give effect to that interest even

if it is not specifically mentioned in the contract of sale. This was applied in the case of

Kabba v. Young (1944) WACA.

The same principle was applied and laid in the case Boateng v. Dwinfour (1979), the Court

of Appeal said: “if the purchaser has whether deliberately or carelessly, abstained from

making those inquiries into the title of his vendor that a prudent [p.367] purchaser would

have made, he will be affected with constructive notice of what appears upon the title.

Apart from investigating the deeds, a prudent purchaser will inspect the land itself. If any of

the land is occupied by any person other than the vendor, this occupation is constructive

notice of the estate or interest of the occupier, the terms of his lease, tenancy or other right

of occupation, and of any other rights of his, except . . . a mere equity."

It can therefore be said from the holdings in Wuta-Ofei v. Danquah(supra), Kabba v.

Young(supra), Boateng v. Dwinfour(supra), Thompson v. Mensah(supra), possession is very

important in the Ghanaian Customary land law.

Possession may lawful or gained wrongfully. Wrongful possessors are termed as squatters;

there is a right allowed by law for rightful owners to bring actions against squatters to

redeem their ownership of their properties or land. The procedure involved in this is

technically known as “proving a better title of a property”.

As noted earlier on, possession is a strong prima facie evidence of ownership therefore it

not easy for a disposed owner to prove a better title of a property. The burden of prove in

the procedure of claiming a better title is upon the claimant (the paper owner of the land).

The law will always protect the possessor against the whole world expect the person who is

able to prove a better title of the property. For example, the law will protect the possessory

right of a thief over a stolen object against any person unless the real owner proves that the property actually belongs to him. In the same vein, the law assumes the possessor (who in this case is the squatter) as the rightful owner of the land (Aidoo v. Adjei (supra)) unless the real owner of the land is able to prove beyond reasonable doubts that the land actually belongs to him and he has a better title over the land. This was why Salmon on Jurisprudence (London, 1936, pg 409) identified that, “The procedure by which an owner recovered his property was cumbrous, dilatory and inefficient”

Salmond also mentioned the fact that “the path of the claimant shrewd with pitfalls, and he was lucky if he reached his destination without disaster.” The destination of the claimant is to prove a better title of his property; however, this procedure may be associated with certain limits and struggles, and pitfalls(mistakes)and may even be estopped by the claimants own conduct. Some of which are discussed below:

First, acquiescence; it occurs when a person knowingly stands by without bringing an action

against any infringement of his right. As a result of acquiescence, the person may lose the

ability to make a legal claim against the trespasser. The doctrine infers from a form of

“permission” or “consent” that results from a silence or passiveness over an extended

period of time.

Second, laches; it occurs when the claimant has unreasonably delayed in enforcing a right

over a property. The court may with reference to the Limitation Decree 1972, (NRCD 54)

term such suit as “statue bad”. The normal period of years for prospective claimant is 12

years with regard to land issues. Regardless however, Salmond still indicates that the

claimant may be lucky in succeeding in his claim of better title. It is an indication that the

court, irrespective of the pitfalls, may grant a title to a claimant if he proves beyond every

doubts that the property belongs to him. This however is a cumbrous process for

“possession is 9 point of the law” according to Salmond.

Possession, as rightfully stated by Salmond, is 9 point of the law, hence a first and almost an

unbeatable evidence of ownership. It takes strong evidences of documents and other

exhibits to reverse ownership title to disposed owners.

In conclusion, possession is an important aspect of the customary land law of Ghana.

Possessory rights should be protected against any squatter on time to avoid the pitfalls and

cumbrous procedures as identified by Salmond on jurisprudence (London, 1936, page 409).

READING MATERIALS

1. **Bernstein v Skyviews General Ltd (1978)1QB 479**.

2. Kelson v Imperial Tobacco Co [1957] 2QB 334

3. Ahiable alias Vivor & others v Dosu & others [1971] GLR 127

4. Wiapa v Solomon (1905) Ren 405

5. Ababio v Kanga (1932) WACA 253

6. Brown v Quarshiga (2003-2004) SCGLR 930

7. Wuta-Offei v Danquah [1961] 1GLR 48

8. Seraphim v Amuah -Sakyi [1962] 1GLR 328

9. Majolagbe v Larbi [1959]190

10. Hayfron v Egyir (1984-86) I GLR 682

11. Ntim and others v Boateng [1963]2GLR 97

12. Amuzu v Oklika [1997-98] 1GLR 89

TUTORIAL QUESTIONS

1. With the aid of legal authorities, explain 'the concept of land.'

2. What are the main features of land?

3. Explain the following:

a. Actual Possession

b. Constructive Possession

c. Legal ownership

d. Equitable ownership

4. Discuss the different ways in which a person can acquire title to a parcel of land.

5. Explain the circumstances under which a person with a superior title to land may lose it to another person who holds an inferior title to the same piece of land.

G. AYISI ADDO

2. TITLE

This refers to the mechanism through which a person right to a parcel of land is established.

Title is the means by which a person establishes his right to land. A person's title indicates by what means he claims to be the owner of land. Title to land may take the form of possession or it may take the form of a document or a series of documents. A good title, however, is always documentary.[16] Section 23(5) of the Land Title Registration Law, 1986 (PNDCL 152) defines a "good title" as -

> *"any title founded on documentary evidence[17],* a title which consists of or commences with:
>
> a) any enactment;
> b) a grant or conveyance from the State;
> c) conveyance, assignment or mortgage which is more than thirty years old and establishes that a person is entitled to deal with the land; [or]
> d) a final judgment of a court of competent jurisdiction."

[16] See Land Title Registration Law, 1986 (PNDCL 152), s 23(5).
[17] Emphasis provided.

In the peculiar situation in this country, a customary grant is a good title if it can be shown that the grantor has been in effective possession of the land for the statutory period of thirty years[18] and the customary grant satisfies all the requirements of customary law.[19]

When a person's title to land is challenged, what a court is called upon to decide is which of the contending parties has a better title to the land. In testing whether one title is superior to the other, there are some important factors to consider. The first is possession. A person who is relying on possession as his title must show that he is in physical possession or has a right to possession as having erected a building on it or planted crops on it or done something on it symbolic of ownership[20] and generally exercising dominion over the land such as by placing a lessee (tenant), a licensee or an agent on it. However, such a possessory title only holds good against someone who cannot show a better title. In *Majolagbe* v Larbi[21], the court held that:

> "the plaintiffs proof of his mere possession of land is sufficient for him to maintain trespass against anyone who cannot show a better title."

Also in *Bristow v Cormicari*[22]*,* Lord Hatherley said:

---

[18] See Conveyancing Decree, 1973 (NRCD 175), s36(l).
[19] For the requirements of valid customary grants see *Ntim* v *Boateng* [1963] 2 GLR 97 (sale); *Yoguo* v *Agyekum* [1966] GLR 482 at 493 (gift). See also *Asare* v *Antwi* [1975] 1 GLR 16 at 24 (sale).

[20] See *Wuta-Ofei* v Danquah/I [1961] GLR 487 at 491.
[21] [1959] GLR 190 at 191.
[22] (1878) 3 App Cas 641 at 657.

"There can be no doubt whether that mere possession is sufficient against a person invading that possession without himself having any title whatever, - as a mere stranger; that is to say, it is sufficient against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

The Court of Appeal also held in *Mensah v Peniana*[23] that:

> "Proof of possession by a plaintiff is sufficient to maintain an action for trespass against a defendant who cannot prove a better title. Therefore, a claim of absolute ownership by a defendant does not automatically put the plaintiff to proof of his title. He must, however, fail if the defendant is able to establish his title to ownership or that he went on the land with the permission of the real owner."[24]

The above proposition is fundamental to the concept of title to land. If the occupier's possession is disturbed, for example, by trespass or nuisance, he can sue on the strength of his possession alone and he does not have to prove his title.

[23] [1972] 1 GLR 337 at 338.
[24] See also *Bucknor* v *Essien* [1963] 1 GLR 426; *Kusi* v *Benyarde*, Court of Appeal, 29 March 1971 (unreported).

Possession of land may be based on an allodial title, freehold title or an interest in land inferior to the allodial or freehold title. If a person in possession cannot show that his possession is based on some title, then he is a mere squatter. Although a squatter's possession by itself is treated as title, he is exposed to the risk of being challenged by someone claiming superior title. In the face of such a challenge, he cannot simply rely on his possession alone if the challenger produces some evidence of title. The squatter will have to establish either that the challenger's title is not good enough to overcome his possessory title or that the challenger's title has been extinguished by limitation. Against the challenger, the squatter cannot plead that the land does not belong to the challenger but to some other person unless the squatter claims to derive his right to possession through such a person. In other words, the squatter cannot rely on a jus tertii. If for example, a who relies only on his possession of land is sued by B, who alleges title, it is not open to B to say that the land belongs to C and not A. It may well be that C has a better title to the land concerned than A, but B cannot set up C's title against A unless B is a grantee of C.[25] The well-established rule is that if a person claims land, he must do so on the strength of some title of his own and not on the weakness of the title of the one against whom he claims.[26]

When a person gains possession of land by leave or license or permission of another, he cannot use the possession so obtained to sustain a plea of jus tertii against the person who gave him

[25] See *England* v *Palmer* (1955) 14 WACA 659.
[26] See *Ricketts* v *Addo* [1975] 2 GLR 158; *Duagbor v Akyea-Djamson* [1984-86] 1 GLR 698; *Asoman* v *Servordzie* [1987-88] 1 GLR 67; *Malm* v *Lutterodt* [1963] 1GLR 1; *Dompreh* v *Pong* [1965] GLR 126.

the leave, license or permission. It is for this reason that a licensee or lessee (tenant) is not allowed to deny the title of his licensor or lessor (landlord).[27]

The second factor to be considered by the court is documentary title. Where two persons produce documents to prove their title to a particular piece of land, the question the court has to decide is which of the documents confers a better title. In deciding this question, the court takes into account the competency of the grantors of the persons to make the grants concerned, whether or not the grantors had any title in the land concerned to transfer to the grantees, among other considerations. Sometimes, mere registration of a valid title document affecting the same land and made by the same grantor may be the only deciding factor between one title document and the other. This is however subject to the caveat that the grantee who did not register his document did not, if his grant is earlier in time, take any steps towards effective possession of the land concerned, apart from his unregistered documentary title. If he was in effective possession of the land, then the mere registration by the latter grantee of his documentary title is not sufficient to deprive the prior grantee of his title to the land concerned. This is because registration, particularly under the Land Registry Act, 1962,[28] only gives notice of the fact of the registration of the instrument but does not give validity to the transaction evidenced by the registered instrument. Thus the law is settled that registration under Act 122 does not confer a state-guaranteed title. Archer J held in *Kwofie* v *Kakraba*[29] as follows:

[27] See *Industrial Properties (Barton Hill) Ltd* v *Associated Electrical Industries Ltd* [1977] QB 580.
[28] Act 122.
[29] [1966] GLR 229 at 231-232.

> "...there is no provision which states that the validity of any instrument shall not be questioned in any court of law after registration. I therefore hold that although registration is now compulsory and constitutes notice to all persons, yet the Act [Act 122] does not confer state-guaranteed title on a grantor who had no title at all,.."[30]

The grantor by virtue of the prior grant to the first person and placing that person in possession of the land, has no title in the land which he can legally convey to the subsequent person. Furthermore, it is the responsibility of any prudent purchaser to check whether or not the land he intends to buy is in possession of any person other than his vendor.[31]

The third form of title is that based on oral grant at customary law. If the conflicting titles are based on oral grants, as usually happens in many cases in Ghana, the court has to consider which grant is more likely to have conferred valid title on the grantee having regard to all the circumstances particularly compliance with the essential requirements of such grants at customary law,[32] concrete acts of possession and exercise of dominion over the land. Oral grants are proved by traditional evidence of witnesses to the grants. For grants which are several decades old, some of these witnesses may have become senile and therefore their traditional evidence of the grant becomes less reliable. It is for this reason that the Conveyancing Decree,

[30] See also *Arkorful* v *Sey* [1980] GLR 752; *Boateng* v *Dwinfuor* [1979] GLR 360.
[31] See *Boateng* v *Dwinfour* (supra); *Kabba v Young* (1944) 10 WACA 135.
[32] See *Ntirn* v *Boateng* [1963] 2 GLR 97.

1973 (NRCD 175) advocated a form of recording system for oral grants.[33] Unfortunately, the recording system advocated under the Decree did not materialise due to administrative ineptitude.[34] As at the time of the repeal of the relevant provisions of the Decree on the recording of oral transactions by the Land Title Registration Law, 1986 (PNDCL 152) in 1986, no legislative instrument making "regulations providing generally for the administration of the scheme for recording customary transfers "has been published as required by section 6(1) of the Decree.

Sometimes an issue as to title arises between a person holding an oral grant of land in accordance with customary law and a grant of the same land to another person in accordance with the common law. The rule is that if the oral customary grant is prior in time to the common law grant and is valid according to customary law,[35] then whether or not the subsequent common law conveyance is registered, it cannot prevail over the prior valid customary grant.[36]

Another issue of title to land arose in the case of *Chahin* v *Epope Printing Press*[37]. In this case the Supreme Court considered the issue whether title to land which has lawfully vested in a third party by virtue of a judgment re-vests automatically in the true owner of the land or is extinguished when the judgment is later reversed. The Court held that "A title to land that has lawfully vested in the third party by virtue of a judgment is not extinguished on the reversal of the judgment and even if it were, it would

[33] See Conveyancing Decree, 1973 (NRCD 175), ss 4-11, now repealed by the Land Title Registration Law 1986 (PNDCL 152), sl38.
[34] It is now compulsory to register all oral grants in areas declared registration districts under the Land Title Registration Law, 1986 (PNDCL 152), s5.

[35] See *Ntim* v *Boateng* [1963] 2 GLR 97.
[36] See *Ntim* v *Boateng* [1963] 2 GLR 97.
[37] See *Boateng* v *Dwinfuor* [1979] GLR 360. [1963] 1 GLR 163.

not re-vest in the appellants without a re-conveyance from the respondents or the taking of an appropriate action for that purpose."[38]

Proving Title Over Land

How does he prove that he has a right over the land as an owner? This can be done in at least four (4) ways. These are;

(a) Possession

(b) Documentation

(c) Combination of Possession and Documentation.

(d) Oral tradition

Possession

A person who derives his title to a piece of land by virtue of being in possession of the land is said to have **"Possessory Title."** This has already been dealt with under "Possession." (Refer to above.)

Possessory title in land can only be brandished against another person who is unable to prove better title than him.

See the case of **Majolagbe v Larbi [1959]190**

Documentation

Sometimes a person is able to establish his title by reference to a document or documents. This is the best form of title to land. **Section 23(5)** of the **Land Title Registration Law, 1986, PNDCL 152** reads:

[38] Ibid, at 164.

"***In this section "good title means, in a case in which a title is founded on documentary-evidence, a title which consists of or commences with***

(a) an enactment,

(b) a grant or conveyance from the Republic,

(c) a grant, conveyance, assignment or mortgage which is more than thirty years old and establishes that a person is entitled to deal with the land, or

(d) a final judgment of a Court of competent jurisdiction."

Documentation may also differ depending on whether it has been registered or not. A registered document generally confers a better title to land than the one which has not been registered.

Combination of Possession and Documentation.

A person may sometimes prove that he has a better title to land by a combination of the fact that he is in possession as well as having documents to buttress same. Naturally this puts him in a better position against the one who is proving his title through either only "possession" or "documentation."

Oral Tradition

A person may also rely on oral tradition to show that the land in question belongs to him. This form of title is seen usually with regards to Stool and family lands. Here the title is not based on any documentation, but may also be based partly on possession.

Historical accounts which show that the land belongs to his ancestors and which has been handed down to him, his family or the stool through generations may be accepted as proof of title to land.

In the case of **Hayfron v Egyir (1984-86) I GLR 682,** the court preferred the documentary evidence of a deed over conflicting oral traditions. In the event of competing titles in respect of title, the court is enjoined to decide which of these competing titles should prevail.

3. OWNERSHIP

This is where title and exclusive possession of an object is vested in an entity. An owner is the one who can show that there is no other superior adverse claim to his title and possession. An owner of land therefore is the one who can demonstrate that he and those through whom he acquired title have been in possession for such a long time that there can be no possibility that there is another person or entity having a superior adverse claim over the land.

There could be more than one person having ownership in a property. In such a case, each person would be known as a **co-owner**

In the face of competing claims of rights over land by different parties, the court determines ownership in favor of the party with the most superior title. Sometimes the competition is between parties with similar titles. For eg two documentary titles or two

oral traditions. If there is nothing to choose between competing oral traditions, the one in possession wins.

Can Someone with a superior title lose it?

Yes. Notwithstanding the fact that a person or an entity may have a superior title, it can be lost to a person with an inferior title. These are ways in which the superior title may be lost;

A. **Statute of Limitation:**

Sometimes however, the one with a superior title may not be regarded as the owner, if through his conduct he may have allowed a person with an inferior title to use the land without objection, depending on the length of time. In Ghana, an owner's right to land can be extinguished if he fails to take action against a person who is in possession of his land, after the expiry of 12 years that it came to his knowledge. This is the period that the cause of action in the land owner accrues. This is applicable to that person's successors in title. Such a trespasser is said to be exercising **"Adverse Possession".**

See: Section 10(1) of the Limitation Act, 1972 (NRCD 54)

B. Laches and Acquiescence:

Closely linked to the above are laches and acquiescence. This also involves the exercise of adverse possession by a person on the owner's land. **Laches** mean "*unreasonable delay in asserting a claim, which may result in its dismissal*." Acquiescence means *"to accept, agree, or allow something to happen by staying silent or by not arguing*." This is

a rule of common law that an owner of land who allows a stranger or squatter to spend money to develop his land, and yet took no action, would not be allowed to enjoy the fruits of the development when he was in a position to correct that mistake within a reasonable time. This one has no statutory backing, as the rule emanated from the decision of Courts. There is no precise number of years within which the owner would have been deemed to have acquiesced to the development.

In **Ntim and others v Boateng [1963]2GLR 97**, the court held that If a landowner who is also a farmer and as such well aware of local farming conditions, including the position that cocoa when planted takes between four and five years to commence bearing, can allow his land to be occupied and developed unchallenged, such an owner cannot be allowed to recover possession and damages for the occupation and improvement of such land. The conduct of the landowner in such a case would amount to acquiescence. He would be estopped from claiming possession.

C. Equitable doctrines of fraud & Notice:

Section 24(1) of the Land Registry Act, 1962 requires that with effect from November 1962, all documents relating to land **must be registered** in order to have any legal effect at all. Without registration, the conveyance is ineffective and invalid and conveys no rights. It reads;

> ***"Section 24—Registration necessary for Validity.***
>
> ***(1) Subject to subsection (2), of this section, an instrument other than,***

(a) a will, or

(b) a judge's certificate,

first executed after the commencement of this Act shall be of no effect until it is registered".

Despite this principle, the law will not allow a person with registered documents obtained fraudulently to be given priority over an unregistered document.

Secondly, if there are two competing documents in which one is registered and the other has not, the law will not come to the aid of the one who has registered the documents if at the time that he also acquired the land, he was aware that the other party had already acquired the same piece of land.

See: Amuzu v Oklika [1997-98] 1GLR 89

Legal and Equitable Ownership

Sometimes a distinction is made between a legal owner and an equitable owner. A legal owner is a person who has the title and immediate right to the possession and use of property. Under the common law, it is only the legal owner who is entitled to the enjoyment of the property. With time however, the courts through judicial decisions recognized a new type of owner, in whom the legal title to the property was not immediately vested, but stood to benefit in future.

An equitable owner is the one who is entitled to the benefit of property although title is not legally vested in him. This arises usually under a trust. The trustee is the one with

legal ownership vested in while the person who stands to benefit from the trust as the beneficiary is the equitable owner. As an example, if A conveys property to B to use for some time till C attains 18years after which the property should be given to C, B is the legal owner but C would be the equitable owner.

The concept of ownership of land embraces possession of and title to land. An owner of land is a person who can show that he and those through whom he claims title have possessed the land for so long that there can be no reasonable probability of the existence of a superior adverse claim. In showing this, he may rely on documents of title or on his own possession. The important thing is that there is no adverse claim. If an adverse claim is raised against the owner, the court has to consider the conflicting titles, whether they are documentary or based on mere possession or an oral grant. If the conflicting titles are documentary, the court has to decide which document confers a better title. If the title is based on oral grant, then the court must confirm which grant complies with the requisites of a grant at customary law. Except in cases where there is an incontestable documentary title, the person in possession has an advantage. If it is the defendant who is in possession, then the plaintiff who claims ownership must prove a better title. If he cannot do this, he must fail. The defendant can simply rely on his possession If the plaintiff who sues for declaration of title is in possession, he too has an advantage. He can simply rely on his possession and he cannot be dislodged unless the defendant shows a better title, that is, a better right to possession than the plaintiff. Indeed, a plaintiff in possession

carries no greater burden of proof than a defendant in possession.[39] If it is the plaintiff who is in possession, he simply remains in possession.[40] If it is the defendant who is in possession, the plaintiff must fail. Under certain circumstances, the plaintiff will fail even if he proves better title to the land. For example, in *Ntim* v *Boateng,*[41] the Supreme Court held that:

"If a landowner, who is a farmer and as such well aware of local farming conditions, including the position that cocoa, when planted takes between four and five years to commence bearing, can allow his land to be occupied and developed unchallenged, such owner cannot be allowed to recover possession and damages for the occupation and improvement of such land. The conduct of the landowner in such a case would amount to acquiescence. He would be estopped from claiming possession."

Also in *Madjoub Rafat* v *Ellis*[42]*,* Windsor-Aubrey J said:
"I am satisfied that they [the respondent and his family] must, by their conduct, be held to have acquiesced, and knowingly permitted the defendant to incur expenditure on Renovating and adding to the building. They have thereby waived and abandoned any rights which they possessed, and cannot now enforce them."

TOWARDS A DEFINITION OF "ABSOLUTE OWNERSHIP" (1961) 5 JAL, 145

[39] See *Asare* v *Appau II* [1984-86] 1 GLR 599.
[40] See *Peniana* v *Affrarn* [1966] GLR 220; *Kodilinye* v *Odu* (1935) 2 WACA 336; *Abakam Effiana Family* v *Mbibado Effiana Family*
[41] [1959] GLR 362 [1963] 2 GLR 97 at 98.
[42] (1954) 14 WACA 430 at 431.

S. R. Simpson

As I read Dr. Allott's article *Towards a definition of Absolute Ownership*[43] I felt increasing dismay because it postulates and makes appear immensely difficult, a problem which in actual working practice barely exists at all.

For over sixty years' settlement officers in the Sudan have been successfully determining ownership without the help of any definition, and in Kenya, during the last five years, the ownership of over a million plots has similarly been decided by committees. Even in West Africa, where there has been no process of systematic adjudication, ownership has been determined in over three thousand cases in Lagos, and ownership is not defined. Indeed I am not familiar with any statute anywhere which does define it"[44] There would seem to be no more need to define *ownership* than there is to define *an estate in fee simple absolute in possession* which is what is vested in a proprietor who is registered with absolute title under the English Land Registration Act, 1925. Yet an estate in fee simple absolute is not defined in any statute and its meaning, not very obvious on the face of it, can only be discovered by reading a text-book on the subject.

---

[43] [1961] J.A.L. 99.

[44] The British Solomon Isles Land and Titles Regulation, 1959, provides that an "owner" in relation to native customary land, means the person or persons who is or are, according to current native usage, regarded as the owner or owners of the land. This cannot be called a definition of "owner*'; indeed it assumes that its meaning is understood.

This does not matter because, being the "best" right, it can only be defeated by somebody who can prove a “better”, whereas were the test by definition the title could be impugned merely for an alleged failure to conform with the definition. Anyway the lack of statutory definition does not appear to have impeded H.M. Land Registry, for over a million titles have been recorded there.

It seems to me, therefore, that in assuming that a definition is needed, the article starts from a wrong premise. *Ownership,* we are told, *has no God-given meaning,* and we are then offered a long definition which I am tempted to suggest would require divine help to interpret. It is couched in a specialized terminology which is only intelligible to a lawyer well versed in English land law. It might (and even this is questionable) assist such a lawyer if he happened to be charged with the duty of converting titles in England to *absolute ownership,* which does not at present exist in English land law, but, speaking from practical experience, I am sure that it could , only confuse adjudication officers who are faced *With the task of ascertaining rights and interests in land not held under English land law and who in practice seem to find no intrinsic difficulty in comprehending the word ownership.* I fear that Dr. Allott has needlessly projected a dense cloud into a relatively clear sky.

It is true that words do not have inherent meaning, but only such as usage gives them. But, of course, usage has already given a clear-cut meaning to most words, otherwise we are should be incapable of expressing ourselves with any sort of precision, and *ownership* is one of the words to which usage has attached a meaning which is perfectly plain to the ordinal man. The idea of

ownership is in fact simple and intelligible to any human being anywhere from earliest childhood he learns to distinguish between *mine* and *thine* and very quickly shows his comprehension of what *mine* means. Even where land is concerned *ownership (absolute ownership)*[45] seems to be regarded by writers on the subject as an ordinary expression in plain English which for their purposes does not require special definition or explanation. Thus Megarry and Wade, having described the fee simple as *the amplest estate which can exist in land,* add *although strictly speaking it is still held in tenure and a therefore falls short of absolute ownership, in practice it is absolute ownership, for nearly traces of the old feudal burdens have disappeared.*[64] They go on to quote Cyprian William as stating: *A tenant in fee simple enjoys all the advantages of absolute ownership, except* 1 *form.* Similarly Cheshire describes die fee simple as *corresponding to the absolute owners/ of goods.*[46] In fact all these writers (and Joshua Williams and Maitland too) use t expression *absolute ownership as if its meaning were obvious.*

And indeed its meaning is obvious, though the very quality of absoluteness naturally makes it difficult, as well as unnecessary, to put it into words. Ownership is the foundation on which all other rights in property stand. It comprises the entirety of the powers of use (including abuse) and disposal over what is owned; but the owner does not necessarily have at a given time, the whole power of use and disposal. Often there is no single person who has the whole power, for various rights may be vested in others. These rights may be substantial, but they will, of their

[45] As Dr. Allott points out there is little significance in adding "absolute" to "ownership". We cannot really have anything whiter 'than- what except in advertisements for detergents!
[46] *The Law of Real Property, 2nd edn., p. 68.*

nature, still be subordinate to or derivative from that of ownership. In seeking the owner, therefore, an adjudication officer must look for the person who has the residue of such power when every dispatched and limited portion of it has been accounted for, and that person will be the owner even if the immediate power of control and use is elsewhere. This duty, and how it must be performed, is made plain in simple language in any legislation which provides for adjudication.

It is this practical task of determining ownership which Dr. Allott seeks to render easier by his proposed definition, but I think that he has *misdirected* himself when he assumes that the registering officer must re-interpret the existing state of affairs in English legal terms The need for this sort of re-interpretation only arises where, in the absence of registration to title and the substantive law which necessarily accompanies it, there is no alternative to native law and custom except applied English land law. In this circumstance interests may pass from one to the other in the way Dr. Allott describes. But this is the very position which registration so easily remedies. It makes provision, not for the translation of native law and custom into terms of English land law, but for a simple system providing adequately both for titles stemming from native law and custom and those from English land law.[47] The *tenant in fee simple* under English law and the man whose rights amount to, ownership under native law and custom both become *registered proprietors* of land and what the proprietor may do in regard to transfer and of his ownership and the creation, transfer extinction of lesser interests will be clearly set out in the law. Thus an adjudication office is not confined to English law, or even English legal

[47] *Modem Real Property, 7th edn., p. 27.*

terminology, but is charged in the first instance with deciding which of the rights in the adjudication area amount to ownership Since, as we have seen, the meaning of ownership is plain and no definition is needed, Dr. Allott is mistaken in thinking that the adjudication officer is going to meet with any difficulty in that respect. Where ownership does exist he will find it quite easy to recognize. He may however meet with difficulty in rights which have not quite developed into ownership, but here again a definition of ownership will not help; it will merely show that the rights in question fall short of ownership. If it is intended that these rights should be *promoted* to ownership, it might be possible to describe them and declare that they shall be recorded as ownership, just as Dr. Allott in his proposed definition declares that *absolute ownership* includes *a fee simple absolute in possession;* but experience has shown that it is better to leave to the adjudication officer discretion to determine what lesser rights, if any, shall be recorded as ownership. This decision may be as much a matter of policy as of law or of fact; it may also involve a measure of agreement between competing interests, but if there is agreement or there are no competing interest's ownership can be recorded without dispute.

Dr. Allott paints a gloomy picture of the task which will confront an adjudication officer in trying to decide where ownership resides when faced with the competing interests of the tribal authority, the family and the individual. But this sort of position is not unknown in English law and procedure. The problem has arisen there, for example, as to who shall be recorded as the owner where there is a strict settlement and this has been solved, not by a definition of ownership, but by the arbitrary decision that the tenant for life shall be registered in H.M. Land Registry as the proprietor subject to a restriction. Special provision may similarly be made in

any registration law wherever it is needed. Thus the Registered Land Bill proposed for Lagos makes full provision for *family land;* it may be registered as family land, in which case the title will be clear but no dealing will be possible, or representatives may be appointed who may deal with it in accordance with the wishes of the family, or the individual members of the family may be registered as proprietors in common not quite the same as tenants in common), or a partition may be effected. There is no *legal -ate of exchange* in this, but merely a clear-cut and simple procedure which is designed to provide for all contingencies and which an adjudication officer can have no difficulty in applying.

I submit, therefore, that *ownership,* because it is absolute, needs no definition and indeed, strictly speaking, is not susceptible of it, for definition describes a thing by its limits and ownership is boundless. In any case we must avoid a definition framed in the terms of a law which does not recognize the ownership of land but still employs the abstruse device of estates.

Unlike ownership, however, subordinate or derivative interests to be allowed in the registration law do require definition, because the names by which they are known will not be self-explanatory and the interest itself may vary in some material particular from that known under the same name in English or some other code of law. For instance, in New Zealand an easement can exist in gross. On adjudication, therefore, the conversion of these lesser interests whether from English or from customary law into interests under the registration law may involve the formulation of accepted equivalents which might perhaps be called *a legal rate of exchange,*

but this is a completely different exercise and has nothing to do with the definition of absolute ownership.

S. R. SIMPSON

Dr. Allott replies:

1 am delighted that Mr. Simpson has accepted my invitation (at p. 102 of my article) to other persons to comment on the very tentative suggestions that I made as to how *absolute ownership* might be defined for the special purposes of contemporary Africa. I only regret that I am not able to agree whole heartedly with all the remarks he makes, or the criteria he offers on the necessity or otherwise for a definition of ownership in African legislation providing for the recording on a register in transmuted form of interests previously existing by virtue either of the customary law of land, or of the English land law as applied in Africa.

Mr. Simpson's first point, that there is no more need to define *ownership* for African legislative purposes than there is to define *an estate in fee simple absolute in possession* for the purposes of the English land law, seems to me, with respect, to overlook the fact that the meaning of an estate in fee simple absolute is in practice defined, not by legislation, but by the practice of the courts as recognized in the textbooks on English land law. There is no question, as with customary land law as currently administered in West Africa, of discovering what interests in land are recognized by that law, and how they should be stated on a register purporting to record *ownership.* With the recording of tile to land in West Africa we are faced with the

problem of translating an interest known to one system of law into one recognized or created by another system of law; the problem of definition is the problem of deciding what instructions we are to give the *translator.*

Mr. Simpson thinks that no instructions are necessary for the *translator* (i.e., the settlement or adjudication officer or judge), since he will know, as an ordinary man, what the meaning of *ownership* is, and to the ordinary man the meaning of *ownership* is perfectly plain. I take leave to doubt, again with respect, whether (I) the opinion of the ordinary man should be decisive of legal matters of great complexity, or (ii) the man in the street could in fact give any useful definition of what he understands by his ownership". (One recalls that the ordinary man in England is very likely to say, to take a simple example, that the house which he occupies on a long lease is *his, belongs to him,* that *he owns it;* the lawyer sees the position otherwise. Equally the Englishman, if in poetic vein, is likely to remark that *the world belongs to me,* or, more prosaically, that "this is his town, his club, his child", etc. Common parlance is not a good guide to the niceties demanded by precise legal expression.

I am afraid I cannot see how it can be maintained that a word whose meaning is plain and obvious cannot, or indeed should not, be defined; either the word is imprecise (in which case definition is required for specific legal purposes to limit its meaning), or it is precise (in which case definition will be both useful and possible).

Contrary to his earlier contention, Mr. Simpson seems to maintain in his closing paragraphs that ownership is boundless and that it would be impossible, as well as undesirable, to limit it; but the process of setting limits to the vague and nebulous is well understood by legal draftsmen, who are constantly being required to define by statute what is meant by *shop, marriage, child, takes,* and so on; and such setting bounds to the indefinite is exactly what is wanted in the case we are considering.

Mr. Simpson argues that the adjudication officer in our hypothetical case is not confined to English law or legal terminology, but is charged in the first instance with deciding which o: the rights in the adjudication area amount to ownership, and that therefore he needs no definition of what he is to understand by *ownership* in this context. I cannot follow this line of thought Mr. Simpson mentions the difficulty that the officer may meet rights *which have not quite developed into ownership,* and he says that in such an instance the definition would merely show that the rights in question fall short of ownership (as defined). Exactly That is the purpose of definitions. Why should it be left to the discretion of adjudication officers what they place or do not place on the register?

Can the holder of an interest in the area feel that the law is clear and has been fairly applies to his case? I fully agree with Mr. Simpson that if there is a compromise between the interests affected a title may go on the register by agreement; but this happy state of affairs is not likely to be of universal occurrence.

I am sorry that I do not agree with Mr. Simpson's stimulating comments on the problem, especially since he has tried to be helpful by giving us his own definition of *ownership* in the fifth paragraph of his comment! The two questions that remain open for future discussion are: (I) is definition of terms like *ownership* necessary or helpful in the special circumstances mentioned where rights in land are being recorded); and (ii) if one assumes that a definition is desirable, how is it to be worded so as to take account of the facts of varying systems of customary law, as well as of English land law and the scheme of the land registration enactment?

CO OWNERSHIP OF LAND

This refers to the situation where two or more people own a piece of land at the same time. These persons have the same interest and enjoy the land at the same time.

Co ownership of land may arise because

a. Two or more people have pooled resources to acquire land with the intention that it should belong to all of them. Eg A husband and a wife, siblings, or friends.

b. Two or more people may benefit from gifts of land either in a will or gifts inter vivos in which they are to co-own the property.

c. Sometimes too the law itself may direct that a particular piece of property should be co-owned by persons. This comes about by operation of law. A typical example is when a person dies intestate and left behind only one house. If he was survived by a wife and a child (or children), they would co- own the house.

Section 4(1) of Intestate Succession Act, 1985 (PNDCL 111) reads;

> ***"Despite this Act,***
>
> ***(a) where the estate includes only one house, the surviving spouse or the child or both of them is or are entitled to that house and where it devolves to both the spouse and the child, they shall hold it as tenants in common."***

There are two main types of co-ownership of land. These are;

1. Joint tenancy, and
2. Tenancy in common

JOINT TENANCY:

Here, the co-owners have the same interest in the same property at the same time without distinction, together with the right of possession of the property, created through a single instrument. If the joint tenants are two, it means that each person is entitled to half the land being co-owned. If there are three joint tenants, each person would be entitled to one -third share of the land, etc.

Husbands and wives are classic examples of situations where people may voluntarily decide to own a piece of land as joint tenants, so that in the event of the death of any of them, the other party may absolutely become the owner of the land.

There are four main features of joint tenancies. These are;

a. **Right of survivorship (jus *accrescendi*):** Whenever any of the joint tenants die, his interest in the property automatically devolves to the surviving joint tenants. This goes on until the last remaining tenant becomes solely and absolutely vested with the ownership of the property. As the surviving joint tenant, he can dispose of the property while alive or pass it on through a will if he dies intestate. It is possible to have a natural person and an artificial person being joint tenants of land.

What happens when all the joint Tenants die simultaneously?

When two or more persons perish in a common disaster or under circumstances which make it impossible to determine the sequence of death, there is no presumption as to survivorship and anyone claiming property through one of the victims whose ownership depended on his surviving the other victim(s), has the burden of proving such survivorship. If this party cannot sustain the burden of proof, his claim fails.

Under the common law therefore, where it is impossible to determine the order of death of two or more persons who are joint tenants of land, one of whom would normally inherit from the other(s), the property of each descends as though the other(s) had never existed. Joint tenants who have died simultaneously are therefore treated as if they have held the property as tenants in common.

This means that there is no right of survivorship between the joint tenants. Each tenant's interest in the property passes according to their respective Wills but if any of the tenants did not leave behind a Will, then it means that he or she died intestate. Such a tenant's share would be distributed under the prevailing law governing intestacy.

Ostrander v. Preece, 196 N.E. 670 (Ohio 1935)

In Ghana, such distribution would be done under the Intestate Succession Act, 1985 (PNDCL 111).

States are at liberty to pass laws to alter this common law position. Some countries use the presumption of survival based on age. An example is England which abrogated the common law principle by enacting a statute which creates a presumption of survivorship based upon the seniority of the deceased persons. Under this statute, the younger is presumed to have survived the elder.

LAW OF PROPERTY ACT, 1925 § 184

b. The four (4) unities

i. **Unity of possession:** This means that each co-owner is entitled as of right to the possession of any part or the whole property. No one has a right to appropriate

to himself exclusively, any part of the property. None of the co-owners can therefore sue the other for trespass, due to this unique feature of unity of possession.

ii. **Unity of interest:** All the co-owners have the same interest in the property and the duration of the interest should also be the same. Therefore, there cannot be a joint tenancy if one of the co-owners has a freehold interest in a property while another has leasehold in the same property. All the co-owners are entitled to an equal share in any profit accruing on the property and equally are enjoined to act together with regard to any legal dealings with the property. They are therefore enjoined to jointly execute documents in relation to the property, in giving notices to bring a lease to an end for example.

iii. **Unity of title:** The parties should have their joint interest being created by the same acts or document. Therefore, if the land was given to them by a conveyance, the same document should have conveyed the property to them. If their title to the land was acquired through adverse possession, then it means that they all took possession of the land at the same time.

iv. **Unity of time:** The property should have been vested in the co-owners at the same time. If the property is vested in them at different times, a tenancy in common would arise

TENANCY IN COMMON

This arises when two or more persons hold an identifiable and a distinct portion of the same land. The share of each co-owner is distinct because each of them know whether his share is half or one third of the land. The land has however not been physically divided to reflect the individual interests of each co-owner.

Tenants in common may therefore hold unequal shares of the property. For example, in an arrangement between three tenants in common, one of them may hold an interest in half of the property, while the other two each have a one-fourth interest.

There is therefore unity of possession just like the joint tenancy. This is because although every tenant in common is aware that he is entitled to say half or one third share of the land, this share has not been physically done. On the other hand, each tenant entitled to use the entire property, so long as they still own their respective portion of the property.

There is however no right of survivorship. If any of the co-owners die, his share of the land is not taken over by the other co-owners. Rather, it is taken by the deceased's beneficiaries. In his lifetime, he may also dispose of his share in the property or may do so in a will.

There may also not be unity of interest as the co-owners may have different interests in the same property. It is possible to have someone with a life interest while another may be having a freehold interest in a tenancy in common.

Presumption of tenancy in common in Ghana

Apart from a conveyance in a trust, the position of the law is that any conveyance of land to two or more persons is presumed to be for a tenancy in common unless the conveyance indicates otherwise. Section 14(3) of the Conveyancing Act reads;

> ***"A conveyance of an interest in land to two or more persons, except a conveyance in trust, creates an interest in common and not in joint tenancy,***
>
> ***(a) unless it is expressed in the conveyance that the transferees shall take jointly, or as joint tenants, or to them and the survivor of them, or***
>
> ***(b) unless it manifestly appears from the tenor of the instrument that it was intended to create an interest in joint tenancy.***

Termination (Extinguishment) of Joint tenancies

1. Severance of Joint tenancies: This can be done in several forms. These are by;

a. Alienation: Sometimes a tenant may decide to alienate his portion of land in a joint tenancy to another person. Although he holds an undivided and indistinct share in the property, he has a potential equal share in the property with the other joint owners. He is allowed to alienate his interest even if the other joint tenants disagree with him. The other joint tenants can prevent him from alienating his share of the land only when he is estopped from doing so by his own conduct. In that case, any purported alienation would be void and ineffective in law.

Price v Hartwell [1996] EGCS 98

When such alienation occurs, it is said that there has been a severance of the joint tenancy by the joint tenant who alienates his portion. The severed tenancy becomes converted into a tenancy in common while the rest of the land which has not been divided continues to be held by the rest of the co-owners as joint tenants. The grantee of the land alienated by joint tenant through severance would relate to the other co-owners as tenant in common and vice versa.

b. Mutual agreement: Where the joint tenants agree to hold the property as tenants in common, there would be a severance of the joint tenancy, with each of them holding it as tenants in common

c. Homicide: Where a joint tenant intentionally kills the other joint tenant so as to be the beneficiary under the right of survivorship, the law would infer that there has been a severance of the joint tenancy with the deceased and the killer becoming tenants in common. This is because, the law frowns upon persons profiting from their criminal deeds.

2. Partition: The joint tenants may also agree to partition the land among (or between) themselves voluntarily or under the direction of the court. When there is a partition, each co-owner would be entitled to a distinct portion of the land and therefore there will not be any unity of possession again. Any of these individual owners can therefore sue the other for trespass after the partition.

3. Union in a sole tenant: This arises when one of the joint tenants acquire all the interest in the land which is owned by the joint tenants. Therefore, if one joint tenant

decides to purchase the whole land and paying off the rest, the purchaser becomes the sole owner and ceases to be a joint owner.

4. Sole survivor: In a joint tenancy, whenever any of the joint tenants die, the rest of the joint tenants would continue to hold the whole property as joint tenants. The last person alive would become the absolute owner of the whole property. This is what is known as the right of survivorship. The moment there is a sole surviving tenant, the joint tenancy has also come to an end. One person cannot be a joint owner of land with oneself.

Termination (Extinguishment) of tenancies in common

1. Where one or more co-tenants buys out the others' portion, this would result in bringing to an end the tenancy in common.

2. When the property is sold and the proceeds are distributed equitably among the owners either by mutual consent.

3. A partition action can be filed in court. This involves going to court and asking to sell the property under court order and to distribute the proceeds among the owners. This usually arises when one or some of the tenants in common decide to sell the property for the sharing of the proceeds but other tenants may not be in agreement. Sometimes too, upon the death of one tenant, the successors may

want to sell the deceased's share but the other co-tenants would not be in agreement, resulting in a partition action being filed in court.

REFERENCES

1. C.H.K LODOH & Da ROCHA: Ghana Land Law & Conveyancing, pages 125- 131.
2. D.D ADJEI: Land Law, Practice and Conveyance in Ghana, pages 145-147.
3. A.J OAKLEY: Megarry's Manual of the Law of Real Property, pages 303- 332.

TUTORIAL QUESTIONS

1. What are the features of a joint tenancy?
2. Critically distinguish between the twin concepts of Joint Tenancy and Tenancy in Common in relation to co ownership of land.
3. Explain the circumstances under which an interest held in a jointly owned piece of land may be extinguished.

G. AYISI ADDO

INTERESTS IN LAND

When people say they own land, they may only be referring to the particular interests they have in a piece of land. Several people could have different interests in the same piece of land at the same time. This is a peculiar feature of land which distinguishes it from other properties.

Who can acquire an interest in Land?

Generally, various categories of personalities or entities can acquire an interest in land. These are;

A. Individuals

B. Groups of persons

C. Legal entities, such as companies, private partnerships, social & religious organizations

D. Families

E. Stools and Skins

F. Sub stools

G. Clans

H. State

Types of interests in land

There are various interests that a person can have in land in the country. These various forms of interests in land have been outlined in Section 19 of the **Land Title registration law, 1986 (PNDCL 152)** which reads;

"**Section 19—Who May Be Registered as Proprietor of Land; Registrable Interests.**

(1) A person shall be registered as proprietor of land if in relation to that land—

(a) he is the allodial owner, that is to say, he holds it under customary law in such manner that he is under no restrictions on his rights of user or obligations in consequence of his holding other than any such restrictions or obligations imposed by the law of Ghana generally; or

(b) he holds a customary law freehold therein, that is to say, he holds rights of user subject only to such restrictions or obligations as may be imposed upon a subject of a stool or a member of a family who has taken possession of land of which the stool or family is the allodial owner either without consideration or on payment of a nominal consideration in the exercise of a right under customary law to the free use of that land; or

(c) he holds the land for an estate of freehold vested in possession or an estate or interest less than freehold according to the rules generally known as the rules of the common law; or

(d) he holds a leasehold interest, that is to say, he holds an interest under a lease for a term of years of which more than two years are unexpired;

(e) he holds a lesser interest in land, that is to say, he holds an interest in land by virtue of any right under contractual or share cropping or other customary tenancy arrangement."

They can therefore be listed as;

1. The Allodial interest

2. The Customary law freehold (Usufruct)

3. The Common Law Freehold

4. The Leasehold

5. Lesser interests, including tenancies and rights granted under contractual and sharecropping arrangements.

<u>At what stage do these interests take effect?</u>

Under customary law, conveyance of land once made in accordance with customary law, is effective as from the moment it is made. (**Bruce v Quanor [1959] GLR 292)**

With regard to interests that are covered by documentation, the rule is that a deed of grant or other assurance of property takes effect immediately upon its execution by the grantor or assuror although the one who acquires the land has not executed(signed) the document.

Fugar v Bossman [1963] 1 GLR 16

1. The Allodial Interest

The Allodial title is sometimes referred to as “Ultimate” or “Absolute” title. This is the highest interest that can be held in land in the country. It is the most superior of all the titles. This interest gives total freedom to the owner in dealing with the land, except as prohibited by law. From the days of old, entities which can acquire the allodial interest are stools, skins, clans, and families. Although it was not very common, some few individuals in the past were also having allodial interests.

How does one acquire the Allodial interest? `

There are five main ways in which one can acquire the allodial interest. These were;

(a) Conquest and subsequent settlement thereon and cultivation by subjects of the stool. Most lands in Ahafo in the Brong Ahafo region were acquired through conquest by the Ashantis. Most lands currently being occupied by the Ashantis were acquired through conquest. Currently it would be illegal for any community to wage war against other communities and obtain land through conquest.

(b) Discovery by hunters or pioneers of the stool of unoccupied land and subsequent settlement and use by the stool and its subjects. An example would be the settlement of the Manya and Yilo Krobos on the Krobo hills after discovery by hunters from those subjects. It is also doubtful if there are any more undiscovered lands within the country.

(c) Gifts to the Stool

(d) Purchase by the stool

(Ohimen v Adjei & another [1957] 2 WALR 275)

(e) Contiguity between two paramount stools. [Any unoccupied land under the authority of a paramount stool which is not part of the land of a subordinate stool or family or a private person would be attached to the paramount stool which in itself has an allodial title]

Wiapa v Solomon (1905) Ren 405

Acquisition of the allodial interest through gifts and purchase seems to be the only ways that in modern times one can acquire the allodial title.

It must be noted that in many areas that lands were acquired by individuals, families and clans through peaceful means, the allodial titles are still vested in them, and not the stools. An examples of such area is the Ga Adangbe. Lands in Prampram, Shai and the Ningo areas are all owned by families and clans, and not the stool.

(Ameoda v Pordia & Ameoda Forzi & others(Consolodated) [1967] GLR 479 @486, 488-489)

Features of the Allodial Interest

(a) The owner of the allodial interest has **complete and total control over the land**. This total control is however limited only by law. Examples of such limitations could be the powers vested in statutory bodies to enter in to any land and use same in the performance of their duties. Ghana Water and Sewage Company, and the Electricity Company of Ghana are vested with such powers.

(b) Customary law allows that where the allodial interest is owned by the stool, subjects of the stool to occupy any vacant portion of the stool lands. This it is believed is because of the

customary services which they are expected to perform to the stool. The subjects can in the process utilize products of the land for personal or economic reasons provided that they do not belong to others. Subjects may also hunt animals, collect snails, herbs, mushrooms, catch crabs, pick wild vegetables, and the fruits of trees in the wild. The subjects can gather firewood, graze cattle.

(c) Where it is a Stool, skin, or family land which holds the allodial interest, the occupants are required to perform customary services to the stool. These could be in the form of payment of money, food crops, drinks or livestock to the stool. This is the position taken by Ollenu, although it is disputed by John Mensah Sarbah who argued that it only depended on the personal relationship between the occupants and the community.

(d) Where the allodial title is vested in a community, there is an obligation on the whole community to defend and protect a member from the claims and demands of a foreign stool. This is because the disturbance of a member's occupation, possession amounts to a disturbance of the whole community.

(e) Ollenu states that where a subject kills a big game on the land, he should give a leg of it to the sub stool who would in turn give a portion to the head stool. If the hunter is a licensee, he should make the presentation through his licensor to the proper authorities. Where a stranger collects snail, mushrooms, etc. not for his personal use but for sale, he should give a third of it to the stool through the proper channels.

(f) The allodial title may be lost through;

I. gift

ii. sale

iii. Conquest

iv. Acquiescence

v. Abandonment.

Azu Crabbe J.S.C. (as he then was) in **Malm v. Lutterodt [1963] 1 G.L.R. 1 at pp. 12-13, S.C**. defined abandonment in legal terminology as follows:

> ***"Land is deemed to be abandoned when the occupier of the land vacates his holding and ceases to exercise any right thereto for an unreasonably long time and does not show any intention of returning to it. In order to establish abandonment, it was necessary for the plaintiff to show an intention to abandon in the minds of the defendants or their late father. This is usually a question of fact which may be inferred from the conduct of the party claiming the right to the land. It is one thing not to assert an intention to use land in one's possession, and another to assert an intention to abandon it. A presumption of abandonment cannot be made from mere non-user: Ward v. Ward ((1852) 7 Ex. 838): the cesser of use must be coupled with an act clearly indicative of the intention to abandon"***

In another case of **Mansah & Another v Asamoah [1975]1 GLR 225,** the Court of Appeal held thus;

> ***"Whether stool land granted to a stranger had become atuogya or abandoned was a question of mixed fact and law. The land would be held to have been abandoned if either the stranger was intransigent or had effectively and voluntarily abandoned the land over a considerable period of years without an intention of returning to it or had died intestate without a successor. 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."***

vi. Conquest **(Owusu v. Manche of Labadi (1933) 1 W.A.C.A. 278)**

vii. Adverse Possession (Statute of Limitation). **Section 10(1) of the Limitation Act, 1975.**

It reads:

> ***"1) A person shall not bring an action to recover a 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 a person through whom the first mentioned claims to that person."***

viii. Compulsory acquisition under **Article 20 of the 1992 Constitution** and the **State Lands Act, 1962 (Act 125)**

Article 20 of the 1992 Constitution reads;

"(1) No property of any description or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied.

(a) the taking of possession or acquisition if necessary in the interest of defense, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and

(b) the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.

(2) Compulsory acquisition of property by the State shall only be made under a law which makes provision for.

(a) the prompt payment of fair and adequate compensation; and

(b) a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from other authority, for the determination of his interest or right and the amount of compensation to which he is entitled."

Section 1 of the **State Lands Act, 1962 (Act 125) also** reads;

"**Section 1—Acquisition.**

> ***(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.***

Although the **Administration of Lands Act,1962(Act 123)** also allows the President to vest stool lands in himself as trustee for the state, judicial pronouncements indicate that the allodial interest in the stool land is not extinguished but runs side by side with the trust. It is therefore erroneous for some authors to hold that the allodial title is lost to the stool by virtue of Act 123.

(See Nana Hyeaman v Osei [1982-83] GLR 495-501)

Section 7(1) of the **Administration of lands Act, 1962(Act 123)** reads;

> "**Section 7—Vesting of Land in President in Trust.**
>
> ***(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 instruct***

2. STATUTORY INTERVENTIONS IN LAND OWNERSHIP

Statutes and the 1992 Constitution have contributed to the making of inroads in the administration of lands in Ghana in general, affecting the allodial interest which is regarded as the highest interest in land which vests absolute control over lands by the owners. Some of these have already been touched on. These are;

1. Compulsory acquisition by the State: The State can compulsorily acquire any land, irrespective of the interest held by the owners. This can be done under the State Lands Act, 1962, (Act 125). Article 20 of the 1992 Constitution gives its blessings to compulsory acquisition of land by the State.

2. **Prohibition of freehold interests in Stool lands:** Article 267(5) of the Constitution prohibits the creation of a freehold interest in a stool land. A freehold interest is defined as an interest which is carved out of allodial title and is held for an indefinite period by the proprietor. The Stool is therefore barred from extending its 'absolute powers' to grant any freehold interest to anyone. It reads:

> ***"(5) Subject to the provisions of this Constitution, no interest in, or right over, any stool land in Ghana shall be created which vests in any person or body of persons a freehold interest howsoever described."***

3. Freeholds cannot be granted to foreigners: Foreigners are barred from acquiring freehold interest in any land in the country. Article 266(1) of the 1992 Constitution reads;

> ***"No interest in, or right over, any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a freehold interest <u>in any land in Ghana</u>."***

As a result, any purported agreement conferring freehold interest in any land in Ghana in a foreigner is void. Article 266(2) of the Constitution reads;

> ***"An agreement, deed or conveyance of whatever nature, which seeks, contrary to clause (1) of this article, to confer on a person who is not a citizen of Ghana any freehold interest in, or rights over, any land is void."***

4. Restriction on Leaseholds to foreigners: A foreigner cannot take a lease of more than 50 years at a time. Article 266(4) of the Constitution reads;

> ***"No interest in, or right over, any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a leasehold for a term of more than fifty years at any one time."***

5. Sharing of revenue from Stool Lands: Article 267(6) of the Constitution requires that any revenue accruing from stool lands ought to be shared according to a strict laid down formula as follows;

10% of the revenue accruing from stool lands shall be paid to the office of the Administrator of Stool Lands to cover administrative expenses; and the remaining revenue shall be disbursed in the following proportions-

(a) 25% to the stool through the traditional authority for the

maintenance of the stool in keeping with its status;

(b) 20% to the traditional authority; and

(c) 55% to the District Assembly, within the area of authority of which the stool lands are situated.

6. Vesting of Stool lands in the President under Section 7(1) & (2) Administration of Lands Act, 1962 (Act 123): As explained earlier on, unlike the State Lands Act (Act 125), Act 123 does not extinguish the stool's allodial title. This notwithstanding, the concurrent vesting of the allodial titles in the stool and the trust when the land is vested in the President as a trustee, is an indication of the vulnerability of the allodial title.

7. The need for concurrence in the alienation of stool lands with consideration: Any alienation of stool lands which is not for the use by a person entitled to use it for free, but would require the payment of consideration, equally requires the concurrence of the Regional Lands Commission. **Section 8 of the Administration of Lands Act, 1962 (Act 123)** reads;

> ***"Any disposal of any land which involves the payment of any valuable consideration or which would, by reason of its being to a person not entitled by customary law to the free use of land, involve the payment of any such consideration, and which is made,***
>
> ***(a) by a Stool;***

(b) by any person who, by reason of his being so entitled under customary law, has acquired possession of such land either without payment of any consideration or in exchange for a nominal consideration,

shall be subject to the concurrence of the Minister and shall be of no effect unless such concurrence is granted."

8. Powers of Public Utility companies: The law empowers public utility companies in the performance of their work to enter unto any land or premise to dig and lay trenches on those lands as and when it becomes necessary. An example is ***Section 2(3)*** *of the* ***Ghana Water and Sewerage Corporation Act, 1965 (Act 310)*** *which reads;*

"(3) For the purpose of carrying out any of its objects the Corporation may, by its officers, other employees or agents—

(a) after giving notice to the owner or occupier of any land or premises, enter upon any such land or premises and thereon dig trenches, lay pipes and do other acts reasonably necessary for carrying out such objects; and

(b) enter any road or place to which the public have access for carrying out such objects:

Provided that the Corporation shall do as little damage as possible in the exercise of its powers under this section, and shall compensate for any damage caused by the exercise 2of such powers, and the liability for, and the amount of, the compensation

shall, in case of difference, be settled in accordance with the provisions of the Arbitration Act, 1961 (Act 38).”

9. Legislation relating to Planning and Zoning:

Irrespective of a person’s ownership of land, the local authority is empowered to regulate the way in which an owner can develop the land. This is to avoid haphazard development as well as ensuring the safety and health of the general public**.** S. 49, 52, 53, 54 and 55 of the Local Government Act, 1993 (Act 462) are typical examples.

Section 49 of Act 462 reads:

> **“Physical development**
>
> ***(1) A physical development shall not be carried out in a district without prior approval in the form of a written permit granted by the district planning authority.***
>
> ***(2) The procedure and manner for securing a permit under subsection (1) shall be prescribed by the Regulations.***
>
> ***(3) Subject to subsection (4), a district planning authority may, prior to the adoption of an approved district development plan for the district, approve an application for a physical development in the district.***

(4) In determining an application for a permit to develop prior to the adoption of an approved district development plan, the district planning authority shall consult the prescribed public agencies and local communities."

Sections 52-55 of Act 462 also read:

52. Unauthorized development

(1) Where

(a) a physical development has been or is being carried out without a permit contrary to this Act,

or

(b) the conditions incorporated in a permit are not complied with, a district planning authority may give written notice in the prescribed form to the owner of the land requiring the owner on or before a date specified in the notice, to show cause in writing addressed to the district planning authority why the unauthorized development should not be prohibited, altered, abated, removed or demolished.

(2) Where the owner of the land fails to show sufficient cause why the development should not be prohibited, altered, abated, removed or demolished, the district planning authority may carry out the prohibition, abatement, alteration, removal or demolition and recover the expenses

incurred from the owner of the land as if it were a debt due to the district planning authority.

(3) This section does not preclude a district planning authority from issuing an enforcement notice demanding the immediate stoppage of the execution of a work carried out contrary to this Act or to the terms of an approved development plan.

(4) A person who fails to comply with a notice issued under subsection (3) commits an offence and is liable on conviction to a fine not exceeding two hundred penalty units or to a term of imprisonment not exceeding six months or to both the fine and the imprisonment; and in the case of a continuing offence to a further fine not exceeding one penalty unit for each day that the contravention continues after written notice has been served on the offender.

53. Execution of district plans

(1) A district planning authority may, for the purpose of enforcing an approved development plan,

(a) prohibit, abate, remove, pull down or alter so as to bring into conformity with the approved plan, a physical development which does not conform to the approved plan, or the abatement, removal, demolition or alteration of which is necessary for the implementation of an approved plan;

(b) prohibit the use of a land or building for a purpose or in a manner contrary to a provision of an approved plan; or

(c) execute a work which is the duty of a person to execute under an approved plan, where delay in the execution of the work has occurred and the efficient operation of the approved plan has been or will be prejudiced.

(2) Before taking action under subsection (1), the district planning authority shall serve notice in the prescribed form on the owner of the land in respect of which the action is proposed to be taken, and on any other person who in its opinion may be affected by it, specifying the nature of, and the grounds on which it proposes to take the action.

54. Nuisance

(1) Where substantial injury to the environment, amenity, public health or the economy is caused by a nuisance or is likely to result from the action or inaction of a person, a district planning authority may serve notice in the prescribed form on, and requiring that person to abate the nuisance within the time specified in the notice.

(2) A notice served under subsection (1) shall specify the nuisance and the steps required to be taken to abate the nuisance.

(3) Where a notice issued under this section is not complied with, a district planning authority may carry out the abatement and recover the costs from the person causing the nuisance or the owner of the land where the nuisance is occurring as if it were a debt due from that person to the district planning authority.

55. Unauthorized development of community's right of space

A district planning authority may without prior notice, effect or carry out instant prohibition, abatement, alteration, removal or demolition of an unauthorized development carried out or being carried out that encroaches or will encroach on a community's right of space, or interferes or will interfere with the use of that space.

10. Petroleum Exploration & Production: The ownership of petroleum in its natural state is vested in the state. An owner of a piece of land which has any form of petroleum on it cannot lay claim to the petroleum. In the same way, the owner of the land cannot undertake any form of exploration, production or development on the land without resorting to laid down procedures to do so.

Sections 1 and 2(1) of the Petroleum Exploration & Production Law, 1984 (PNDCL 84) reds as follows:

"Petroleum property of the Republic

(1) In accordance with clause (6) of article 257 of the Constitution, the petroleum existing in its natural state within the jurisdiction of the Republic is the property of the Republic and is vested in the President on behalf of the people.

2. Exploration, development, production of petroleum

(*1) A person, other than the Ghana National Petroleum Corporation established under the Ghana National Petroleum Corporation Act, 1983,2(2) shall not engage in the exploration, development or production of petroleum except in accordance with the terms of a petroleum agreement entered into between that person, the Republic and the Corporation pursuant to subsection (4) of section 5 or any other authority granted or recognized under this Act."*

Other relevant laws

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

2.Minerals and Mining Act 2006 S.1.

Can other entities apart from the stool acquire the Allodial title currently?

The 1992 Constitution in Article 267(5) prohibits the creation of any freehold interest out of the allodial title(interest). Questions are being asked as to whether an entity

apart from the stool can currently acquire the allodial interest from another stool. This is because the freehold interest is even lower than that of the allodial title. No specific mention was made of it in the Constitution. It is however believed that the Lands Commission would not grant their concurrence to such an alienation.

2. The Customary Freehold (Usufructuary Interest)

The usufruct

Literarily, 'usufruct' means "use of the fruits of the land." This term is defined by the Black's Law Dictionary as;

> ***"A right for a certain period to use and enjoy the fruits of another's property without damaging or diminishing it, but allowing for any natural deterioration in the property over time."***
>
> ***In Roman law, the usufruct was considered a personal servitude, resulting in a real right. In modern civil law, the owner of the usufruct is similar to a life tenant, and the owner of the property burdened is known as the naked owner. La. Civ. Code art. 535.***
>
> — Also termed perfect usufruct; usufructus; ususfructus; (in Scots law).
>
> ***"Usufructus is … the right of using and enjoying property belonging to another provided the substance of the property remained unimpaired. More exactly, a usufruct was the right granted to a man personally to use and enjoy, usually for his life …, the property of another which, when the usufruct ended, was to revert intact to the dominus or his heir. It might be for a term of years, but even here it was ended by death, and in the case of a corporation (which never dies)***

> ***Justinian fixed the period at 100 years. A usufruct might be in land or buildings, a slave or beast of burden, and in fact in anything except things which were destroyed by use …, the reason, of course, being that it was impossible to restore such things at the end of the usufruct intact …"*** R.W. Leage, Roman Private Law 181–82 (C.H. Zieglered., 2d ed. 1930)."

The terms 'usufructuary interest', "customary freehold" and "determinable interest" are all used interchangeably. The term refers to an interest in land held by subgroups and individuals who acknowledge the land to be under the allodial ownership of a larger community in which they are members. It can also be described as an interest a clan, family or an individual who are subjects of a stool may acquire from a land where the allodial interest is vested in the stool. In the same way, where the allodial title is vested in the clan, families and individuals may acquire this usufructuary interest. Where the allodial interest is vested in a family, a family member can also acquire the usufructuary interest.

An usufructuary interest co-exist side by side with the allodial interest. The usufruct owner of the land (customary freeholder) here is claiming an interest through someone already vested with the allodial interest. In the case of **Nii Amon Kotey v Asere Stool [1961] GLR 492-496,** the court acknowledged that the allodial interest was vested in the Asere stool while the usufructuary interest was vested in the Nikoi Olai family.

In the case of **Awuah v Adu Tutu & 1 other [1987-1988] 2 GLR 191**, the plaintiff acquired land from the Akwaboah Stool. He cultivated on a large portion of the land and

gave out the remainder to another person to cultivate as an abunu tenant. The plaintiff sued the allodial owners for declaration of title and damages for trespass. The court acknowledged that there was in existence simultaneous coexistence of both the allodial interest of the stool as well as the usufructuary interest of the plaintiff in the piece of land given to the plaintiff. The court stated thus;

> ***"…. the plaintiff had an estate in that portion of the stool land and of which he took effective possession, occupied and cultivated. That estate could variously be described as usufructuary, possessory or determinable title. The usufructuary title is a specie of ownership co-existent and simultaneous with the stool's absolute ownership. This has nicely been put by Dr Asante in his book Property Law and Social Goals in Ghana. At 53, the learned author stated:***
>
> ***"The stool, in effect, no longer has dominium of the stool land but an interest in stool land conceptually superior to that of the subject. A concept of a split ownership is emerging allowing the existence of separate by simultaneous estates in respect of the same land."***
>
> ***The usufructuary is regarded as the owner of the area of land reduced into his possession; he can alienate voluntarily to a fellow subject or involuntarily to a judgment creditor without the prior consent of the stool. There is practically no limitation over his right to alienate that usufructuary title. So long as he recognised the absolute title of the stool, that usufructuary title could only be***

determined on an express abandonment or failure of his heirs: see Thompson v. Mensah (1957) 3 W.A.L.R. 240.

Neither can the stool divest the usufructuary of his title by alienating it to another without the consent and concurrence of the usufructuary: see Ohimen v. Adjei (1957) 2 W.A.L.R. 275."

How does one acquire the Usufructuary interest (customary freehold)?

1. Implied Grant from Stool: Whenever a subject of a stool, effectively occupies unoccupied land in which the allodial interest is vested, it is treated as an implied grant from the stool. In the case of **Bruce v Quaynor [1959] GLR 292**, the court affirmed this principle and held that the plaintiff's possession of the land for about 30 years without any objection from the stool is an indication of an implied grant from the stool to it. The court held that the subject of a stool is entitled by customary law to occupy any vacant portion of the stool's land, either upon actual or implied grant. According to the court, his possession and occupation of the land as a subject of the stool constituted good title, whether or not it was in virtue of an actual grant. Such title would take precedence over any grant which the stool might purport to make subsequently to another, for by customary law a stool has no right to grant land which is in the occupation of anyone (subject or stranger) without the consent of the person in occupation

2. Actual grant from Stool: A subject of a stool can also acquire an usufructuary interest in land by an express grant from the stool or the allodial owner. The grant could be made orally, but it is still effective. A subsequent grant by deed would not take away from the fact that there is already in existence a valid usufructuary interest.

See **Bruce v Quanor &ors [1959] GLR 292**

The growing demand for land by the subjects and the need to regularize its use for all the subjects accounts for the acquisition of the land from the allodial owner. In the case of **Frimpong v Poku, [1963] 2GLR 1**, the defendant as a subject of a stool was found to have taken more land than had been allocated to him by the Sankori stool. The Stool therefore went ahead and sold the extra portion to the plaintiff. He argued that he was entitled as a subject of the stool in accordance with customary law to occupy any vacant stool land.

The court rejected this argument. The court held that the principle of customary law which says that a subject is free to cultivate any extent of stool land does not confer on a subject an unlimited license for indiscriminate cultivation, and a subject usually obtains the formal permission of the stool for the purpose. In modern times, it has become necessary to ensure a more equitable distribution of available land for cultivation and the practice has been for limited areas to be demarcated for subjects of the stool.

3. Transfer by a Subject: A subject may also transfer his interest in the land to another subject, without the consent of the allodial owner. The new subject only needs to

continue to recognize that the allodial interest is held in the stool or family, as the case may be.

See: Ohimen v Adjei (supra)

<u>Can a Stranger who is not a subject of a stool acquire the usufructuary interest?</u>

Although the general perception is that it is only a subject of a stool, a member of a family or clan which can acquire the customary freehold, judicial decisions contradict this assertion. In the case of **Awuah v Adu Tutu & 1 other [1987-1988] 2 GLR 191,** the court found nothing wrong with a stranger acquiring this interest, except that he is restricted to only the portion of land which has been granted to him. The court held that;

> ***"It appears the plaintiff was not a subject of the stool of Akwaboa, the allodial owner of the land in dispute. In other words, the plaintiff was a stranger grantee of that stool in respect of a defined portion of the stool's forest land which he had cleared and cultivated. But it should be remembered that the usufructuary title which a stranger-grantee like the plaintiff acquires, places the stranger-grantee in the same position as the subject of the stool, <u>except that in the case of farming land, as well as in building land, the title of the stranger-grantee is limited to a well-defined area demarcated and granted to him; whereas the subject of the stool is not so rationed in the amount of the forest land he may occupy</u>."***

As long as the stranger grantee performed the obligations imposed upon him in respect of the grant, the allodial owner could not dispossess him of the land.

Unlike a subject who can acquire the usufructuary interest as of right by occupying any portion of the uncultivated or vacant land, a stranger must properly acquire the land for his use from the stool before he could be vested with the usufructuary interest. In the case of **Oppong Kofi & Others v Attribukusu III [2011] SCGLR 176**, the court said thus;

> ***"As members of a stranger -family and unlike the case of stool subjects, it would be expected that they would still have needed formal grants from the stool to carry on their expansion programme."***

In the case of **Mansah v Asamoah [1975] 1GLR 225**, another limitation imposed on a stranger grantee was that he couldn't dispose of the land without the consent of the allodial owner. The court stated that;

> ***"…a stranger-grantee of stool land, like the subject-grantee, had a possessory heritable interest in the land he had cultivated and so long as he continued to discharge his obligations and complied with the conditions of his grant he could not be deprived of his interest by the stool although unlike the subject-grantee he could not alienate or dispose of his interest inter vivos without the consent of the stool. Nevertheless, where the stranger-grantee died intestate without a successor or had abandoned the land it would revert to the stool which could validly alienate it to another person."***

Upon the death of a stranger grantee, it is required that the customary successor be introduced to the allodial owners. This is not a requirement in respect of a subject grantee. The court in the **Mansah v Asamoah (supra)** explains that;

> ***"What is the purpose of the introduction of a customary successor to a stool land occupier and his elders? When a subject-grantee dies, his customary successor need not introduce himself because the subject-grantee occupies the land as of a right, that is, as a member of the land-owning community. However, when a stranger-grantee dies, his customary successor must introduce himself to the stool so that the chief and his elders must know who occupies the land and from whom the fulfilment of any obligations, imposed by the grant, can be expected."***

Stranger-grantee's determinable estate is heritable, and it vests immediately in his successor as of right, upon his appointment as customary successor.

Mansah v Asamoah (Supra)

FEATURES OF THE USUFRUCTUARY INTEREST

1. The usufruct owner is claiming title through someone already possessing the allodial title in the land.

2. The one exercising the usufructuary interest should cultivate or occupy, unoccupied portion of the land. The right of a person by customary law to the free use of land is limited to land in its natural state, i.e. land which has nothing but natural products thereon, not land which has been developed by human skill, industry or capital.

No person is entitled to the free use of a cocoa farm made by another, or a house built by another person.

Total Oil Products Ltd v Obeng & Manu [1962] 1GLR 228

3. The one exercising the right of usufructuary interest should be in effective possession of that land.

> ***"some of the cardinal incidents of the usufructuary interest were that the usufructuary had exclusive possession and enjoyment of his portion of land, and he could not capriciously be divested of that interest by the stool; neither could the stool alienate that portion of land to any other person without the prior consent and concurrence of the usufructuary. Thus the usufructuary interest was potentially perpetual. So that apart from the statutory powers for expropriation or acquisition as provided in the State Lands Act, 1962 (Act 125), as amended by the State Lands Act, 1962 (Amendment) Decree, 1968 (NLCD 234), the interest of the usufructuary could be determined only by his consent, his abandonment or upon failure of his successors."***
>
> **Mansu v Abboye [1982-83] GLR 1313(Holding 1)**

4. Use of adjoining land. The customary freeholder has an inherent right to expand his farming into a vacant and virgin land adjoining his own. The direction of expansion is however indicated by the method of farming. The farmer does not however acquire a customary freehold in the adjoining land. It has been held that the community is at liberty to grant it to someone else. In the case of dispute as to how far neighboring farmers can extend their farming activities into vacant adjoining land, the allodial title holder settles the dispute by apportioning the land between the neighboring farmers.

5.The interest in the land is perpetual and cannot be determined by the allodial owner without his consent. This means that an allodial owner cannot alienate it or in any way deal with it without the consent of the customary freeholder (usufructuary interest). Any attempt by the allodial owner or his grantee to enter the land held by the customary successor without his consent would amount to trespass.

In **Ohimen v Adjei,** the court held that;

> ***"It would be repugnant to natural justice and good conscience if, while the stool can insist upon the services and customary rights due 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 his title to that land."***

A freehold title is carved out of the allodial title and is therefore theoretically, a lesser interest than the allodial title. In reality, the proprietor of a freehold title and his successors in title hold it for an indefinite period until there is a failure of succession. Succession in this context may be by devolution on the proprietor's death or by deposition *inter vivos*. So long as someone claims the succession in title from the original freeholder, the freeholder will continue.

An alienation of land by a stool which is occupied by a subject who holds usufructuary interest therefore is null and void.

Oblee v Armah & Affipong [1958] 3 WALR 484

6. Except for restrictions placed on land user by statute, there is no limit on the customary freeholder in his use of the land. He is entitled to farm and build on it and entitled to enjoyment of the natural products.

The interest acquired by the usufruct owner is not a mere right of occupation and farming. It is an interest in land that he could alienate ***inter vivos*** or upon his death would be regarded as part of his estate as long as he recognizes the interest of the allodial owner. In the case of **Nii Amon Kotey v Asere Stool**, the court held that;

> ***"A usufructuary right in possession is now an estate or interest in the land which the subject can alienate, use and deal with as his own, so long as he does not prejudice the rights of the paramount stool to its customary services."***

The usufructuary owner can therefore dispose of his interest in the land without reference to the stool, subject to the allodial interest of the stool.

Addai v Bonsu [1961] GLR 275

7. The usufruct owner is however under an obligation to perform customary services due from the subject or member to the stool, or family or clan when demanded by such stool, family or land.

8. The usufruct owner is the owner of all the economic trees found on the land within his control and possession. The allodial owner cannot sell, or harvest these economic trees without the consent of the customary freeholder. Such economic trees include palm trees, cocoa and coffee. It doesn't matter that they grew in the wild and were not purposely planted by the customary freeholder. An allodial owner would be committing trespass if he enters upon the land of a customary freeholder (usufruct owner) without his consent or harvests the economic trees.

See: **Attah v Esson [1976] 1GLR 128**

Mansu v Abboye & Another [1982-83] GLR 1313

9. A customary freeholder can maintain an action against the allodial owner if the latter alienates any portion of his land to a third party without the consent of the customary freeholder. An action for declaration of title, recovery of possession, damages for trespass and an order for perpetual injunction can be maintained in respect of his usufructuary interest.

See: Awuah v Adu Tutu & 1 other [1987-1988] 2 GLR 191. The court stated thus;

> ***"The courts have repeatedly held that a subject of the stool, or a stranger-grantee of the stool for that matter, can maintain an action against even the stool in defense of the usufructuary title and may impeach any disposition of such interest effected without his consent in favor of a third party."***

10. Where there is an actual grant from the stool to the customary freeholder, an oral grant is still valid. Even a subsequent regularization by the allodial owner does not take away the fact that there has already been a valid grant to the customary freeholder, orally.

Bruce v Quaynor (supra)

11.The modern tendency is to limit the extent of the land a subject may acquire by reason of his inherent right due to the pressure on land, the growing population and urbanization. Haphazard building may infringe the town and country laws as specific areas may have been zoned for specific purposes. The community may have reserved land for the community's use, such as schools, police post, hospitals, etc. These must not be encroached upon by people seeking to exercise their usufructuary interests in the lands of their allodial owners.

Frimpong v Poku (supra)

How Will the Usufructuary Interest Be Lost?

1. Denial of title of the Allodial Owner: a stool subject forfeits his usufructuary title to stool land in his possession if he denies the title of the stool; the only way in which a subject can be said to have denied the title of his stool is where he claims that the land he occupies belongs to a stool other than the stool to which he is a subject, and that he holds the land as grantee of that stool.

Total Oil Products Ltd v Obeng & Manu [1962] 1GLR 228

The allodial owner is required to give the usufruct owner a hearing before dispossessing him.

Adjei v Grumah [1982-83] GLR 985

2. Abandonment: Mere absence from land is not evidence of abandonment. There must be an intention to abandon in addition to the physical act of abandonment.

Mansah v Asamoah (Supra).

When a person in possession of Stool land abandons it or when his family have abandoned it for more than ten years at least, the village headman and others can allow another person to occupy the same.

(Sarbah, Fanti Customary Laws)

3. Failure of Successors: Where there is failure of a successor, the land reverts back to the allodial owners.

Mansu v Boye [1982-83] GLR 1313

4. Consent of the Usufructuary owner: A person with the usufructuary interest can lose his interest in the land if he voluntarily consents to the allodial owner taking the land back.

5. Judicial Sale: If the land in question is sold in execution of a judgment debt, the new owner takes the land free from any encumbrance.

6. Compulsory acquisition: The State Lands Act, 1962 (Act 125) and Article 20(1) authorizes the state to compulsorily acquire the land, free from encumbrances.

7. Unrectified customary breaches: Where there is proven and unrectified breaches of customary tenure, the usufruct would be lost to the allodial owner.

Asseh v Anto [1961] GLR 1313

Has The Usufructuary Interest Extinguished the Allodial Interest?

There is no doubt that the usufructruary interest has acquired some immense powers at the expense of the allodial interest to the extent that to some authors, it has extinguished the allodial interest. Woodman stated that:

> ***"The rights enjoyed by the Usufructuary owner has reached a point where one can say that when a subject acquires the Usufructuary interest, it essentially extinguishes the allodial interest."***

Features of the Usufructuary interest which support the argument

I. Potentially perpetual interest in the usufruct owner, preventing the allodial owner from granting conflicting rights in the land as long as the usufruct persists.

Total Oil Products v Obeng

ii. Usufruct owner can sue the allodial owner for a declaration of title, damages for trespass or recovery of possession

Mansu v Boye

iii. Usufruct owner can alienate his interest without the consent of the allodial owner, subject to the performance of customary services and the recognition of the title of the allodial owner.

Thomas v Mensah

iv. Usufruct is the owner of all economic trees on the land. Allodial owner needs the consent of the usufructruary owner before he can harvest.

Atta v Esson

v. Allodial owners have become titular(ceremonial) custodians instead of the actual owners. The Stool vested with the allodial interest holds the land in trust for their subjects who are the beneficial owners in the long run.

Ohemeng v Adjei

vi. Judicial pronouncements indicating that once the usufruct is created, the allodial interest becomes an empty shell

Tettey v Ameni-Quashie

Features of the allodial interest which do not support the argument

I. The usufructruary owner may lose his interest to the allodial owner in the event of denying the title of the allodial owner

ii. The usufructruary owner may lose his interest to the allodial owner where there is failure of successors

iii. the usufructruary owner may lose his interest to the allodial owner for unrectified customary breaches (failure to perform customary rites)

iv. Usufructuary interest is essentially dependent on the allodial interest for its existence as it is created out of the latter.

v. Apparent constitutional restrictions prohibiting the creation of the freehold interest from stool lands. As per Article 267(1) and 266

vi. Notwithstanding the principle in **Mansu v Boye,** allodial owner may be allowed to re-enter an uncultivated land

Adjei v Grumah

vii. The usufructruary interest cannot transfer the interest of the allodial owner.

TUTORIAL QUESTIONS

1. With the aid of legal authorities, explain how the allodial interest can be acquired and lost.

2. What are the features of the allodial interest in land?

3. In what ways have statutes and (the constitution) changed the face of land ownership in Ghana?

4. With the aid of legal authorities, explain how the Usufructuary interest in land can be acquired and lost.

5. What are the main features of the Usufructuary interest in land?

6. *"The rights enjoyed by the Usufructuary owner has reached a point where one can say that when a subject acquires the Usufructuary interest, it essentially extinguishes the allodial interest."*

   Do you agree with this view in the light of the various features of the allodial and Usufructuary interests?

7. Kofi and Esuman are farmers. They are subjects of the Tutugyagu stool at Kwamekrom. The Tutugya stool has a vast land of uncultivated land at Kwamekrom. Kofi who was desirous of going into vegetable farming approached the occupant of the stool for a portion of land to cultivate. The Chief, Odeneho Konkonsa I, acceded to his request and granted him two acres of the stool land for the cultivation of the vegetables. Kofi immediately took possession of the two-acre land but realizing that it was too small for his project, appropriated an extra acre of land belonging to the stool without its consent. When the stool realized what Kofi had done and confronted him, he argued that as a subject of the stool, he had a right to appropriate any vacant portion of the stool land. The Tutugya stool has reallocated all three acres of land which was being cultivated by Kofi to a stranger, Ogyam to rear livestock.

   Essuman on the other hand without informing the stool, appropriated to himself one acre of vacant portion of the stool land. When this got to the notice of the stool, he was asked to perform customary rites to the stool yearly which comprised donating some foodstuffs and drinks. He complied with this for about two years and defaulted. For two consecutive years, Essuman has failed to perform any customary rites to the stool. The chief and his elders have out of anger been sending the youth to the land to forcefully harvest some of the vegetables during the harvest period.

   Kofi and Essuman have approached you for an advice over the conduct of the Tutugya stool.

What legal advice would you render to them in the light of your knowledge in the law of Immovable property?

Q&A

MANAGEMENT OF STOOL PROPERTY

What is a "Stool"?

When the word 'stool' is used, it may connote at least two things, namely;

A. It may be referring to a customary community similar to a body corporate, headed by a chief who is wielding some form of traditional political authority, or

B. It may also be referring to the symbol of the office of a chief or another customary office holder, which normally is a small carved black wooden stool.

It is the meaning ascribed to it in 'A' that which is relevant for the current studies.

Article 295 (1) of the 1992 Constitution defines a stool as follows;

""stool" includes a skin, and the person or body of persons having control over skin land"

Under customary law, the stool and skin are embodiments of the collective rights of the whole community. Symbolically, it is represented by the wooden carved seat or the skin of an animal. Chiefs are regarded as trustees of lands on behalf of all the subjects of the stool. It is the individuals who are the descendants of the stool who are known as the subjects. Stool and skin lands therefore belong to the stools and the skins.

Who is a chief?

Section 57(1) of the Chieftaincy Act, 2008, (Act 759) defines a chief as;

> ***"…. a person who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage."***

What is a Stool Land?

The Administration of Lands Act, 1963 (Act 123) defines it thus;

"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."

Under the 1979 Constitution, the stool divested the said lands of state control. Currently Articles 257 (2), (3), and (4) of the 1992 Constitution have confirmed the re-vesting of the lands in the Northern, Upper East, and Upper West in the appropriate traditional owners.

Articles 257 (2), (3) and (4) reads;

> ***"(2) For the purposes of this article, and subject to clause (3) of this article, "public lands" includes any land 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.***
>
> ***(3) For the avoidance of doubt, it is hereby declared that all lands in the Northern, Upper East and Upper West Regions of Ghana which immediately before the coming into force of this Constitution were vested in the Government of Ghana are not public lands within the meaning of clauses (1) and (2) of this article.***
>
> ***(4) Subject to the provisions of this Constitution, all lands referred to in clause (3) of this article shall vest in any person who was the owner of the land before the vesting, or in the appropriate skin without further assurance than this clause."***

The re investing of these lands again in the 1992 Constitution may be out of abundance of caution after the overthrow of the 1979 Constitution on 31st December 1981.

Article 295(1) of the 1992 Constitution also defines stool land thus;

> ***"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***"

Legal Features of Stool / Skin (lands)

1. Stool is a body corporate. This means that it has a legal personality. It can sue and be sued. It's the stool, acting through the occupant and the elders who manage the affairs of the stool. The occupant of the stool and the elders may die but the stool, being a corporate entity, does not. In **Quarm v Yankah II [1930] 1 WACA 80, @83**, the court held;

> ***"The conception of the stool that is and has always been accepted in the court of this colony…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 forever."***

2. It is only the occupant of the stool or skin who can sue and be sued on behalf of the stool or skin. A person who therefore seeks to sue a stool or skin must sue the occupant of the stool as representing the stool or skin. Thus the titles of the suit would look like this;

> ***"Nana Sasraku Kusi I, chief of Adukrom and representing Adukrom stool, H/N 1, Adukrom v Kofi Mensah of H/N 78, Adukrom."*** OR
>
> ***"Nana Sasraku Kusi I, chief of Adukrom, suing on behalf of Adukrom Stool, H/N 1 Adukrom v Kofi Mensah of H/N 78, Adukrom."***

In the same way, a person suing the stool over a parcel of land will have to sue the chief as representing the stool. For example;

> ***"Kofi Mensah of H/N 78, Adukrom v Nana Sasraku Kusi I as representing the Adukrom stool."***

3. Where the stool or skin is vacant, it is the regent or the caretaker of the stool or skin who can sue and be sued on behalf of or as representing the stool or skin.

Order 4, Rule 9 of High Court (Civil Procedure) Rules, 2004 (CI 47) reads;

> ***"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."***

4. A chief who dies in the course of litigation may be substituted by the regent where there is any, or the caretaker. On the other hand, where the successor is enstooled or enskinned, the new chief may be substituted for the deceased chief. The same procedure is adopted when a chief abdicates the throne at a time when he is a party to a case in court on behalf of the stool

5. A private individual**,** or even an elder of the stool cannot sue on behalf of the stool. Where the occupant of the stool, or regent (caretaker) refuses to do so even when the properties or interests of the stool is in danger of being lost or wasted. In the same way, a private individual(s), or even an elder cannot defend an action on behalf of the stool.

The courts have refused to endorse the exceptions that pertain in respect of family lands in **Kwan v Nyieni [1959] GLR 67,** which 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.

See: **Gyamfi & Another v Owusu & Others [1981] GLR 612**

6. It is only the occupant of a stool, therefore who has a right to claim compensation in respect of a stool land and neither the elders nor the community could sue for compensation.

See: Owusu v Manche of Labadi [1933] WACA 278

7. In the absence of the Chief, another may be appointed under customary law to represent him. The Regent can sue and be sued for and on behalf of the stool. In the absence of a Regent, a Caretaker of the stool can sue and be sued for and on behalf of the stool.

See: Bukuruwa Stool v Kumawu Stool [1962] 1GLR 352

8.In the absence of the chief, regent or caretaker the class of persons who may be appointed by a stool for the purposes of litigation is strictly limited. It includes the

linguist, elders and office holders of the stool (who are its natural representatives) but the class will not be extended beyond these save in the case of a particular stool where a local custom, proved to the satisfaction of the court, establishes that some other person or persons are entitled to represent the stool concerned.

See: Ofuman stool v Nchiraa Stool [1957] 2 WACA 230

9. The settled law was that an occupant of a stool, i.e. a chief could not be called upon by his subjects to account during his reign as a chief.

See: Gyamfi & Another v Owusu & Others [1981] GLR 612. In that case the appellants were the Omanhene and Osiakwahene (paramount chief and a sub-chief) of the Kumawu traditional area. The government through compulsory acquisition acquired some lands at Digya-Kogya, the property of the Kumawu stool, for a game reserve. The appellants with the connivance of some public officials managed to fraudulently receive the compensation without any reference to the stool. Some subjects of the Kumawu stool came together and successfully sued the appellants at the High Court for and on behalf of the Kumawu stool for a recovery of the compensation wrongfully paid to the appellants. Upon an appeal to the Court of Appeal, the court reversed the Judgement and held that the respondents had no capacity to bring an action for and on behalf of the stool and that only the occupant of the stool could do that. The court said the incidents of family land were different from stool land and would not stretch the principles in Kwan v Nyieni into stool lands.

Per Archer J.S.C:

> ***"The advent of Anglo-Saxon system of jurisprudence into this country did not affect this principle of law . . . 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....The circumstances of this case require that the appellants, i.e. the second defendant and the codefendant, the occupant of the Kumawu stool, be called upon to account. More so, the codefendant. 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."***

It is interesting to note that the proposed Land Act seeks to deviate, it may appear, from the established principle of "customary law and usage" by proposing that where for example a chief does not account fairly to his subjects he commits an offence as rendered hereunder as follows;

> ***"(1) A stool, skin, tendana, clan or family land shall vest in the appropriate stool, skin, tendana, clan or family on behalf of, and in trust for the subjects of***

the stool, skin, tendana, clan or family in accordance with customary law and usage.

(2) A person shall not create an interest in, or right over any stool, skin, tendana, clan or family land which vests in that person, another person or a body of persons a freehold interest in that land howsoever described.

(3) Sub-section (2) does not take away the inherent right of a subject of a stool or skin, or a member of a clan or family to the usufructuary interest in a vacant portion of the stool, skin, tendana, clan or family lands."

FUNDAMENTAL RESPONSIBILITY -AS A FIDUCIARY

"(1) A chief, tendana, clan head, family head and or any other authority in charge of the management of stool, skin, tendana, clan or family land, is a fiduciary charged with the obligation to discharge the management function for the benefit of the people of the stool, skin, clan or family concerned and is accountable as a fiduciary.

(2) A chief, tendana, clan head, family head or any other authority in charge of the management of stool, skin, tendana, clan or family land shall be transparent, open, fair and impartial in making decisions affecting the specified land.

(3) A fiduciary under this section who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine of not more than ten

thousand penalty units or a term of imprisonment of not more than ten years or both."

9.Prohibition of Execution: Stool property is not to be seized in execution of a judgement taken against the stool, without the written consent of the National House. Section 46 of the Chieftaincy Act, 2008 (Act 759) reads;

"Stool property whether movable or immovable shall not be seized in execution at the suit of a person except with the written consent of the National House."

ALIENATION OF STOOL LANDS

Stool lands are owned by stools for themselves and on behalf of their subjects. The chief and his elders or a chief, the sub chiefs and the elders of the stool represent the stool. In some Akan states, the elders of a stool consist of the sub chiefs and a head of family who is not a sub chief. The head of family is usually consulted before the queen mother nominates a chief. The following rules apply when dealing with alienation of stool lands:

1. The general rule is that a valid alienation of stool land is one which is made by the occupant of the stool with the consent and concurrence of the principal elders. This point was made by Justice Ollenu in the case of **Allottey v Abraham (1957) 3 WALR 280**. Where the occupant of the stool does not therefore partake in the transaction, it is null and void. (**Agbloe v Sappor)1947 12 WACA 187**

A chief once sworn before his subjects, kingmakers and elders of his stool can alienate stool lands with the consent and concurrence of the elders. He does not need to have sworn any oath before the paramount chief to make him a chief. The introduction to the paramount chief and subsequently swearing before him is just a customary requirement indicating allegiance and not that it confers the title of a chief on him.

In Re Adonten Divisional Stool of Twifo Traditional Area [2009] SCGLR 404 @ 412

2. A grant by a caretaker alone without the knowledge, consent, and concurrence of the elders of the stool is void for lack of capacity. In **Awuku v Tettey [2011]1 SCGLR 366,** the case concerned the alienation of Osu stool lands at Maamobi-Kotobaabi by a caretaker acting without the concurrence and consent of the elders and a head man. The court held that the alienation was void.

3. An alienation by the chief alone, without the consent and concurrence of the principal members of the stool is also void. In the case of **Akunsa v Botchway & Jei River Farm Ltd [2011] 1 SCGLR 288** the supreme court held that stool lands are communally owned and any alienation of such land by a chief without the consent and concurrence of the elders of the stool would render the alienation void.

See: **Akwei v Awuletey [1960] GLR 231.**

4.However, a document purported to be executed by the occupant of the stool and at least signed by the linguist would be deemed to be binding on the stool.

Amankwanor v Asare [1966] GLR 598

5. An oral customary grant validly made could be confirmed in writing by the same grantor or his successor and would take effect from the date the oral grant was made and not and not the day it was that it was confirmed.

Malm v Lutterodt [1963] 1 GLR 1

However, it is only a valid customary grant that can be confirmed in writing by the same grantor or his successor. Where the customary grant is void, it cannot be confirmed by the grantor or his successor and would remain void.

Hammond v Odoi & Another [1982-83]2GLR 1215

6. A chief who alleges that he made a grant of a stool land with the consent and concurrence of the elders of the stool and therefore made a valid grant has the burden of proving who those elders are when that assertion is challenged.

France v Golighty; France v Addy (consolidated) [1991] 1 GLR 74

7. A grant of stool lands to a person by a chief with the consent and concurrence of the principal members of the stool would remain valid even if the chief's enstoolment is subsequently nullified. A successor to a stool cannot dissociate himself from any grant of land made by his predecessor on account of destoolment, abdication or death.

Amankwah v Kyere [1963] 1 GLR 409

8. Although a conveyance of stool land was normally made by the stool occupant with the consent and concurrence of the stool elders, a chief could consent or authorize the conveyance to be executed by a person other than himself. So that even if the plaintiff's

document was signed in this case only by members of the committee, inasmuch as the stool occupant consented to the alienation, her title would be perfectly valid.

Ntem v Ankwanda [1977] 2 GLR 452

9. Alienation of stool property requires consent of Traditional Council: Any transaction seeking to alienate or pledge stool property, whether movable or immovable including land is voidable unless it was made with the consent of the Traditional Council which owns or exercising proprietary interest over that stool land.

Section 45 of the **Chieftaincy Act, 2008(Act 759)** reads;

"In addition to the consent and concurrence of the Lands Commission required by clauses (3) and (4) of article 267 of the Constitution, a transaction purporting to alienate or pledge stool property whether movable or immovable is voidable unless made or entered into with the consent of the Traditional Council concerned."

10. Concurrence of the Regional Lands Commission: Any alienation of stool lands which is not for the use by a person entitled to use it for free under customary law but which requires that some consideration is paid, ought to get the concurrence of the Regional Lands Commission. Section 8 of the Administration of Lands Act, 1962 (ACT 123) reads;

> ***"(1) A disposal of a land which involves the payment of a valuable consideration or which would, by reason of it being to a person not entitled by***

customary law to the free use of land, involves the payment of available consideration, and which is made

(a) by a stool, or

(b) by a person who, by reason of that entitlement under customary law, has acquired possession of the land without payment of a consideration or in exchange for a nominal consideration, is subject to the operation of article 267 of the Constitution."

Article 267 (3) & (4) read as follows'

"(3) There shall be no disposition or development of any stool land unless the Regional Lands Commission of the region in which the land is situated has certified that the disposition or development is consistent with the development plan drawn up or approved by the planning authority for the area concerned.

(4) Where the Regional Lands Commission fails or refuses to give the consent and concurrence under clause (3) of this article, a person aggrieved by the failure or refusal may appeal to the High Court."

The Supreme Court has however held that the concurrence need not occur before the alienation takes place. In other words, the property can be alienated before the

concurrence is sought from the Lands Commission (or "the Minister", prior to changes in the law substituting the "Lands Commission" for "the Minister")

In the case of **Western Hardwood Ent. Ltd v West African Ent. Ltd [1998-99] SCGLR 105,** the court held that;

> ***"It must be noted that section 8(1) of Act 123 does not require the concurrence to precede the disposition. The subsection contemplates the holder of the land to make all arrangements to secure the minister's concurrence after the disposition. By this provision the disposition remains of no effect until the concurrence is given. But it must be emphasized that the disposition is not void in the sense that it cannot ever be strengthened any time thereafter. It is therefore in the interest of the lessee to secure the minister's concurrence; the vendor need not bother himself with that. The provision in subsection (6) relating to a transaction entered into in contravention of the provisions of section 8 as being void, does not affect the position as far as section 8(1) is concerned. What it means is that any transaction purposely entered into to evade the requirement of the minister's concurrence would be struck down: see Schandorf v Zeini [1976] 2 GLR 418 at 440-441, CA."***

In the **Schandorf** case (supra) Amissah JA who delivered the lead judgment in the Court of Appeal made the position clear at pages 440-441 of the report as follows:

". . . this section 8(1) does not require the concurrence of the Minister to precede the disposition. The wording of the subsection contemplates the holder of the land making all arrangements for a disposition being first made and then the Minister's concurrence being sought afterwards. It is common practice that these transactions requiring the Minister's concurrence are entered into before the conveyance is submitted to the Lands Department for the necessary concurrence. The disposition remains of no effect until the concurrence is given. Without the concurrence, it is not void in the sense that it cannot ever be activated thereafter. And on this matter, it is more in the interest of the grantee or transferee of the land to secure the Minister's concurrence. So generally, he applies for it and pursues his interest. When section 8(6) speaks of transactions entered into contrary to the provisions of the section being void, as far as section 8(1) is concerned, it does not make any difference to the position as stated. It would, of course, strike down transactions purposely entered into to evade the requirement of the Minister's concurrence. It is therefore not correct for counsel … to contend that any disposition of stool land which requires the minister's consent under section 8 of Act 123 remained void and of no effect till the necessary concurrence is given".

Who Is in Charge of the Management of Stool Lands?

The law currently requires that the management of stool lands shall be done in accordance with Article 267 of the Constitution. Section 1of Act 123 reads;

"The management of stool lands shall be exercised in accordance with article 267 of the Constitution and where there is a conflict between a provision of this Act and a provision of Chapter Twenty-one of the Constitution the provision of the Constitution prevails."

Article 267 of the 1992 Constitution reads***;***

"(1) All stool lands in Ghana shall vest in the appropriate stool on behalf of, and in trust for the subjects of the stool in accordance with customary law and usage.

(2) There shall be established the Office of the Administrator of Stool Lands which shall be responsible for -

(a) 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 the stool lands;

(b) 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 in clause (6) of this article; and

(c) the disbursement of such revenues as may be determined in accordance with clause (6) of this article.

(3) There shall be no disposition or development of any stool land unless the Regional Lands Commission of the region in which the land is situated has

certified that the disposition or development is consistent with the development plan drawn up or approved by the planning authority for the area concerned.

(4) Where the Regional Lands Commission fails or refuses to give the consent and concurrence under clause (3) of this article, a person aggrieved by the failure or refusal may appeal to the High Court.

(5) Subject to the provisions of this Constitution, no interest in, or right over, any stool land in Ghana shall be created which vests in any person or body of persons a freehold interest howsoever described.

(6) Ten percent of the revenue accruing from stool lands shall be paid to the office of the Administrator of Stool Lands to cover administrative expenses; and the remaining revenue shall be disbursed in the following proportions-

(a) twenty-five percent to the stool through the traditional authority for the maintenance of the stool in keeping with its status;

(b) twenty percent to the traditional authority; and

(c) fifty-five percent to the District Assembly, within the area of authority of which the stool lands are situated.

(7) The Administrator of Stool Lands and the Regional Lands Commission shall consult with the stools and other traditional authorities in all matters relating

to the administration and development of stool land and shall make available to them all relevant information and data.

(8) The Lands Commission and the Administrator of Stool lands shall co-ordinate with all relevant public agencies and traditional authorities and stools in preparing a policy framework of the rational and productive development and management of stool lands.

(9) Parliament may provide for the establishment of Regional branches of the office of the Administrator of Stool Lands to perform, subject to the directions of the Administrator of Stool Lands, the functions of the Administrator in the region concerned.

The Highlights of Article 267 are;

1. The vesting of ownership of stool lands in the stools, in trust for their subjects.

2. The creation of the Office of the Administrator of Stool lands responsible for:

a. The establishment of a stool land account for each stool into which all revenue, rent, etc. should be paid

b. The collection and receipt of all stool revenue

c. the disbursement of the income to the stool

3. The collaboration between the Lands Commission and the Administrator of stool lands in connection with the development of stool land.

4. A formula for sharing revenue accruing to the stool

5. The concurrence of the Regional Lands Commission in alienation of stool lands

6. Prohibition of creation of freehold interest in stool land.

TUTORIAL QUESTIONS

1. What would you regard as the unique legal features of stool/skin lands in Ghana?

2. What are the legal principles governing the alienation of stool/ skin lands in the country?

3. How has the decision in **Gyamfi & Another v Owusu & Others [1981] GLR 612** impacted on the management of family and stool properties?

4. *"The law currently requires that the management of stool lands shall be done in accordance with Article 267 of the Constitution."*

Explain the features of Article 267 of the 1992 Constitution of Ghana with regard to the management of stool lands.

5. The stool of Kokrokoo is the allodial owner of a vast piece of land in the Eastern region of Ghana. The occupant of the stool is Nana Kusi I. He was approached by a team of investors from the USA who needed a piece of land for the setting up of a factory. In consultation with the principal elders of the stool, 4 acres of the stool's land was allocated to their company, Almoor Inc. incorporated in the USA for a period of 60 years at a consideration of GHC 100, 000 under a leasehold. Some few months later, one of the directors of the company, Sam, privately approached Nana Kusi I for a plot of land to put up a residential house. At that time, the relationship between the chief and his elders had grown bad due to his suspicion that the elders were undermining his position. Nana Kusi I consulted his close friends who advised him to go ahead and give the plot of land without the elders. Nana Kusi I allocated to Sam a plot of land for an outright purchase of GHC 10,000.

Some few months later, Nana Kusi I was destooled for gross disrespect towards the elders. A new chief, Nana Larbi, was enstooled. He sent messages to all persons who had acquired land from his predecessor Nana Kusi I that he would not recognize any of those transactions and so they should approach the stool for renegotiations. While Sam and Almoor Inc however ignored this directive. Some of the youth felt that this was an act of disrespect to the stool and impressed upon the stool to take action against Sam

and Almoor Inc. The new chief and the elders asked the youth to exercise patience for a while. The youth ignored and have sued Sam and Almoor Inc. at the High Court for a recovery of the land.

Sam and Almoor Inc. have consulted you for advice. Render a comprehensive to them based on your expertise in the law of Immovable Property.

COMPULSORY ACQUISITION OF LAND

The right to own property

The rights of individuals, groups or artificial persons to own property is guaranteed by the 1992 Constitution. This is captured in Article 18 of the Constitution which reads;

> ***"(1) Every person has the right to own property either alone or in association with others.***
>
> ***(2) No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."***

Article 36 (7) of the 1992 constitution also reads;

> ***"The State shall guarantee the ownership of property and the right of inheritance."***

This means that one's right to own property will be protected and can only be lost through due process of law. There are several laws in operation which tend to interfere with a person's right to own property. An example is the Local Government Act, 1993 (Act 462). Section 52(1) & (2) of the Act vests several powers in the district planning committee to enable it to check unauthorized development. It reads;

> ***"Unauthorized development***
>
> ***(1) Where***
>
> ***(a) a physical development has been or is being carried out without a permit contrary to this Act,***
>
> ***or***
>
> ***(b) the conditions incorporated in a permit are not complied with, a district planning authority may give written notice in the prescribed form to the owner of the land requiring the owner on or before a date specified in the notice, to show cause in writing addressed to the district planning authority why the unauthorized development should not be prohibited, altered, abated, removed or demolished.***
>
> ***(2) Where the owner of the land fails to show sufficient cause why the development should not be prohibited, altered, abated, removed or***

demolished, <u>the district planning authority may carry out the prohibition, abatement, alteration, removal or demolition</u> and recover the expenses incurred from the owner of the land as if it were a debt due to the district planning authority."

The State is also empowered to compulsorily acquire land from landowners for various purposes that would be of benefit to the public as whole. This is however also regulated by the 1992 Constitution. This constitutional power seeks to draw a delicate balance between the right of individuals and groups to own property and that of the State to also acquire land for the public good.

Article 20 of the 1992 Constitution reads;

"(1) No property of any description or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied.

(a) the taking of possession or acquisition if necessary in the interest of defense, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and

(b) the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.

(2) Compulsory acquisition of property by the State shall only be made under a law which makes provision for.

(a) the prompt payment of fair and adequate compensation; and

(b) a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from other authority, for the determination of his interest or right and the amount of compensation to which he is entitled.

(3) Where a compulsory acquisition or possession of land effected by the State in accordance with clause (1) of this article involves displacement of any inhabitants, the State shall resettle the displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values.

(4) Nothing in this article shall be construed as affecting the operation of any general law so far as it provides for the taking of possession or acquisition of property.

(a) by way of vesting or administration of trust property, enemy property or the property of persons adjudged or otherwise declared bankrupt or insolvent,

persons of unsafe mind, deceased persons or bodies corporate or unincorporated in the course of bent wound up; or

(b) in the execution of a judgement or order of a court; or

(c) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants; or

(d) in consequence of any law with respect to the limitation of actions; or

(e) for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry; or

(f) for so long as may be necessary for the carrying out of work on any land for the purpose of the provision of public facilities or utilities, except that where any damage results from any such work there shall be paid appropriate compensation.

(5) Any property compulsorily taken possession of or acquired in the public interest or for a public purpose shall be used only in the public interest or for the public purpose for which it was acquired.

(6) Where the property is not used in the public interest or for the purpose for which it was acquired, the owner of the property immediately before the compulsory acquisition, shall be given the first option for acquiring the property and shall, on such reacquisition refund the whole or part of the

compensation paid to him as provided for by law or such other amount as is commensurate with the value of the property at the time of the reacquisition."

Salient features of Article 20

1. The State can in principle compulsorily acquire any property of whatever description or interest situated in the country.

2. Any property compulsorily acquired by the state should comply with the conditions as set out in Article 20.

3. The acquisition of the property by the state should be done in the interest of the public and this includes any of the following;

a. defense

b. public safety

c. public order

d. public morality

e. public health

f. town and country planning, or

g. the proper utilization of the property for the public benefit.

4. The necessity for the acquisition of the said property should be clearly stated.

5. The benefit of the acquisition of the property by the state should justify any hardship that would accrue to the original owner(s).

6. Compulsory acquisition of any property shall be made under a law

7. The law under which any compulsory acquisition is made should make provision for:

a. the payment of prompt and fair compensation to the original owners

b. the right of persons who have an interest in the property to assert their right or the amount of money to be paid as compensation to have a right of access to the High Court as of right.

8. Where the State's compulsory acquisition of the land results in a displacement of the inhabitants, the State shall rehabilitate the inhabitants on an alternative land, without sacrificing their economic, cultural and social values.

9. Property which has been acquired by the State for public good or in the interest of the public shall be used solely for that purpose.

10. In the event of the State being unable to use the property for the intended purpose, the original owners should be given the first option to acquire the property, subject to refunding in whole or in part any compensation which had previously been paid by the State.

The Application of Article 20

The Supreme Court has made some pronouncements on the application of Article 20 of the 1992 constitution. In **Kpobi Tettey Tsuru III v Attorney General [2010] SCGLR 904, (LA Wireless Station case)**, the plaintiff, Nii Kpobi Tettey Tsuru III, the La Mantse, prayed the High Court for a declaration that the piece of land known as the La Wireless Station, which had been compulsorily acquired from the La Stool by the government of the Gold Coast in 1957 and had since ceased to be used as a wireless station, entitled the La Stool as the original owners, under the provisions of article 20(5) and (6) of the 1992, to be given the first option to reacquire the said parcels of land. The high Court referred the matter to the Supreme Court for an interpretation of article 20(5) and (6) of the 1992 constitution.

The court held that Article 20(5) and (6) of the 1992 constitution is inapplicable to the acquisitions of properties which were made before the coming into force of the constitution.

The court further held that Article 20(5) and (6) of the constitution does not operate retrospectively. In other words, the constitution operatives prospectively unless a contrary intention appears. Therefore, all properties which were compulsorily acquired after the 1992 Constitution came into effect are not covered by the constitution. The plaintiff cannot therefore invoke those constitutional provisions for the conferment of any rights thereon upon him.

In another case of **Ellis v Attorney General [2000] SCGLR 24,** the government of the PNDC in October 1992 passed the Hemang Lands (Acquisition and Compensation Law),

1992 (PNDCL 294). This law came into effect in November 1992. By this Law, the government acquired lands belonging to the Ellis and Wood families and paid what was termed as a final and total compensation of C 200m. The 1992 constitution came into force on 9th Jan 1993, a few weeks after PNDCL 294 came into effect.

The plaintiffs, as the lawful attorneys of the Ellis and Wood families brought an action at the supreme court for;

a. A declaration that PNDCL 294 is inconsistent with, and in contravention of the 1992 constitution

b. an order setting aside or striking down as null and void, the said PNDCL 294.

The grounds of the plaintiff's contention included the following;

I. PNDCL 294 involves a compulsory acquisition of the properties without any indication that it was in the interest of defense, public safety, public order, public morality, public health, town and country planning, or the development or utilization of property so as to promote the public benefit.

ii. PNDCL 294 does not clearly state the necessity for such acquisition or providing reasonable justification for the hardship caused to the plaintiffs' families

iii. The law does not make provision for the payment of fair and adequate compensation to the families since the amount of compensation was too small, and was unilaterally imposed on them by the government.

iv. PNDCL 294 purports to oust the jurisdiction of the High Court or any other court in challenging the amount of compensation as well as any matters related to the compulsory acquisition.

The Supreme Court however upheld a preliminary objection by the Attorney general and held that the court could not declare PNDCL 294 null and void under the 1992 constitution because the law had been passed and the plaintiffs' land had been acquired and vested in the State in November 1992, before the coming into force of the 1992 constitution on 7th January, 1993. The constitution could only be applied prospectively and not retrospectively.

The Administration of Lands Act, 1962 (Act 123)

Prior to the coming into force of the 1992 Constitution, laws had been passed dealing with the compulsory acquisition of various properties by the state for public use. The Administration of Lands Act, 1962 (Act 123), was principally passed to regulate the management of stool lands. Currently the management of Stool lands is mainly covered by Article 267 of the constitution. If therefore there is any conflict between any provision of Act 123 and that of the constitution, the latter would prevail.

This notwithstanding, Act 123 empowers the President to acquire stool lands for public use where in his opinion he considers the land as conducive to the public welfare and the interest of the State. Currently, it can be undertaken hand in hand with Article 20 of the Constitution. Section 10(1) of Act 123 reads;

"Use of land for public purposes

(1) Subject to article 20 of the Constitution, the President may authorize the occupation and use of a land to which this Act applies for a purpose which, in the opinion of the President is conducive to the public welfare or the interests of the State, and may pay into the appropriate account out of moneys provided by Parliament an annual amount of money which appears to the President, considering

(a) the value of the land, and

(b) the benefits derived by the people of the area in which the land is situated from the use of the land, to be proper payments to be made for the land, and the moneys so paid into the account shall be applied in the same way as other revenues collected under this Act."

With regard to the payment of compensation to the landowners, it is paid annually to the landowners and shared as per the dictates of the Act and the Constitution.

The procedure for the acquisition of the land is dealt with in Section 10(2) which reads;

"Where the President authorizes the occupation and use of a land under this section, the President shall publish a notice in the Gazette giving particulars of the land, of the use to which it is intended to be put, and of the payments which it is intended to make under this section in respect of the use of the land."

Section 10(3) and (4) deals with the fact that the quantum of compensation is assessed by the Minister and if the owners are dissatisfied could appeal to the Appeal Tribunal.

They read;

"Where a person suffers special loss by reason of disturbance as the result of an authorization under this section that person shall, out of moneys provided by Parliament, be paid the compensation that the Minister or, on appeal, the appeal tribunal, may determine.

(4) A person dissatisfied with the failure of the Minister to grant compensation or with the amount of the compensation, may appeal to the appeal tribunal."

The Act also empowers the Lands commission to ensure that any unlawful occupant or structure on the land is removed. There are sanctions for any unlawful occupation on the land. Section 16(2) of the Act reads;

"A person who continues in occupation of land after the date on which that person is to surrender the land under this section, or who, having surrendered it, renews the unlawful occupation of the land, commits a misdemeanor and, in the case of a continuing offence, is liable in addition to a fine imposed for the original offence, to an additional fine not exceeding two hundred penalty units for every day during which the offence is continued."

State Lands Act, 1962 (Act 125)

The State may also compulsorily acquire land under Act 125. This occurs when the President is of the view that it is in the public interest to do so. Unless it is one of great necessity, the lands that are acquired under this Act, are lands that fall out of the purview of the Administration of Stool Lands (Act 123). Thus, stool lands for instance would normally not be acquired under Act 125, as Act 123 has been enacted for that purpose. But where the President decides that a particular land which should ordinarily be acquired under Act 123, he is empowered to do so.

Sections 1 and 3 of Act 125 read;

> ***"(1) Where it appears to the President in the public interest so to do, the President may, by executive instrument, declare the land specified in the instrument, other than land subject to the Administration of Lands Act, 1962 (Act 123), as land required in the public interest."***
>
> ***(3) Where the President is satisfied that special circumstances make it expedient that a particular land which is subject to the Administration of Lands Act, 1962 (Act 123) should be declared under subsection (1) as land required in the public interest, the President may, by executive instrument, declare that land as land required in the public interest, and the Administration of Lands Act, 1962 shall not apply to the land in respect of which an executive instrument is made in accordance with this subsection.***

Mode of Acquisition

The mode of acquisition is through an executive instrument, which includes the details of when the acquisition is to take place and the amount of compensation which would be paid. The executive instrument would then be published. With the publication, the land then becomes vested in the President, on behalf of the State. The vesting is without any encumbrances whatsoever. This means that any obligations or liabilities attached to any interest in the land would be extinguished.

Section 1(5) of Act 125 reads;

> ***"On the publication of an instrument made under this section, the land shall, without further assurance than this subsection, vest in the President on behalf of the Republic, free from any encumbrances."***

Claims and compensation

Within six months of the publication of the executive instrument, any person with a right or interest in the land shall notify the Lands Commission in writing indicating the nature of the interest, the damage that the acquisition would cause to his right or interest, the extent of the damage, the amount of money being demanded as compensation and the basis for the calculation.

The Lands Commission then pays a compensation to the owner after undertaking an assessment based on the market value of the land, the cost of disturbance or any

damage that would be caused by the acquisition, and the benefit that would accrue to the persons of the area of the location of the land.

"Cost of disturbance" means the reasonable expenses incidental to a necessary change of residence or place of business by a person having a right or an interest in the land;

All persons who would be adversely affected such that they need to be resettled would be given an alternative land, taking into consideration their social and cultural values.

Speculative development and compensation

The Act frowns on speculative development which is undertaken on a land which is due to be compulsorily acquired as a means of getting compensation from the State. Any developments or improvements that are made on the land within two years of the publication of the executive instrument would not be compensated for unless it was not made in anticipation of the State's imminent acquisition.

Section 4(5) of Act 125 reads;

> ***"In assessing compensation under this Act account shall not be taken of the improvement on the land made within two years previous to the date of publication of the instrument made under section 1, unless the improvement was made in good faith and not made in contemplation of acquisition under this Act."***

Escrow Account

Where there is a dispute over land that has been compulsorily acquired, the State is required to pay the compensation into an escrow account, (once assessment has already been done) pending a determination of who is the owner of that land.

Section 4(6) of Act 125 reads;

> ***"Where compensation for land is assessed but cannot be paid owing to a dispute, the Government shall, pending the final determination of the dispute lodge the accrued amount in an interest yielding escrow account and the amount together with the interest shall be released to the person entitled on the final determination of the dispute."***

Appeals

Owners of land who are dissatisfied with any assessment or compensation paid by the Lands Commission have a right of appeal to the High Court and eventually to the Court of Appeal.

The Statute of Limitation and Compulsory Acquisition by the State

There are two provisions of the Limitation Act, 1972 (NRCD 54), which impacts on the compulsory acquisition of land by the State. Long after the lands have been compulsorily acquired by the State, certain entities who may be families, stools, or individuals start making agitations and demands on the State for compensation. Two issues arise. These are;

1. whether the owners of the land do have a right to recover the land on the ground that they had not been compensated by the state over the acquisition of the land by the government in the past, or

2. In the alternative, are the owners entitled to any compensation, if indeed they were never compensated for the land which was compulsorily acquired?

This is even more interesting when the Acts make provision for persons who feel aggrieved about matters incidental to the acquisition to appeal to the courts for redress. What prevented them from making use of these laid down procedures?

Section 10 of NRCD 54 bars anyone from exercising a right to bring an action to recover land, 12 years after the action could have been brought for adverse possession. It reads;

> ***"1. A person shall not bring an action to recover a 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 a person through whom the first mentioned claims to that person."***

In fact, the acts under which the State compulsorily acquires land would usually give a time limit within which any matters incidental to the acquisition, like compensation should be made. Moreover, section 4 (1)(f) of NRCD 54 requires that any action to recover sums of money, by virtue of any enactment should be instituted within 6 years. It reads;

"A person shall not bring an action after the expiration of six years from the date on which the cause of action accrued, in the case of-

an action to recover a sum of money recoverable by virtue of an enactment, other than an action to which sections 2 and 5 apply."

These provisions shut out indolent landowners who tend to sleep over their rights.

READING MATERIALS

1. B.J DA ROCHA & C.H.K LODOH : Ghana Land law and Conveyancing, 1995, pages 4-5, 9, 173-174

2. DENNIS D. ADJEI: Land law, Practice and Conveyancing in Ghana, 2015, pages 85-96.

3. Articles 18, 20 and 36(7) of the 1992 Constitution

4. The Administration of lands Act, 1962 (Act 123)

5. State Lands Act, 1962 (Act 125)

6. Kpobi Tettey Tsuru III v Attorney General [2010] SCGLR 904, (LA Wireless Station case)

7. Ellis v Attorney General [2000] SCGLR 24

TUTORIAL QUESTIONS

1. *"The 1992 constitution of Ghana ensures that there is fine balance between a person's right to own property and the right of the State to acquire property in the public interest."* **Discuss**

2. What are the main features of Article 20 of the 1992 Constitution?

3. *''As we read the Constitution, it has no retrospective effect."*

    a. Critically assess the above proposition in the light of the relevant law and judicial decisions in relation to the State's power of compulsory acquisition of property.

    b. Agya Koo won has recently been awarded an LLB degree was heard advising General Mosquito, the renowned movie actor, that the law is settled that:

"Whenever the State is unable to use the property compulsorily acquired for the purpose for which it was acquired, the same may be offered to any citizen of Ghana who is capable of paying the consideration for it."

To what extent do you agree?

THE OWNERLESS LANDS OF GHANA [1974] VOL. XI NO. 2 UGLJ 123 - 142

Kludze A.K.P.

A DOCTRINE, which appears so far to have been unquestioned, is that in Ghana there is no land without an owner. Its implication seems to be that for every piece of land in the country it is possible to identify an owner. While this doctrine may serve some purposes of convenience and may also usefully be called in aid in the resolution of otherwise intractable land disputes, it is the present writer's respectful view that its general application in the country is not justified. It is also submitted that there is insufficient authority for the proposition. And it is further

submitted that the possible deductions from the doctrine would lead to such absurdities that the doctrine itself must be rejected as unsound.

Statement of the Doctrine

It is not clear how and when the rule was first formulated that there is no land without an owner. From Mr. J. M. Sarbah,[48] [49] however, we know that as early as 1891, Mr. Justice Smith stated the doctrine in his report on the land tenure in the then Gold Coast. After explaining that land may be categorized as stool land, family land and private land, the report goes on to say that *under these designations all the land in the colony, save what the Government have from time to time taken for public purposes, has, according to native law, an owner.*[50] On the authority of this report, it would appear that the proposition that there is no unowned land in Ghana is a rule of the customary law because it is *according to native law.* The learned judge prefaced his report with the intimation that his knowledge in this regard was *derived from cases heard in the Courts;* but unfortunately, perhaps because it was unnecessary for the sort of report required of him, he did not cite the particular cases on which he based himself. Perhaps we may also point out that he nevertheless explained that the customary law in these court proceedings was expounded by *native experts* who, as he conceded, *do not always agree.*

In another report, apparently in June, 1891, Mr. Bruce Handle, then Attorney-General of the Gold Coast (Ghana), also stated: "It is considered by the natives that all lands whether

[48] Sarbah, J.M., Fanti Customary Laws (1904), pp. 271-81.
[49] See Sarbah, J.M., op. cit., p. 271.
[50] See Sarbah, J.M., op. cit., p. 277.

reclaimed or not, are attached to the stools of the different kings and chiefs.... There is no land which is not or has not been so attached."[68] The suggestion here also is that there is no ownerless land because every portion must be owned by one stool or the other.

In his book, Mr. Sarbah also made the statement that "According to native ideas there is no land without owners."[51] This brief statement by Mr. Sarbah does not illuminate the issue any further because, in his usual style, Mr. Sarbah does not subject this apparently important proposition to either discussion or analysis. Furthermore, the proposition cannot be regarded as Mr. Sarbah's or carry the weight of his authority because, as he explained,

he relied on the reports by Mr. Justice Francis Smith and Mr. Bruce Handle to which we have already referred. These propositions, it is submitted, can be criticized on several grounds. In the first place they are not judicial pronouncements and do not carry the weight of such authority. Secondly, they are not based on adequate research, let alone field research. They are opinions of colonial judges who did not understand our system of land tenure and who, on their own admission, relied solely on the conflicting evidence and the conflicting opinions of the so called native experts who appeared before them. There is no reason why these opinions of foreign judges should be perpetuated or be entrenched with the judicial fiat. What is more, in the absence of any citation of the cases on which these opinions are based, it is difficult to say whether these were cases in which the doctrine's applicability was a substantive issue.

[51] Sarbah, J.M., op. cit., p.66.

A serious criticism of the doctrine that there can be no unowned land is that it is founded on the false assumption that all lands in Ghana are stool lands. For, as Mr. Bruce Handle says, *all lands ... are attached to the stools of the different kings and chiefs...* and *there is no land which is not or has not been so attached.*[52] It is submitted that this is a wrong premise and, the premise on which it is based being wrong, the doctrine is also wrong. Whatever may have been the judicial attitude in the past, it is respectfully submitted that nobody can today seriously argue for the view that all lands in Ghana are stool lands. Even as early as 1903 Mr. Casely Hayford had pointed out that, apart from other lands, among the Fanti *there are the general lands of the state over which the King exercises paramountcy*[53] He goes on to explain that *It is a sort of sovereign oversight which does not carry with it the ownership of any particular land. It is not even ownership in a general way.*[54] Later it was written by Dr. Danquah that *In Fanti proper (Borebori Fanti) there are but very few Paramount stools which can claim absolute right of ultimate ownership in all the lands in their state divisions.*[55] Mr. Pogucki has also made the observation that the Akan-type stool .land does not exist among the Ewe, the Adangbe and the communities of the Northern and Upper Regions.[56]

If these opinions are correct, then in a very substantial part of the country, stool lands as generally understood in Ghana are unknown. It is particularly encountered only among the Akan and some Ga communities. Although in a somewhat cursory and unsatisfactory manner,

[52] See Sarbah, J.M., op. dt., p. 277.
[53] Casely Hayford, Gold Coast Native Institutions (1903), pp. 44-5.
[54] Ibid.
[55] Danquah, J.B., Akan Laws and Customs (1928), p.215.
[56] Pogucki, R.J.H., Land Tenure in Ghana, Accra (1957), Vol. 6, p.8.

Mr. Ollennu also makes the concession in a brief remark that *the absolute ownership in some lands, e.g. in some of the Adangme areas, the Anlo and Adjumaku areas, is vested in families or tribes not in a stool or skin.*[57] After a discussion of stool lands in Ghana generally, Dr. Bentsi-Enchill also states that:

In most other areas of Ghana, there is no such basic notion of what has been called state ownership above. The principal owners of land absolute or allodial owners therefore are clans or extended families or village communities[58]

The present writer has also found from field research that the concept of stool land is unknown in the Ewe system of land tenure.[59] Dr. Nukunya also says that stool lands do not exist among the Anlo Ewe.[60]

In Hew of this analysis, it is submitted that the doctrine that there is no land without an owner cannot be applied throughout the whole country, in as much as its basis is the assumption that what appears to be ownerless must be attached to a stool. For what appears to be ownerless in many parts of the country cannot be owned by the stool which as a matter of principle has no proprietary interest in land. This argument may be countered by the reminder that the reports of Mr. Justice Smith and Mr. Bruce Handle were mainly concerned with Fanti land tenure. Similarly, it may be explained that both Danquah and Sarbah confined themselves to the Akan.

---

[57] Ollennu, N.A., Principles of Customary Land Law in Ghana (1962), p.140.
[58] Bentsi-Enchill, K., Ghana Land Law (1964), p. 16.
[59] Ibid.
[60] See Kludze, A.K.P., Ewe Law of Property (1973), pp. 140-76.

To argue in such a vein would only constitute a concession that what is usually held out as a general proposition in Ghana can only apply among the Fanti or perhaps some of the Akan. It would be wrong and unjustifiable then to generalize from the experience in only such a small part of the country.

In any case, even in its restricted application to the Fanti the doctrine cannot be without a problem. As we have seen, Mr. Casely Hayford explains, and Dr. Danquah supports him, mat in some parts of Fanti the stools, though paramount in political authority, do not hold the proprietary title to the lands. It cannot be argued convincingly, therefore, that among the Fanti every piece of land belongs to one stool or the other.

The Public Lands Bill of 1897

It has been suggested that the doctrine that no unowned land exists in Ghana was one of the weapons with which an attack was made at the turn of the last century on the Public Lands Bills of 1894 and 1897. By those Bills the then Colonial Government sought to vest the vacant lands of the Gold Coast Colony in the British Crown. The Bill of 1894 was intended *to vest waste lands, forest lands and minerals in the Crown.* Under the 1894 Bill *waste-land* was defined as land which, for a period of thirty years before the commencement of the Ordinance, had not been put to any beneficial use. This met with protests from the chiefs and people. In 1897 a new Public Lands Bill was introduced to vest all *public lands* in me Crown. This brought in vehement protests again. Among other arguments, it was contended that the Bills were based on the erroneous assumption that unoccupied lands were ownerless. It was vehemently urged

on the Colonial Government that "every piece of land and every plot of land in the Gold Coast has an owner whether such piece or plot be waste land or forest land." [61] [62] Consequently, it has been suggested that *by stating that all unoccupied lands were owned by the communities it was possible to depict the Lands Bill as an act of expropriation.*[63] With this stand by the chiefs and people it became generally accepted that there are no ownerless lands in Ghana.

In the first place it is doubtful if the Colonial Government yielded because it came to the realization that no land was ownerless. The Bill did not seek to appropriate to Government what was regarded as ownerless. It sought to declare as public land, and therefore vest in the Crown, *vacant land* which was defined as any land which had not been used for three years. The Bill, strictly speaking, was not concerned with ownerless land but with vacant land. Land which is vacant may be owned or ownerless. The substance of the opposition to the Bill, however, was that it greatly encroached upon the rights of ownership to land because of the proposed forfeiture for non-user.

Nevertheless, the point made by the chiefs and people of the then Gold Coast that no land was ownerless has been regarded as a basic principle in our land law. One would ask whether this statement by the chiefs and people, under the leadership of the Aborigines

[61] Nukunya, G.K., Land Tenure and Inheritance in Anloga, Technical Publication Series, No. 30,1.S.S.E.R., Legon (1972), pp. 9,11-12.
[62] **...** Speech by Mr. J.M. Sarbah on behalf of the Chiefs and People at the Legislative Council. See minutes of the meeting of the Legislative Council on 27 May, 1897.
[63] De Graft-Johnson, Transactions of the Gold Coast and Togoland Historical Society, Vol. 1, p. 99.

Rights Protection Society, was rightly elevated to a legal principle. It is submitted that the contention was a political argument which was not based on legal research. It is not unlikely that it was exaggerated to impress the colonial administration. Without further enquiry it is unsafe to convert what was essentially a political ruse into a principle of law.

The proposition that in Ghana there is no land without an owner has been stated in a few cases. It is submitted that in all these cases the reference to the doctrine was by obiter dictum and must be treated as such. For in none of these cases was the doctrine a substantive issue to be determined by the court. The proposition was stated in the early case of *Wiapa v. Solomon.*[64] In that case, the plaintiff claimed title to certain lands in Akwapim as against the defendant, a purchaser who took from the Omanhene of Akwapim. The plaintiff's case was that his predecessor had found the land ownerless and had been in occupation of it for a long time. The trial court, however, made a finding of fact that the plaintiff had not been in effective occupation. This finding alone, if correct, could be enough reason to reject the plaintiff's claim to title. However, the court delivered itself of the following words per W. Brandford Griffith C.J.:

The *other Defendant, Solomon, claims by purchase from Akuffo as Omanhene. According to the Plaintiff Wiapa, Nto, a predecessor of the Nyago family of Tutu, went to the land in question many years ago. At that time Plaintiff admitted that the land belonged to no one. He further stated that he was told that the land was originally the property of Akwamus, the former inhabitants of the present Akwapim country. Upon these admissions Mr. Sarbah, for the*

[64] (1905) Ren. 405.

Applicants, argued that if this land was no one's land and was within Akwapim country, it must have been attached to the Akwapim stool, and he enunciated the general principle that all unoccupied land within territory under a paramount stool belongs to such stool This is practically the principle upon which the Courts of this colony have proceeded from their inception, and this doctrine has served as a safeguard to the natives against possible Government claims.[65]

It is submitted that on principle the decision in Wiapa v. Solomon was wrong. The court itself made the point later in its judgment that *It is clear from the Plaintiffs evidence that the land upon which Nto went was unowned, and therefore stool land.*[63] If this was the case, then as a citizen Nto acquired a definite interest therein, what is generally referred to as the usufructuary title to the land. It is also settled by authority that a citizen who has acquired the usufruct in unoccupied stool land cannot be dispossessed, not even by the stool.[66] [67] [68] Accordingly, as Nto had acquired a usufruct in the land which descended to the plaintiff Wiapa, that was good against the whole world, including the paramount stool. Therefore, the purported sale by the Omanhene to the defendant Solomon was ineffective; for even the owner of the allodial title cannot sell the land while under the occupation of a subject. For this purpose, it is immaterial that the citizen acquired the usufruct by express or implied grant. The point was indeed made that the plaintiff proved only *intermittent occupation of one or two indefinite plots of land*

[65] Wiapa v. Solomon (1905) Ren. 405, 410-11.

[66] Wiapa v. Solomon (1905) Ren. 405, 411.
[67] Ababio v. Kanga (1932) 1 W.A.C.A. 253.
[68] Wiapa v. Solomon (1905) Ren. 405, 411.

within the extensive area claimed.[69] Having regard to the shifting cultivation practiced even today in this country, the *intermittent occupation* must be enough evidence of occupation to vest the usufructuary title in the plaintiff. Therefore, while such occupation could not entitle the plaintiff to the whole of the *extensive area claimed,* it should have been held to have created in his favor the so called usufructuary interest in the *one or two plots* within that area.

The basic criticism of the decision in *Wiapa v. Solomon,* for present purposes, is that the exposition on the doctrine that there could be no ownerless lands was irrelevant to the issue before the court. It is not unlikely that the court was misled by the personality and stature: of Mr. Sarbah who appeared for the defense. It is submitted that the true issue before the: court in Wiapa v. Solomon was the capacity of the Omanhene to sell the land in dispute to the defendant Solomon. On this issue, the basic point is the if stool lands exist in Akwapim and all Akwapim lands are stool lands,[70] the plaintiff Wiapa could not acquire any interest the disputed land except by occupation of land belonging to his stool. Consequently, it was not possible for Wiapa to claim title against the stool but only through the stool. In that case the plaintiff Wiapa's claim to be owner of what was by definition a stool land could only: the properly understood as an assertion of the so called usufruct. It is regrettable that this point was not suggested to the court by the plaintiff who was apparently unrepresented by counsel, and the court itself failed to appreciate it.

[69] Ibid

[70] On the available evidence, the presenTwriter doubts the proposition that all Akwapim lands are stool lands. There is evidence that in
Akwapim the allodial title to some lands is in the families.

Another case usually cited as authority for the proposition that there is no unowned land in Shana is *Ababio v. Kanga.*[71] For in that case appears the following passage:

> *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*[72]

It is respectfully submitted that this was no more than an obiter dictum. The issue between the parties was not the ownership of vacant land. It was admitted that the land in question was stool land of the Omanhene of Eastern Nzima. As both the plaintiff (Ohene Appoh Ababio of Assenta) and the defendant (Ohene Doku Kanga of Kickam) were divisional chiefs of Eastern Nzima, the paramount title of the Eastern Nzima Stool was not even remotely in issue. As the West African Court of Appeal itself emphasized *it was a question of the divisional boundary between Assenta and Kickam, the real question at issue being whether:he line of the boundary runs from the bridge south of the Bobloma creek or whether it follows the stream westward and then southward to the* sea.[73] Reference was indeed made in passing to the principle that no land was ownerless. This was, however, done only to determine whether certain individuals who had before litigated over the lands now in dispute were respectively citizens of Assenta and Kickam and, therefore, had bound their stools on the principle of res judicata. The dictum being clearly an obiter dictum, it is submitted that Ababio v. Kanga is not a sufficient authority that there is no unowned land in Ghana. The present writer, then disagrees with Dr.

[71] (1932) 1 WAC.A. 253.
[72] Ababio v. Kanga (1932) 1 W.A.CA 253 at p. 255.
[73] Ababio v. Kanga (1932) 1 W.A.CA 253 at pp. 253-54.

Woodman's view that the holding in Ababio v. Kanga was that there was no unowned land.[74] Similarly in Ashrifi v. Golightly,[75] it was only a brief reference that Jackson J., made by way of obiter dictum to the principle that *all land is deemed to be owned by someone.*[76]

The only case which appears to support the proposition that there is no unowned land in Ghana is *Ofori Atta v. Atta Fua.*[77] This was a dispute between Nana Ofori Atta as Omanhene of Akim Abuakwa and Nana Atta Fua as Omanhene of Akim Kotoku, as to the boundary between the two paramount Stools. It was established that the lands concerned had previously been occupied by the Akwamu before they were driven away by the Ashanti. The I predecessors of both the plaintiff and the defendant, who appear to have originally assisted I the Ashanti in driving away the Akwamu, were in turn driven away by the Ashanti. The I learned Chief Justice said:

> *On the evidence I consider it is clear that both the plaintiff's sub-chiefs and the* I *defendant's ancestors were driven out of this land by the Ashantis, and I cannot find.* I *any evidence of effective re-occupation by either side before this dispute arose, as I do* I *not consider the temporary occupation of the Juabeng hunters given in evidence,* I *evidence of effective occupation.*[78]

[74] See Woodman, G. R,, "The Allodial Title to Land" (1968) 5 U.G.L.J. 79,82.
[75] D.C. (Land)'48-'51,312.
[76] Ashrifi v. Golightly, D.C. (Land) '48-'51,312 at p. 338. As this was only an obiter dictum it did not receive attention on appeal to W.A.C.A. sub nom. Golightly v. Ashrifi (1951) 14 WACA. 676.
[77] D. &F.Ct. '11-16, 65.
[78] Ofori-Atta v. Atta Fua (1913) D. & F.Ct. 'Il-'16,65 at pp. 65-66.

From the foregoing, it is evident that each side claimed title and sought to do so through I evidence of re-occupation which did not satisfy the court. It was for the reason of the I inconclusive evidence that the court held that the lands should be shared between the two I stool. The exact words are:

> *These lands being uninhabited lands situated between two paramount stools would* I *according to Native Law and custom accrete to the paramount stools and the question* I *of boundary between the two paramount stools would be one in respect of adjoining* I *land.*

Nowhere in the judgment is it suggested that there could be invoked any principle or I doctrine that there could not be an ownerless land. If the background to the dictum is 1 properly appreciated, it is submitted that the effect of the judgment in Ofori Atta v. Atta Fua I was that, the land lying between the parties having become ownerless, it was to be shared I between the two adjoining stools which were laying competing claims to the land. This was a I practical approach because a third party was not claiming interest therein. It is clear from I the judgment that if effective re-occupation had been established by one party, that party I would have been declared the owner of all the disputed land. For if the *ownerless* land had I become vested in the adjoining stools automatically on its becoming *ownerless,* then it would have been irrelevant to consider whether there had been effective re-occupation by I either side. For effective occupation could not have changed the automatic boundary which I would have existed by operation of law from the moment that the owners were driven away ' That both the

parties and the court looked to evidence of re-occupation means that it was *z* I question of fact and title did not vest merely by contiguity to ownerless land.

It is further submitted that from Ofori Atta v. Atta Fua we cannot infer the doctrine that there is no ownerless land. For, if the land had become vested automatically in the adjoining stools, the court's function would simply have been to identify a pre-existing boundary, fixed by law. In Ofori Atta v. Atta Fua, however, the court was not called upon to do such a thing] On the contrary, the court fixed a boundary for the parties. Said Smyly C.J.:
Being of opinion that no boundary has ever been fixed between these accreting lands, I now under the provisions of the Ordinance determine that the following shall be the boundaries between Western and Eastern Akim.[79]

The learned Chief Justice then proceeded to set out a detailed description of the boundary fixed for the first time by himself. The decision, if one may say so, is a common sense approach to a familiar problem. It was not necessary to call in aid any doctrine of the nonexistence of ownerless lands. If two stools lay adverse claims to an ownerless land lying between them, and there is not a third claimant, the solution is to share the land among them by fixing a boundary for them. This is what our illiterate fathers have always done from time immemorial. That was all that the court also did in Ofori Atta v. Atta Fua and nothing more. The decision, therefore, can only be understood on the basis that the land was ownerless until the contesting stools began to claim it.

[79] Ofori-Atta *v.* Atta Fua (1913) D. 5 F.Ct. 'll-'16 at pp. 65-66.

In other cases, the principle was not applied. For instance in Ngmati v. Adetsia[80] which concerned titled to land claimed by both the Manya Krobo and Yilo Krobo, the issue was decided simply on the evidence. It could not be solved on the so-called principle that all unowned land should automatically be deemed to belong to the adjoining stools. In Aradzie v. Adianka[81] the Full Court held that the doctrine that there could not be unowned land in Ghana was inapplicable to the early eighteenth century and cast doubt on its applicability.

it is respectfully submitted then that on the basis of the case law, there is insufficient authority for the principle that there is no unowned land in Ghana or that there cannot be unowned lands. The cases from which the doctrine is supposed to be enunciated did not concern this issue and the courts did not purport to formulate such a doctrine.

Modern Formulation of the Doctrine

If, as submitted, there is little judicial authority for the proposition that there cannot be ownerless lands in Ghana, how has the doctrine crept into our law? It is respectfully suggested that the origin of the so-called doctrine in its present form may be traced to no judicial authorities who have formulated it and extended its scope from simple dicta to what now stands on the pedestal reserved for doctrines of law. Those who have in recent times propounded these doctrines include Mr. Ollennu, Dr. Bentsi-Enchill and my colleague, Dr. Woodman. It is true that Mr. Sarbah had stated that *According to native ideas there is no land*

[80] [1959] G.L.R. 323.
[81] (1923) F.C.'23-'25, 52.

without owners.[82] [83] The validity of the statement even in that form is not free from doubt because Mr. Sarbah does not cite any convincing authority for it, nor are we told that it was based on research. Nevertheless, if Mr. Sarbah correctly stated the proposition at the beginning of the century that *there is no land without owner,* it cannot be legitimately inferred from that statement that land subsequently abandoned could not become ownerless. With characteristic force but without any basis in authority, Mr. Ollennu has stated that:

> *The first basic principle of our customary land law is that there is no land in Ghana without an owner. Every inch of land in Ghana is vested in somebody."*

It is not a little surprising that for such a proposition, which he regards as fundamental, Mr. Ollennu does not cite any authority. It is submitted, however, that the truth is that, although the proposition is very desirable and is tempting, there is no authority for it. It cannot be the result of research by Mr. Ollennu because, as we shall show, it is contradicted by the facts. The statement that there is no unowned land, or that there can be no unowned land, in Ghana is not a principle, let alone a basic principle, of our land law. It cannot, therefore, be regarded as a *first basic principle.* If even the proposition is true, it is not essential to our understanding of the land law and it blurs rather than illuminates the basic problem of the nature and quantum of interests in land in Ghana.

[82] Sarbah, J. M., op. cit., p. 66.

[83] Ollennu, N. A., Principles of Customary Land Law in Ghana (1962), p. 4.

Unfortunately Dr. Bentsi-Enchill also does not question the existence of the doctrine but accepts it as *a basic principle,* though perhaps not *the first basic principle,* concerning land titles.[100] Dr. Bentsi-Enchill goes further than Mr. Ollennu in referring us to such cases as Wiapa v. Solomon[84] and Aradzie v. Adiankah.[102] It is regretted that Dr. Bentsi-Enchill does not discuss these cases; for, as we have shown, the passages in these cases on which he relies can properly be dismissed as obiter dicta which cannot support such a wide principle. Dr. Bentsi-Enchill also omitted to discuss the implication of the so-called principle that there is no land without an owner. It would appear that this was due to the fact that he was more concerned in this regard to show that the principle was applied in successfully resisting the proposed Public Lands Bill of 1897 which would have vested title to all unoccupied lands in the British colonial authority, thus demonstrating that the establishment of British jurisdiction in the Gold Coast (Ghana) was without prejudice to the existing land titles and interests of the chiefs and people under the customary law.[85] It had indeed been generally accepted that this was the reason why the Colonial Government in 1897 dropped the Public Lands Bill which would have vested all vacant lands in the Crown It may now appear, however, that commentators have unjustifiably ignored the possibility that the Colonial Government could have withdrawn that Bill because it was sensitive to the wishes of the people and did not wish to precipitate a confrontation with the chiefs and people who were united in their opposition to the proposed legislation. For, in our own lifetime, the existence of the so-called doctrine that there is no land without an owner die not stand in the way of a strong ruler like Kwame Nkrumah. The chiefs and people in 189[86]

[84] Bentsi-Enchill, K,, Ghana Land Law (1964), p. 22.
[85] (1932)1 W.A.C.A. 253
[86] (1905) Ren. 405.

opposed the attempt to vest *vacant lands* in the Government because it was criticized as an act of expropriation. But in 1962 the Nkrumah government passed an Act[87] which empowered the President, whenever it appeared to him in the public interest to do so, to declare vested in him not only *vacant lands* but *any stool land* whether vacant or not. That Act was passed without even a finger of opposition and Sarbah could not come to the rescue. Similarly without opposition the Nkrumah Administration passed an Act vesting al minerals of Ghana in the President.[88]

The doctrine that there is no ownerless land in Ghana has also been stated, perhaps re stated and amplified, by Dr. Gordon Woodman.[89] He observes that it *is a firm principle I customary law that there is no unowned land in Ghana.*[90] The authorities on which he relied are Sarbah's brief statement,[91] and dicta in cases like *Ofori Atta v. Atta Fua,*[92] *Ababio* I *Kanga*[93] and *Wiapa v. Solomon.*[94] As has been submitted earlier, these cases do not and cannot by mere obiter dicta support the so-called principle. For example, Dr. Woodman says in *Ababio v. Kanga* it was held that there was no ownerless land in Ghana." The passage he relies on is:

[87] (1905) Ren. 405.
[88] (1923) F.C. *'23-'25*, 52.
[89] Bentsi-Enchill, K., op. cit., pp. 20-23.
[90] The Administration of Lands Act, 1962 (Act 123), esp. s. 7.
[91] The Minerals Act, 1962 (Act 126).
[92] Woodman, G. R., "The Allodial Title to Land" (1968) 5 U.G.L.J. 79.
[93] Sarbah, J. M., op. cit., p. 66.
[94] (1913) D. & F.Ct. ·ll-·16, 65.

> *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.*[95]

As has been shown,[96] this was not a holding of the court. The passage is only an obiter dictum because the issue between the parties was not the ownership of vacant land but the divisional boundary between two sub-chiefs. The land itself was admitted by both parties to be stool land of the Omanhene of Eastern Nzima.

Dr. Woodman, in any case, seems to have extended the scope of the principle and its application. After referring to *OforiAtta v. Atta Fua*[97] and *Ababio v. Kanga,*[98] Dr. Woodman says *if no acts whatsoever have been done in respect of the land, it belongs to the nearest immunity by the mere fact of contiguity.*[99] [100]He goes further to state that, from the date when the *no unowned land* doctrine applied (which he estimated at about the year 1750), *all -remaining unowned land must be deemed to have automatically accrued to the nearest immunities.* He describes this as an additional method of original acquisition of land which may be christened acquisition by contiguity. Another way Dr. Woodman formulated the principle is that *The courts accept that since 1750 at the latest it has been impossible for any land in Ghana to be unowned.*[101]

---

[95] Ababio v. Kanga (1932) 1 WACA 253, at p. 255.
[96] **See** pp. 129-130 Supra.
[97] (1913) D.&F.Ct. 11-16,65.
[98] (1932) 1 WACA 253.
[99] Woodman, G. R., op. dt., p. 82.
[100] bid.
[101] Woodman, G. R,, op. dt, p. 83.

It is submitted that there is no authority for these propositions by Dr. Woodman. The cases on which he relies do not support his view. There is no case in which it has been held, as Dr. Woodman suggests, that if no acts of ownership have been exhibited then what would have been ownerless land accretes to the nearest stool. In *Ofori Atta v. Atta Fua* there were attempts and acts manifesting claims of ownership by the two adjoining stools and as a practical solution the land was shared among them. In *Ababio v. Kanga* the issue did not arise at all because the allodial ownership of the Paramount Stool of Eastern Nzima was not in dispute. In *Wiapa v. Solomon* both parties had done acts calculated to assert title.

It is further submitted that Dr. Woodman has no authority for his proposition that *all remaining unowned land must be deemed to have automatically accrued to the nearest communities.* This proposition has not been stated anywhere else and it seems to be a logical, though inaccurate, extension of the proposition that there was no unowned land. The earlier propositions had been limited to declarations that there were no unowned lands. If the declaration was true in 1897 that at that time there were no unowned lands in Ghana, it is not permissible to infer from this factual observation that it is therefore impossible to have ownerless lands half a century later. If land which was owned in 1897 is effectively abandoned by the owner in 1947, it must become ownerless at least for some length of time and there is no authority that it cannot become so ownerless. It is submitted, therefore, that there is no justification for the extension of the doctrine to mean that *since 1750 at the latest it has been impossible for any land in Ghana to be unowned.*

The Doctrine as a Rule of Law.

It is difficult to regard as a rule of law the proposition that there is no unowned land m Ghana. Not only does its operation as a rule of law create problems but it also solves no problems. Further, there is no reason for the alleged existence of such a rule of law. The concept of ownership being known to our land law, the notion of land being *ownerless* must be an accepted legal phenomenon unless there is some compelling reason for its exclusion. No such reason being assigned; it is submitted that those who opine that as a rule of law there can be no unowned land in Ghana must be wrong.

The methods of original acquisition of the absolute title in land have never been stated as including the concept of vesting ownerless lands in adjoining stools or families. In ***Ohimen v. Adjei,***[102] Ollennu J., set out the modes of acquisition of title to land as conquest and subsequent settlement and the discovery and settlement on unowned land. The two other methods of gift and purchase are not relevant here. It seems from *Ohimen v. Adjei* and other authorities that the basis of title is settlement on the land, that is settlement by victors on the land of the vanquished or settlement on land which was vacant or ownerless. Nowhere in the authorities is it stated that title to unowned land vests in the adjoining stool without settlement. Even in the event of a community being defeated in war and driven away by a superior force, title to the vacant lands does not automatically vest in the victors, unless they settle on the lands. On what

[102] (1957) 2 W.A.L.R. 275.

basis, then, can it be argued that if stool B, lying between A and C, is driven away from its lands by V, but V does not settle on the land, the lands automatically vest in A and C who did not take part in the war? Surely, if that were to happen today, the land would become ownerless and remain so until A or C or some other person or community settles on the land.

The operation of the doctrine to vest title automatically in adjoining landowners could lead to absurd results. Would the doctrine automatically vest title in an adjoining stool or landowner by operation of law even if the said stool or landowner is not interested in acquiring title to the land? What happens if one of the adjoining stools expressly disclaims ownership [103]and has, therefore, taken no steps to settle on the land or assert title to it? Would it be held that by operation of law the disclaimer is ineffective and that the disclaiming stool is an owner willy-nilly? The case which comes near this is ***Ofori Atta v. Atta Fua.*** In that case the land lying between Akim Abuakwa and Akim Kotoku became ownerless when the Ashanti drove away the former occupants but did not settle thereon. Quite rightly the ownerless land was shared between the two stools which claimed title to portions of the land. Can it be seriously suggested that the decision in Ofori Atta v. Atta Fua would have been the same even if Nana Ofori Atta, for the Akim Abuakwa stool, had expressly stated that his stool claimed no interest in the land? Can it be suggested that, even in the face of such a disclaimer by the Akim Abuakwa stool, a boundary would have been fixed between Akim Abuakwa and Akim Kotoku exactly as the court did, so as to force ownership on Akim Abuakwa by operation of law? The

[103] One can think of several reasons for such disclaimer. It could be due to the fact that the vacant land is infertile or unsafe for human occupation An adjoining stool may also refuse title to the land of the vanquished if its sympathies are with the vanquished.

answer in both cases must be in the negative. It is submitted that if Akim Abuakwa disowned any interest in the vacant land, the whole land, or so much of it as the Akim Kotoku claimed, would have been declared to belong to the Akim Kotoku. The statement of fact in the late nineteenth and early twentieth centuries that there were no unowned lands, whether true or not, must not be misinterpreted to mean an inflexible rule of law that ownerless lands cannot exist. The statement is not an inflexible rule of law, such as the law of physical science that nature hates a vacuum. There would be no mischief arising from the existence of ownerless lands today and we should not invent rules to exclude it.

If it were indeed a doctrine of the customary law that ownerless lands could not exist in Ghana, the customary law would have devised its own mechanism for determining the new boundary between the adjoining stools. This, however, is not the case. In ***Ofori Atta v. Atta Fua,*** the court had no formula for determining the boundary. It relied on the evidence to fix a boundary for the claimants for the first time. It was not a recognition of a boundary existing by operation of law. Suppose there were five or more stools having lands lying contiguous; to an abandoned land, how would their boundaries be determined? It is submitted that there is no basis for fixing the limits except the evidence of occupation or assertion of title. The basis of the new ownership, then, would not be mere contiguity but the assertion of title to ownerless land.

The Proposition as a Statement of Fact

It is submitted that all that can be said of the so-called doctrine is that the declaration by the chiefs and people of this country in 1897 that there were no ownerless lands was a statement

of fact, not of law. Whether it was a true statement or not, it was meant to be a factual statement and not a proposition of a rule of law.

The courts, of course, were entitled to take judicial notice of the factual statement that there were no ownerless lands in Ghana. This indeed is what they have done. To take judicial notice of a fact, however, is not exactly the same as regarding that statement of fact as a rule of law. Thus, having taken judicial notice of the statement, it raises only a rebuttable presumption that there are no ownerless lands in Ghana. If so applied this principle could assist parties in establishing title to land. Let us take it, for instance, that the Banka Stool and the Domo Stool are each claiming title to a piece of land. The Domo Stool claims title from time immemorial, while the Banka Stool contends that the said land was ownerless when it settled on it in about 1860. The rebuttable presumption that there was no unowned land in Ghana (since 1750 as Dr. Woodman suggests), could assist the Domo Stool in tilting the scales in its favor because, without proper evidence in rebuttal, the Banka claim that it found the land ownerless in 1860 must be rejected as improbable.

If we accept that the proposition is nothing but a statement of fact, it follows that it must admit of exceptions in cases where there are ownerless lands. For a statement of fact cannot but describe the facts at the time it is made.

The Existence of Ownerless Lands

Even as a statement of fact, it is not wholly true to say that in 1897 there were no unowned lands in what is now Ghana. For it is demonstrable by the results of research that ownerless lands exist in Ghana.

In the first place the differing systems of land tenure make it apparently easier to encounter unowned lands in some parts of the country. In formulating the doctrine that there can be no ownerless land in Ghana, it has been stated that what appears ownerless must be deemed to be attached to the adjoining stools. Obviously this can only be said of communities with Akan-type stool lands. For in those communities all lands belong to the stool and the families and individuals hold subordinate or dependent interests therein. Within such a scheme it is less likely that there would be ownerless lands within a chief's territorial area. For in such a case what appears to be ownerless would indeed be stool land which is vacant or unencumbered.

In other communities, notably among the Ewe, the Adangbe and the communities of the Northern and Upper Regions, such stool ownership of land is unknown. The lands belong to the families allodial. In these communities, although in every case the territorial area of a chief is identifiable, the stool is not the owner of all the lands. The respective families carve out their entitlements by a gradual process of acquisition through occupation by their members. As it is a slow process, portions remain ownerless until appropriated by a family. While so ownerless the land would not accrete to the stool because stool ownership is not known. Such lands, some of which exist in parts of the country even today, are clearly ownerless.

It may be necessary at this stage to distinguish jurisdictional authority from the proprietary interest. When it is contended here that land is ownerless, it only means that it is ownerless z in the proprietary sense. Thus a stool may exercise jurisdiction over a vast area of land, but within that area may be portions in which no person or family claims any proprietary interest. As far as jurisdictional authority is concerned, no land has been found by the present writer without a stool exercising jurisdiction over it. It is probably true that there is no land over which no chief exercises jurisdiction. This, however, may not be extended to ownership of proprietary interests.

It has been difficult to find land which is admittedly ownerless. This is partly because informants have become aware of the doctrine that no land is ownerless. Different persons have, therefore, been laying claims to lands which would properly be regarded as ownerless. Nevertheless, in research conducted over only a small area in the Kpando and Hohoe (Gbi) districts of the Volta Region, the present writer found evidence of the existence of ownerless lands in our time. It would appear from this result, obtained from only a very small area, that serious research in other parts of the country may lead to the explosion of the so-called doctrine that there are no ownerless lands in Ghana.

In Aveme-Dra in Aveme, near Kpando, the land known as Drato is part of the territorial area of Aveme. Yet neither the chief of Aveme-Dra nor the Fiaga of Aveme claims any proprietary interest in the Drato. Similarly, no family or individual claims ownership of the land. The Drato is, therefore, ownerless even today.

In Kpando the lands lying between Kpando and the Kwahu of the Eastern Region, near the Volta River, are within the territorial area of Kpando and under the jurisdiction of the Fiaga of Kpando. They are known as Kpatoe lands. The Kpatoe lands, however, are ownerless because they do not belong to any family or individual, nor are they stool lands because the stool has no proprietary interest in them. Perhaps this example was given to the present writer because the Kpatoe lands have been flooded by the Volta Lake.

The present writer also has an example from the Hohoe (Gbi) area. The Kodzofe land in Gbi-Kpeme lies near the inter territorial boundary between Gbi and Likpe in the Volta Region. The land was regarded as Gbi land and the chief of Gbi-Kpeme exercised jurisdiction over it for and on behalf of the Fiaga of Gbi. However, title to the Kodzofe land was not vested in any family or individual person; neither was it stool land of either the Gbi-Kpeme stool or the Paramount Stool of Gbi. It was ownerless land without any doubt. It remained ownerless until about 1925 when the present writer's maternal grandfather, Togbe Adzima, then the chief of Gbi-Kpeme, urged the citizens of Gbi-Kpeme to go into occupation of the land and acquire whatever amount they could. Togbe Adzima himself acquired a portion in his private and personal capacity. Owing to the history of this land, every farmer who acquired any portion acquired the absolute or allodial title to his portion in his own right. The individual portions are, therefore, not family or ancestral lands and the individual owners can dispose of them today without the consent of their families. If the Kodzofe land was ownerless until 1925, it certainly falsifies the

general proposition in 1897 that there were no ownerless lands, let alone the assertion that ownerless lands cannot exist in Ghana.

Another example of ownerless land is the Abudome land of Hohoe (Gbi). The Abudome land lies between the chiefdoms of Alavanyo and Gbi. Although it has always been Gbi land in the sense that it was within the Gbi boundary and the Fiaga of Gbi exercised jurisdiction over it, yet it was ownerless. The Abudome land was ownerless because no individual or family claimed proprietary title to it and it was not stool land in any sense. It was only about a generation ago that the Abudome land was divided among the then seven divisions of Gbi, each division then sharing its allocation among the sub-divisions and the constituent families. Following this, those individuals who were interested entered upon portions allocated to their divisions and families and made farms thereon. Until the Abudome land was divided it was ownerless. Therefore, it could not be true that at the turn of the last century there were no unowned lands in this country.

Recently Dr. Nukunya came out with the result of an independent investigation which has a searing on the issue.[104] Dr. Nukunya has also come to the same conclusion as the present writer that among the Ewe the stool as a rule does not have the proprietary interest in the lands over which it exercises jurisdiction. Thus he concludes from his specific study of the Anlo Ewe that the Awoamefia or Paramount Chief of Anlo is not the owner of all Anlo lands but the respective

[104] Nukunya, G. K., Land Tenure and Inheritance in Anloga, Technical Publication Series, No. 30,1.S.S.E.R., Legon (1972).

families. He, therefore, came across the case of the Keta Lagoon which, because it does not belong to any family or individual, is ownerless. The Lagoon is not stool land or stool property. Thus, among the Anlo Ewe also we have the example of the Keta Lagoon which is ownerless land. It is submitted that, from these examples, the assertion chat there are no unowned lands, or that there cannot be unowned lands, in Ghana is contradicted by the facts. The statement made in opposition to the Public Lands Bill of 1897 was made by the chiefs and people of the then Gold Coast Colony, comprising the present Eastern, Central and Western Regions. They could only speak of their localities. What they said at that time, therefore, could not necessarily apply to the present Ashanti, Brong-Ahafo, Northern, Upper and Volta Regions. It is therefore unwarranted by the facts to extend such a local statement to embrace the whole country and transform it into a general rule of law.

LEGISLATION ON INTRODUCTION AND PRELIMINARY MATTERS

THE CONSTITUTION 1992, ARTICLE 295 (1)

“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.

INTERPRETATION ACT, 2009 (ACT 792), Section 46

Land’ in any enactment includes any estate, interest or right in, to or over any land or water.

LEASES

A lease may ordinarily be defined as an interest in land which is created when a person with an allodial, usufructuary or a freehold interest in land gives out a specific portion of such interest to another for a fixed term and upon mutually agreed terms and conditions. While sometimes used interchangeably with 'tenancy', a tenancy is usually for a relatively shorter period. Interestingly, sometimes people use the term 'lease' to also refer to the document containing the terms of a lease. Leases are generally regulated by the Conveyancing Act, 1973 (N.R.C.D 175).

Section 45(2) of the Conveyancing Act 1973 (N.R.CD 175) reads;

> ***"lease" includes an original or a derivative sublease, and an agreement for a lease where the lessee has become entitled to have the lease granted."***

Terminologies

The person who gives out the lease is known as the **'lessor'** while the person who takes the benefit under the lease is known as the **'lessee.'** When the lessor gives out the lease to the lessee, the leasehold interest in the property will revert to the lessor after the expiration of the period of the lease. The interest which the lessor retains in the property after having given out the lease to the lessee is therefore known as the **'reversionary interest.**' A lessor is at liberty to give out the reversionary interest even as the original lease is still subsisting.

Until the expiry of a lease, the lessee may decide to give out his interest in the unexpired term to another person. When this occurs, such interest given out by the lessee is known as an **'assignment.'** Under NRCD 175, it has been defined as;

> ***"the transfer of the residue of a term or interest created by a lease."***

The lessee, in such circumstances is also known as the 'assignor' while the person who takes the benefit of the assignment becomes the 'assignee.' The assignee will then become the new 'lessee' as the original lessee (assignor) will have no interest in the land, having divested himself of all his interest in the land to the assignee.

A lessee may instead of assigning the whole of his remaining interest to an assignee, decide to rather give out his interest or part of it to a person for a shorter period. This is known as a **sublease.** In such circumstances, the lessee is known as a 'sub lessor' whiles the one who takes the benefit under the sublease is known as the 'sub lessee.' The Act defines a sublease as;

> ***"…includes an agreement for a sublease where the sub lessee has become entitled to have the sublease granted."***

Features of a Lease (Legal lease)

1. A precise description of the area of the land which is being given out under the lease would be disclosed in the agreement.

2. The identity of the parties to the lease would be disclosed in a lease.

3. The duration of the lease should be certain. Although 99 years is the usual number of years granted in a lease, legally, there is no inhibition towards a grant of a lease of less or more than 99years.

   For a lease term, there is nothing special about 99 years. It is believed that the term of years is intended to convey the idea that the lease runs for the life of the tenant as most individuals don't live longer than 99 years. Other writers suggest that the government once levied a higher tax on leases of 100 years or more, and to avoid the payment of tax, the lessors settled on 99 years. There is however no concrete evidence to support this assertion

4. The presence of valuable consideration for the lease. It usually takes the form of rent payable annually or any other mode as agreed between the parties.

5. The presence of covenants between the parties. Since a lease is basically an agreement between two parties, each of the parties undertakes to be bound by specific promises to one another in a lease. These are specific covenants. But there are a lot covenants which are also implied by law.

6. The lessee should have an exclusive right to the possession of the land as long as the lease subsists.

7. The parties to the lease should execute the lease either by themselves or by other persons doing so on their behalf. It must be noted however that it is the signature of the lessor which is most crucial.

8. The lease should be in writing unless it comes under any of the exceptions under Section 3 of the Conveyancing Act, 1973.

Why should the lease be in writing?

One of the main features of a lease is that it should be in writing. The need for a lease to be in writing is due to the fact that under NRCD 175, any transfer of an interest in land which is not in writing does not confer any interest on the transferee.

Section 1 of NRCD 175 reads;

> ***"(1) A transfer of an interest in land shall be by a writing signed by the person making the transfer or by the agent of that person duly authorized in writing, unless relieved against the need for a writing by section 3.***
>
> ***(2) A transfer of an interest in land made in a manner other than as provided in sections 1 to 10 shall not confer an interest on the transferee."***

There is no standard format for the drawing of a lease although by practice templates have evolved. The lease would be signed by the parties and the form of signature could also be by the usual signature or any mark which is attributable to the party. The signature is usually at the

bottom of the document but it can also be in any part of the document provided it is indicated to cover the whole document. It is enough if the name appears on the lease and the party does anything to recognize name as his. The need for the lease to be signed can be seen in the fact that the contract would not be enforced against a party who fails to sign the lease.

Section 2 of NRCD 175 reads;

> ***"A contract for the transfer of an interest in land is not enforceable unless***
>
> ***(a) it is evidenced in a writing signed by the person against whom the contract is to be proved or by a person who was authorized to sign on behalf of that person, or***
>
> ***(b) it is relieved against the need for a writing by section 3.***

In the case of **Fugar v Bossman [1963] 1 GLR 16,** the court held that a deed of grant or other assurance of property takes effect immediately upon its execution by the grantor or assuror and the property expressed to be assured passes at once to the grantee although the latter has not executed or assented to the deed. In other words, once the grantor has signed the lease for example, the terms of the lease are binding on the grantor and it can be executed against him, even if the lessee has not signed his part of the lease.

See; **Dacosta & ors v Ofori Transport Ltd [2007-2008] 1 SCGLR 602**

Alternatively, where it is the grantee who signs the document and not the grantor, the document would be enforced against the grantee although the grantor has not executed the document.

Exceptions to the need for writing

Despite the general rule that a lease should be in writing, there are exceptions. Under section 3 of NRCD 175, a transfer of an interest in land which is not in writing would still be regarded as valid under certain conditions.

Section 3(1) of the Act reads;

> ***"Transactions permitted without writing***
>
> ***(1) Sections 1 and 2 do not apply to a transfer or contract for the transfer of an interest in land which takes effect***
>
> ***(a) by operation of law;(operation of law refers to those rights which are conferred upon an individual by law without any act of his own. An example is intestacy.***
>
> ***(b) by operation of the rules of equity relating to the creation or operation of resulting, implied or constructive trusts;***
>
> ***(c) by order of the Court;***
>
> ***(d) by will or on intestacy;***
>
> ***(e) by prescription;***
>
> ***(f) by a lease taking effect in possession for a term not exceeding three years, whether or not the lessee is given power to extend the term;***
>
> ***(g) by a license or profit other than a concession required to be in writing by section 3 of the Concessions Act, 1939;2(2) or***

(h) by oral grant under customary law."

Equitable Leases

These are leases which have not complied with the strict formalities for the creation of a lease, but may still be enforced as if a valid lease has been so created. There are at least two ways in which an equitable lease may be created. These are;

a. An agreement for a lease

It would be recalled that a definition of a lease under section 45(2) of NRCD 175 includes "*an agreement for a lease where the lessee has become entitled to have the lease granted."* Under which circumstance does an agreement for a lease arise? Secondly when does an agreement for a lease to be regarded as a lease?

Before parties execute a lease agreement, it occasionally occurs that they would initially enter into an agreement for the creation of a lease in the future. This agreement, is thus different from the lease itself. The law would however give full effect to such an agreement and regard it as a proper lease if all the essential provisions of a lease are present in the agreement. In such a case, the law would regard such an agreement as having the attributes of an enforceable contract and may enforce it as if it is the lease itself. These essential provisions may include the identity of the parties, the rent payable as well as an accurate description of the land. In such a case, it can be said that an equitable lease has been created. The equitable maxim of 'equity considers as done which ought to be done' comes into play here. It is known as **the rule in Walsh v Lonsdale.**

Limitations on the rule in Walsh v Lonsdale

I. Although a court could take the view that a particular agreement for a lease should be enforced as an equitable lease under the rule, it can still exercise a discretion to refuse to do so. This is because all equitable remedies are discretionary. A court may refuse to order for specific performance due to a bad conduct on behalf of the person asking for the relief. He may have been involved in a misrepresentation or fraud, undue delay, or the court may be of the view that he could be compensated adequately in damages.

On the other hand, a legal lease (a lease which has complied with all the statutory requirements) does not suffer from these defects).

ii. Whenever a legal lease is created, under the common law, it operates as a notice to the whole world. Therefore, anybody who purports to have acquired interest in the land after the creation of the lease takes the interest subject to the legal lease whether he was aware of its creation or not. On the other hand, an agreement for a lease does not bind a subsequent purchaser for value without notice of the existence of the agreement.

This dichotomy has been whittled down to an extent in Ghana. Under section 24 of the Land Registry Act, 1962(Act 122), an agreement (even if it is not a formal lease) once in writing could be registered and by section 25 of Act 122, would be deemed to constitute notice to the whole world.

b. Part Performance

Sometimes, the parties have negotiated and agreed on all the essential requirements of a lease, but it may not have fully complied with the requirements of the law in terms of the drawing up of a lease. An example may be where the lessor had failed to sign the lease which is for a term of more than three years, a requirement under section 1 of the Conveyancing Act, and therefore making the contract unenforceable against him.

This notwithstanding, if the evidence shows that despite the fact that the lessor failed to sign, there has been a substantial or part performance of the parties based on this purported lease, a court would enforce the purported lease as if it is a valid lease by regarding it as an equitable lease. It can be enforced against the lessor by an order of specific performance taken by the lessee against him.

Covenants

Covenants refer to binding undertakings that are made by the parties to a contract. A lease is essentially a contract between the lessor and the lessee. In the lease, the parties may make solemn promises to undertake in relation to the use of the land. Each of the parties will be held responsible for these covenants that they have specifically agreed to be bound by. Such covenants may either require a party to do something or may require a party not to do something in relation to the use of the land.

Where the covenants require a party to do something on the land, it's known as a **"Positive or Affirmative" covenants**. An example is to "maintain a fence''. On the other hand, where the covenant requires a party to refrain from doing a particular thing in

relation to the use of the land, such covenants are called **'Restrictive or negative covenants".** They are generally meant to protect the land. Examples are "not to dig a bore-hole on the land" or "to use the land for only residential purposes." In these instances, if the lessee digs a borehole or uses the land for religious or educational purposes, they would amount to a breach of the restrictive covenants.

The courts would ordinarily enforce the covenants that have been agreed upon by the lessor and the lessee as long as they are not illegal or contrary to public policy.

Apart from these specific covenants which are found in a lease, the law may also imply certain covenants in any lease. In Ghana, sections 22 and 23 of the Conveyancing Act, 1973 contain covenants that are implied by statute. Such covenants are known as "C**ovenants implied by law."**

Privity of contract and Privity of Estate

Where parties enter into a contract (like a lease), the parties are bound by the covenants in the contract. This means that in the event of one party failing to comply with the provisions of the contract, the other party is at liberty to take action to enforce the performance of the covenants.

Privity of contract

Privity of contract simply means that the parties share a common interest in the contract (lease) which binds them together. It refers to the relationship that is established when you and someone else have a contract. It therefore arises as a result

of the presence of a contract between the parties. A lessor and a lessee can therefore be said to have a privity of contract.

In the same way when a lessee assigns his interest to another person (assignee), the lessee (assignor) and the assignee have a privity of contract between them as the parties have a common interest in the contract (assignment) executed between them. Under the common law, strangers to a contract are unable to sue on the contract. The Contract Act, 1960 has however made some modifications. By section 5, any provisions in a contract which purports to confer a benefit on a third party, may be enforced or relied upon by the beneficiary as though he were a party to the contract. Under section 12(1) of the Conveyancing Act, in every lease unless expressly stated as inapplicable, any reference to a party to a contract is taken to include the heirs, successors, personal representatives and assigns. It reads;

> ***"In a conveyance of an interest in land, the expressions used to denote the parties to the conveyance include their heirs, successors, personal representatives and assigns, except in so far as contrary intention is expressed in the conveyance or appears by necessary implication."***

Privity of Estate

Apart from the shared interest in a contract between a lessor and a lessee, there is also a shared interest in the land which is the subject of the lease. For as long as the contract between a lessor and lessee subsists, the two parties will continue to have a common interest in the land. One person would stand in the relationship as the landlord (lessor) while the other would be the tenant (lessee). This 'landlord – tenant' interest which both parties have in the land is what is known as the **"Privity of Estate**." There is therefore a privity of estate between a lessor and a lessee, as well as between a sub lessor and a sublesee. In the same way, the lessee (assignor) and the assignee will also have a shared interest in the land which is the subject of the assignment. This is because an assignee takes the place of the lessee and becomes the new tenant to the original lessor (landlord). This creates privity of estate between the assignor and the assignee. On the other hand, a lessor and a sub lessee will not be relating to each other as a 'landlord' and a 'tenant'. In this case one can say that there is no privity of estate between the lessor and the sublesee.

Implied Covenants Under the Conveyancing Act

It has been noted that apart from specific covenants that the lessor and the lessee may incorporate in a lease, the law may itself imply certain covenants into a lease. This is a requirement in respect of all conveyances which have been made for valuable consideration. In the absence of any specific covenants in respect of particular issues, the implied covenants would operate.

The parties to any conveyance in respect of land are also at liberty to modify any of the implied covenants to suit their peculiar circumstances. The law would give effect to these modified implied covenants as long as they are not illegal, against public policy, or may end up defeating the intention of the statute. Particularly, any variation in the agreement which seeks not to hold the lessor personally responsible for his actions is frowned upon by the Act. Sections 22(7) and (8) of the Conveyancing Act reads:

> ***"A covenant implied under this section may be varied or extended by the conveyance and, as so varied or extended, shall operate in the same manner and with the same consequences as if the variations or extensions were implied under this section.***
>
> ***(8) A variation or extension under subsection (7) which wholly removes the personal liability of the covenantor is void."***

Sections 22 and 23 of the Conveyancing Act of 1963 deals with covenants that are implied by statute in respect of all conveyances of Interests in land for valuable consideration, (which includes leases), on behalf of the transferor and the transferee respectively.

Implied Covenants by Transferor (Lessor)

In respect of all conveyances, the law implies four (4) covenants on behalf of the transferor. These are;

1. The Right to Convey
2. Quiet Enjoyment
3. Freedom from Encumbrances
4. Further Assurance

Section 22(1) of the Conveyancing Act, 1973(NRCD 175) reads;

> ***"(1) In a conveyance for valuable consideration there shall be implied the covenants for right to convey, quiet enjoyment, freedom from encumbrances and further assurance, in the terms set out in Part One of the Second Schedule."***

1. **The right to convey**

There is an implied covenant on the part of every transferor that he has the right to transfer the land in question. By this, the transferor is indicating that he is either the owner or may be doing so lawfully on behalf of the owner. If he is not the owner the *'Nemo dat rule'* would become applicable as you cannot give what does not belong to

you. It also implies that if he needs the consent of certain persons before conveying the property, he has already sought the consent of these persons before conveying the property. A transferor who purports to convey any property which in fact he has no right to convey would be in breach of this implied covenant and therefore action could be taken against him by the transferee.

In part one of the second schedule to the act, it explains it thus;

> ***"That despite anything done, omitted or knowingly suffered by the covenantor or anyone through whom the covenantor derives title otherwise than by the purchaser for value, the covenantor has, with the concurrency of every other person conveying by the covenantor's direction, full power to convey the subject-matter expressed to be conveyed, in the manner in which it is expressed to be conveyed."***

2. Quiet enjoyment by the transferee

The transferor guarantees that he or any person under his direction will guarantee the transferee an undisturbed possession of the land which he has conveyed to the transferee. This right of quiet enjoyment extends not only to the transferee but also all other persons who are using the land lawfully on the authority of the transferee. An exception may be when at the time of the grant of the land, it was made clear by the transferor that some other person was to exercise an interest on the land and both parties agreed on it at the time of the grant of the land.

A transferor will therefore not be allowed to exercise adverse rights in respect of the land during the subsistence of the lease, as it would amount to what is known as a derogation of the grant on the part of the lessor.

3. Freedom from encumbrances

An encumbrance is any right or interest that exists in someone other than the owner of landed property which restricts or impairs the transfer of the property or lowers its value. Apart from any encumbrances which may be known to the parties in respect of the land, at the time that it is being conveyed, and which the conveyance is being made subject to, the transferor guarantees that there are no other encumbrances in respect of the land.

This means that if there is any encumbrance in respect of the land, the transferor is under an obligation to make it known to the transferee or take steps to discharge the encumbrance or indemnify the transferee against any claims or demands that may be made in respect of the land as a result of such encumbrance. An example of such an encumbrance is a mortgage or accrued taxes to a local authority if the local authority has the power to dispose of the land to settle the taxes.

4. Further assurance

The transferor impliedly undertakes to ensure that he will do whatever is lawfully necessary to ensure that the transferee's title to the land would be perfected. This means that as and when it becomes necessary to execute any document in favor of the transferee so as to remedy any defect in the conveyance, the transferor would do so. The transferor would be obliged to do this when the request is coming from the transferee or anybody else deriving his title from him. It must however be borne in mind that it is the transferee who bears the costs incurred by the transferor in the process of executing any processes so as to perfect the title of the transferee.

Further Implied Covenants

Where the transfer of the interest in land involves an assignment or a sublease, the law imposes further implied covenants.

ASSIGNMENT

Validity of the head lease:

A transferee (lessee) who decides to transfer the residue of his interest to a third party is also known as the 'Assignor'. This process is known as the assignment. He can only assign his interest in the land when there is a valid lease (head lease) still subsisting

between him and the original lessor. There is therefore an implied covenant on the part of the assignor that the head lease is valid at the time of the assignment. In Part 2 of the Second Schedule to the Conveyancing Act, it states;

> ***"That despite anything done, omitted to be done or knowingly suffered by the covenantor or anyone through whom the covenantor derives title otherwise than by purchase for value, the head lease is at the time of conveyance a good, valid and effectual lease of the property conveyed, and is in full force, unforfeited and unsurrendered, and has not become void or voidable."***

1. **Past observance of head lease:**

There is an implied covenant on the part of the transferor that he has complied with all the conditions of the head lease at the time of the assignment. This means that all covenants which he was required to comply with at the time of the assignment, including the payment of rent has also been fulfilled. The Act makes specific reference to;

> ***"That despite anything done, omitted to be done or knowingly suffered by the covenantor or anyone through whom the covenantor derives title otherwise than by purchase for value***

a) the rent payable under the head lease by the lessee and the person deriving title under the lessee has been paid up to the time of conveyance;

(b) the covenants, conditions and agreements contained in the head lease and to be observed and performed by the lessee and the persons deriving title under the lessee have been observed and performed up to the time of conveyance."

Sublease

In a sublease, the lessee has given out part of his remaining lease to a third party. A sublease will always be at least one day short of the date of expiry of the original lease. The lessee in this circumstance becomes the "sub lessor." The third party becomes known as the "sublesee."

There is an implied covenant on the part of the sub lessor in respect of the following;

1. Validity of the head lease: The sub lessor impliedly covenants that the original lease between him and the lessor (head lease) is valid at the time of the grant of the sublease to the sublesee. (section 22(2) of NRCD 175)

2. Past observance of head lease: There is an implied covenant on the part of the transferor that he has complied with all the conditions of the head lease at the time of the sublease (section 22(2) of NRCD 175).

3. Production of the head lease: The sub lessor is implied to have covenanted to make available the original lease and make available to the sublesee copies thereof as if he has given a written undertaking to that effect as required under section 35(2) of the Conveyancing Act (section 22(3) of NRCD 175).

TRUSTEE OR BY COURT ORDER

There are times when the conveyance of a property was done by a trustee or someone at the instance of a court order. There is an implied obligation on their part that they had not encumbered the property by their own actions (section 22(4) of NRCD 175).

Implied Covenants by Transferee (Lessee)

In respect of the transferee too, the law implies certain covenants as having been made on behalf of the transferee. These are covered by section 23(1) of the Conveyancing Act.

The section reads;

> ***"In a conveyance by way of lease for valuable consideration there shall be implied the covenants relating to payment of rent, repair to adjoining premises, alterations and additions, injury to walls, assignment and subletting, illegal or immoral user, nuisance or annoyance, and yielding up the premises, in the terms set out in Part One of the Third Schedule."***

They can be itemized as follows;

1. To pay rent

2. Repair to adjoining premises

3. Alteration

4. Injury to walls

5. Assignment and subletting

6. Illegal or immoral use

7. Nuisance or annoyance

8. Yielding up premises

1. **To pay rent:** The lessee impliedly covenants to pay the rent as per the mode specified in the lease.

2. **Repairs to adjoining premises:** The lessee covenants to allow the lessor to enter the premises with workmen at reasonable times and with prior notice to the lessee, to effect repairs or alteration on adjoining premises belonging

to the lessor. Where any damage occurs as a result of this entry by the lessor, he shall reimburse the lessee for the damage.

3. **Alteration:** The lessee impliedly covenants **that** without a written consent obtained from the lessor, he shall not put up new buildings or make any alteration or addition to the leased property.

4. **Injury to walls:** The lessee also covenants that without obtaining a written consent from the lessor, the lessee cannot damage any wall or cut any timbers on the premises or permit anybody else to do so.

5. **Assignment or subletting:** The lessee covenants that without first obtaining a written consent of the lessor, he will not assign, sublet or part with possession of any part of the leased premises to any other person, provided such a person is respectable and responsible. The lessor shall however not be allowed to unreasonably withhold consent.

Unless expressly stated in the lease, the Conveyancing Act frowns upon the payment of monies to a lessor before he would give his consent for the lessee to assign or sublet his interest to a third party. The only exception is where the monies are necessary in respect of legal expenses that would be incurred as a result of granting such consent. (See: Section 17 of NRCD 175)

6. **Illegal or immoral user:** The lessee also covenants not to use or permit any other person to use the premises or any part of it for any illegal or immoral use.

7. **Nuisance or annoyance:** The lessee covenants not to use or permit anything to be done on the premises which would cause a nuisance or annoyance to tenants or occupiers of adjoining premises, or cause any damage to the lessor.

8. **Yielding up premises:** At the end of the lease, the lessee covenants with the lessor that at the expiration of the lease, he shall give up vacant possession of the lease together with any additions made thereon, and ensure that the fittings and fixtures on the premises are in a good state.

Further Implied Covenants

Sublease (Part two of schedule three)

Where there has been a sublease of the property, the following **covenants are implied on behalf of the sublesee.** These are;

1. **Future observance of head lease:** Apart from the obligation to pay rent and other covenants which must necessarily be performed by the sub lessor, the

sublesee is required to observe the covenants under the original lease (head lease).

2. **Indemnifying the sub lessor:** The sublesee covenants to indemnify the sub lessor against any breaches of the covenants contained in the head lease as far as they relate to the premises which has been sublet.

3. **Permitting repairs under head lease:** The sublesee covenants that subject to the giving of a written notice by the sub lessor, he shall allow the sub lessor to enter the premises at reasonable times, for the purposes of enabling the sub lessor to comply with the head lease. This is however subject to the fact that those covenants are not ones that should be performed by the sublesee.

A. Assignment (Part three of schedule three)

The law implies the following covenants on behalf of the Assignee. These are;

1. **Payment of rent:** The assignee covenants to pay rent in respect of the assignment under the lease as and when they become due.

2. **Future observance of head lease:** the assignee covenants to observe the head lease which is the source of the original lease. This means that the agreements and any covenants in the head lease, he would comply with them, having stepped into the shoes of the lessee.

3. **Indemnity:** The assignee undertakes to indemnify the assignor and his property against any claims, proceedings or costs arising out of a breach of any of the covenants in the lease.

USUAL COVENANTS

Sometimes people enter into an agreement for the creation of a lease subject to what is known as the 'usual covenants.' Under the common law, these refer to peculiar covenants that govern the transfer of land within a particular community, taking into consideration the location, the nature of the property and the purpose of the lease. They vary from community to community. Usual covenants also differ in terms of the use to which the land is put to use. Leases of land for agricultural use, mining use and residential use would also be different from one another. Even in respect of land which has been leased for residential purposes, there might be differences between urban and rural areas. And it has even been noted that usual covenants may also change over the years. What may be regarded as usual covenants by a particular generation in the past may not necessarily be the same for now.

Most of these usual covenants have been incorporated into the Conveyancing Act as implied covenants under sections 22 and 23 of the Act. The lessor's covenants for 'quiet enjoyment' as well as the lessee's covenant to 'pay rent' are examples of "usual covenants." Other usual covenants that may be read into a lease under the common law, and which may be applicable in Ghana are the lessee's covenant to repair and keep the premises in repair.

ENFORCEMENTS OF COVENANTS IN A LEASE

The creation of a lease may result in the creation of a sub-lease as well as an assignment. The creation of a lease therefore may result in the creation of several parties, namely a lessor, a lessee, a sublesee or an assignment. There are times when a little confusion as to which of the parties can enforce the covenants against the other. Can the lessor enforce the covenants in the lease against the sub-lessee or the assignee? Are the covenants binding only as between the original parties to the lease or it extends to other persons who may have inherited the original parties? If the covenants are not binding only on the original parties to the contract, then we must find out whether in reality it is all the covenants that are binding on parties other than the original parties.

The general rule is that with regard to the original parties to the contract, they are bound by the covenants within the contract. A lessor and a lessee are bound by the covenants in the lease. Similarly, a sub lessor and a sublesee are bound by their covenants in the sublease. An assignor and an assignee are also bound by the covenants

in the assignment. These parties are bound by their covenants as a result of privity of contract and also privity of estate (apart from an assignor and an assignee in which no privity of estate arises because the lessee as the assignor would be replaced by the assignee as the new 'tenant' to the original lessor).

Covenants which run with the land or reversion

Another way of classifying covenants has to do with whether they relate to the use of the land or not. There are some covenants which specifically relate to the use of the land. In such a case, it is also said that they touch and relate to the land. In the Conveyance Act, they are also referred to as covenants with "*reference to the subject matter of the lease."* A covenant by a lessee to pay rent or by a lessor to erect a fence on the land would be regarded as covenants affecting the use of the land.

On the other hand, there may be covenants in a lease which are not regarded as relating to any interest in the land. These covenants may be personal in nature and only relating specifically to the parties themselves. An example may be a covenant which requires a lessee to periodically service the landlord's vehicle because the lessee is a mechanic. In that case the lessor may decide to take a lower rent on the lease. The covenant to service the lessor's vehicle is not one which is related to the use of the land, and therefore is not a covenant which runs with the land. Of course this is a bit arguable because to an extent, because the service rendered by a lessee to a lessor has some link to an interest in the land, as it is regarded as part of the rent.

Under section 25 and 26 of the Conveyancing Act, covenants which run with the land (relating to an interest in the land) are not only binding between the original parties but also against their successors in title. Section 25 of the Act reads;

> ***"1) A covenant relating to an interest in land of the covenantee***
>
> ***(a) shall be deemed to be made with the covenantee and the successors in title of the covenantee and the persons deriving title under the covenantee or them, and***
>
> ***(b) is enforceable by the successors referred to in paragraph (a) to the same extent as by the covenantee.***
>
> ***(4) For the purposes of this section, a covenant runs with the land when the benefit or burden of it, whether at law or in equity, passes to the successors in title of the covenantee or the covenantor."***

A sublesee is also bound by any restrictive covenants that may be contained in a lease itself. This is because of the definition of "successors in title" in section 25(2) and 26(3) of NRCD 175.

When a lessee assigns his interest in land to an assignee, covenants which touch on the use of the land continue to be in force. If there is a breach of a covenant by the assignee, the original lessor can hold him responsible for the breaches. Interestingly, the fact that a lessee has assigned his interest to an assignee does not mean that he can't be

held responsible by the lessor for breaches committed by the assignee after the assignment. There is an implied covenant on behalf of an assignee however, to indemnify the assignor (assignee) against any action that may be taken against him by the lessor for any breach of a covenant.

Remedies for Breach of Covenant

Covenants in a lease are binding contractual undertakings which the parties are expected to be bound by. In the event of a breach of a covenant by a party, the remedies available to the injured party would be largely governed by the remedies otherwise available to a party when there has been a breach of contract. However, due to the peculiar relationship that may exist between the parties because of the landlord-tenant relationship, a few modifications may become applicable. The following remedies are available for breach of covenant. These are;

1. Damages
2. Injunction
3. Action for rent
4. Distress for rent
5. Forfeiture

1. **Damages:** At common law, this is the only remedy available to a party for breach of a covenant. If the breach occurs on the part of a lessee, the lessor is entitled to compensation to a value that is commensurate with the breach. If there has been a loss of value to the reversion interest of the lessor, then such loss would have to be computed and paid for by the lessee. This means that the damage being awarded is just to restore the value of the property to its original position. This would be appropriate when dealing with covenants that run with the land or the reversion, i.e. they are related to the use of the land. Even with regard to covenants which do not run with the land, damages may be awarded for their breach.

   If the breach is also on the part of the lessor, the lessee is entitled to damages. This damage is assessed by noting the difference between the value of the lease with the covenant broken and the value of the lease with the covenant if it had been performed. Any of the parties would be entitled to any special or general damages that may become due.

2. **Injunction:** This is an equitable relief that would normally be invoked by a party where there has been a breach or threatened breach of a negative covenant. Here damages may not be appropriate. A lessor can ask for an injunction against a lessee if there has been a breach or a threatened breach to quiet enjoyment, subletting or assigning without his consent or alterations to the premises.

Where a breach has already occurred, damages and an injunction may be sought for by the injured party.

3. **Specific Performance:** This is another equitable relief available to a party to a lease to compel another party to comply with a covenant which he may have failed or refused to perform.

4. **Action for Rent and Mesne Profits:** A lessor reserves the right to take action against a lessee who has failed to pay rent. This right of the lessor is without prejudice to any other relief that he may seek from the court. Failing to pay rent is an implied covenant of any lessee. A lessee is required to pay rent in respect of the lease unless this has been expressly excused by the landlord.

Mesne Profit: Where a lessor or a landlord sues a lessee for recovery of land or premises and there are any arrears of rent, the landlord can also ask for these arrears of rent. But since judgment may not be immediate, it means that the lessee or the landlord is going to still accumulate more arrears after the writ has been issued. This 'future rent' that would be incurred by the lessee (tenant) between the date of the filing of the writ and the date of the judgment is what is known as *mesne profit*. They are seen as damages which must be awarded to the lessor (landlord) by the lessee (tenant) for the use of the land or premises**.**

5. **Forfeiture:** This refers to a right vested in a lessor (landlord) to terminate the lease because of the failure of the lessee (tenant) to perform a covenant under the lease. At common law, this right is expected to be incorporated into a lease before it would be enforced. It was strictly construed in favor of the tenant and the court of equity readily gave a relief to him against forfeiture. In Ghana, statutory interventions with regard to 'forfeiture' of a lease or a tenancy are regulated by sections 17(1)(b) of the Rent Act 1963 and section 29 of the Conveyancing Act, 1973.

Under the Conveyancing Act, a right of re-entry or forfeiture due to a breach of a covenant by a lessee is not enforceable unless the lessor has served on the lessee a written notice indicating the nature of the breach complained of and the lessee failing to remedy the breach within a reasonable time or payment of adequate compensation to the lessor where the breach is not capable of being remedied.

FIXTURES

In the law of immovable property, a fixture refers to a movable item or article which by its annexations to land or a building on the land has lost its character of movable property and therefore in the eyes of the law has become a part and parcel of the building or the land to which it is annexed to. This definition is a reflection of the maxim,

*"quidquid plantur solo solo cedit." (*This means 'whatever is attached to the land is part of the land.')

It must be noted however that no matter the extent of its annexation to land, if the intention of the parties is that the object which is attached to the land is not to be regarded as a fixture, then it would not be regarded as a fixture. It is in the absence of an express agreement between parties that disputes often arise at the end of the lease or the tenancy in determining whether an object which was annexed to the land had become a fixture and therefore should not be removed by the lessee (tenant) when he is vacating the land or the premises. Some examples of fixtures are

i. Light fixtures

ii. Central heating systems (Inc. radiators)

iii. Kitchen units

iv. Bathroom suites

v. Built-in wardrobes

vi. Plugs and sockets

It becomes sometimes difficult to determine whether or not an item is so much annexed to the land or the building so as to qualify as part of it. General criteria that are used in determining whether an article has been so attached to the building or the land as to regard it as part of the building or the land are;

a. The nature of the object

b. the extent or degree of the attachment to the building or the land

c. The purpose of this annexation. Generally, if the object's purpose is to improve the use of the land, there is the assumption that it had become a fixture.

d. The mode of attachment

e. The damage which would be occasioned to the land if the object is detached from the land. If a substantial damage would be done to the land or the building, then it may be regarded that the object has become a fixture

In reality and for practical purposes, it is evident that the most important factors that are taken into consideration in determining whether an object has become a fixture are the degree of annexation and the purpose of the annexation.

The Degree of Annexation (Attachment)

In the early days of the common law, the rule was that for a chattel to be regarded as a fixture, it must be attached to the land or building by some mechanical means. This meant that the object should be nailed, screwed, or fixed to the land or the building with mortar or any other means.

This was originally the most important consideration at common law in determining whether an object (movable property) had been converted into a fixture. For a movable object to be regarded as a fixture, it must have a substantial connection with the land. An object which merely rests or touches the land may not always be regarded as a fixture. The fact that an object is so heavy and resting on the land does not by itself mean that it has metamorphosed into a fixture. If, however the object is secured to the building or the land by some mechanical means like nails or screws, it might be regarded as a fixture. It is immaterial that the nails or screw may be removed without difficulty.

The Purpose of the Annexation

In the olden times, the thinking was that every object that was substantially attached to the building or the land was a fixture. Due to the injustice that it resulted, a new criterion with regard to the purpose for the annexation of the object was to find out the purpose for the attachment as it had the propensity to assist in determining whether it was a fixture or not. One way was to find out the intention of the lessee or tenant in fixing the object on the land. If the tenant or the lessee attached the object to the land

not with the intention to improve the land but rather to ensure that it would assist the lessee or the tenant to enjoy its use, then it would not be regarded as a fixture. Generally, tools of trade that are attached to land are not regarded as fixtures as they have been attached to the land to enable the lessee (tenant) to ply his trade. It would not have been intended that the lessee would leave these tools of his trade on the land at the expiration of the lease.

If a lessee or a tenant takes up a lease, in the absence of a contrary intention, it does not necessarily mean therefore that automatically, machinery, equipment or material that he fixes unto the land should be regarded as a fixture.

Removal of Fixtures by a Tenant

As a general rule, a fixture is regarded as part of the land and unless there is a contrary intention between the parties or it forms part of an exception to the general rule, it cannot be removed by the lessee or the tenant after the expiration of the lease. On the other hand, if the object has not become a fixture, then it means that the tenant or lessee is at liberty to remove them at the end of the lease.

Because some fixtures can be removed under certain conditions but others cannot be removed, a distinction is sometimes drawn between those fixtures which can be removed and those which cannot be removed. With regard to the fixtures that can be removed by the lessee or the tenant after the expiration of the lease, they are

sometimes known as “tenant’s fixtures” whiles the fixtures that cannot be removed by the tenant are known as “landlord’s fixtures.”

Tenant’s fixtures

These are articles that are attached to the land by the lessee or the tenant during the subsistence of the lease. In the absence of an express agreement between the parties or by virtue of a local custom to the contrary the tenant would have the right to remove them either during the term or within a reasonable time after the expiration of the term. A tenant’s fixtures can be categorized into three main types. These are;

1. Trade Fixtures
2. Ornamental and domestic fixtures and
3. Agricultural fixtures

1. **Trade Fixtures:** These refer to movable objects that are attached to the land by a lessee or the tenant with the aim of plying his trade or business. Examples may include sheds erected by a tenant for his poultry farming, fittings of a restaurant or drinking bar, petrol pumps fixed at a filling station, etc.

   As a general rule, in the absence of any specific agreement between the parties, a tenant is allowed to remove these fixtures even if they have become part of the land or premises. The public policy rational behind this is

to encourage trade and business practices, in the interest of the general good. This is because if a lessee or a tenant knows that any equipment or machinery which he had installed on the land or premises are not removable by him again, he may not be motivated to invest his capital in the land. This would clearly affect the growth of industries, employment, revenue generation by the state through taxation, and employment.

There are however some restrictions on the right of a tenant to remove fixtures from the land. These are:

a. The tenant should only remove the fixtures during the term of the lease (tenancy). If he decides to remove them after the lease has come to an end, he may be prevented from doing so and the fixtures would be regarded as part of the land unless it is done within a reasonable time after the expiration of the lease. The reason for this may be as result that as a fixture, they are technically part of the land and therefore should not have been removed by the tenant. It is therefore a sort of privilege that has been extended to him by the law just to encourage hard work and businesses.

b. If there is a clear agreement between the parties that the lessee is not to take away any trade fixtures on the land, then the tenant would be prevented from doing so. A clause in an agreement that the lessee would at the end of the lease deliver up the land “together with all fixtures”

would prevent the lessee from removing any fixture even if it is a trade fixture. See: **Leschallas v Woolf [1908] 1 Ch. 641**

c. The objects which the tenant can remove should be movable ones at the time they were brought unto the land or premises by the tenant.

d. The trade fixtures must be capable of being removed without causing substantial damage to the land. With regard to trade fixtures however, this factor is not strictly enforced, unlike other fixtures. Generally, if the removal of the fixture occasions any damage to the land, the lessee is liable to repair the damage. If the tenant replaced an object belonging to the lessor or the landlord and wishes to take his own fixture away later on, the lessee or tenant is obliged to re fix the landlord's original object or replace them.

2. **Ornamental and Domestic Fixtures:** These are objects that are attached to the land or the premises by the lessee or the tenant for decorative and domestic use. These include wall mirrors, paneling, window blinds, decorative electrical appliances, pumps, flower pots, etc. Generally, objects that can easily be moved as a whole would be regarded as a removable fixture.

If a tenant does not remove the ornamental or domestic fixtures at the end of the lease, they will be regarded as gifts to the landlord. The reason why the tenant is generally permitted to remove ornamental and domestic fixtures is that a tenant or lessee who attaches such things to the land is presumed not intend them as gifts to the landlord at the end of the lease. Ornamental and domestic fixtures that cannot be removed without causing damage to the premises or the land may be regarded as part of the land or the premises and therefore cannot be removed (landlord's fixtures).

3. **Agricultural fixtures:** These are machinery and other movables erected on the land by the tenant for agricultural purposes. These are all removable by the tenant, in the absence of a clear agreement to the contrary. The tenant would therefore be expected to remove them before the termination of the lease or within a reasonable time after the expiry of the lease. The tenant is however at liberty to leave them for the landlord (lessor), subject to the payment of compensation by the landlord (lessor).

Devolution of fixtures

A beneficiary of land or premises in a will or where he enjoys the property due to intestacy is allowed to keep fixtures that have been attached to the premises or the land. In that case it is immaterial if the objects attached to the land or the premises are trade, ornamental or agricultural fixtures. This rule applies equally when land is

mortgaged. All fixtures on the property are deemed to be part of the mortgaged property.

Remedies in Respect of Fixtures

If a tenant wrongfully removes fixtures from the premises or the land, the landlord has these options at his disposal. These are;

a. Damages: The landlord may decide to sue the tenant for damages for breach of the covenant.

b. An action to recover the value of the fixtures: Here the landlord would be suing to recover the value of the fixture that the tenant or lessee has unlawfully taken away.

c. Injunction: Where a tenant or lessee threatens to remove fixtures, or has started the process of removing them, the landlord can maintain an action against the tenant from going ahead with the removal of the fixtures. A mandatory injunction may be requested by the lessor (landlord) to compel the tenant or the lessee to return the fixtures.

TERMINATION OF LEASES

There are several ways by which a lease may be brought to an end. These are by:

1. Expiry (Effluxion of time)
2. Occurrence of an event
3. Notice
4. Surrender
5. Merger
6. Forfeiture
7. Frustration
8. Dissolution of company
9. Denial of Title (Disclaimer)
10. Death

11. Compulsory Acquisition by the State

1. Termination by expiry of Lease (Effluxion of time)

Every lease has a date that that it commences and a date that the lease will also come to an end. This is one of the peculiar features of a lease; there is certainty of the duration that the lease would last. Ordinarily under the common law, the moment the date that the parties have mutually agreed that the lease comes to an end matures, the lessor is entitled to vacant possession of the land. This is an event that happens automatically.

Where the lease is not one of bare land but involves the lease of premises, different considerations apply. Upon the expiry of a lease of land with premises thereon, the lessor (landlord) does not automatically take vacant possession of the premises. In such a case, a statutory tenancy arises by operation of law. This is because in such an instance, the lease becomes subject to the Rent Act, 1963 is what would be applicable and not the Conveyancing Act.

2. Termination upon the occurrence of an event

It sometimes happens that the parties to a lease agreement may stipulate therein that upon the occurrence of a specific event, the lease would be brought to an end. Generally, the courts would enforce such an agreement as long it is not illegal or contrary to public policy. This is not

very common in practice. If the subject matter of the lease is a premise, then such an agreement may be subject to the Rent Act. Some of the occurrences which parties may agree that their occurrence should terminate a lease under the common law are marriage, failure of personal occupation, the breach of a condition, and parting with possession.

Under the common law, leases which involve premises may be terminated upon marriage if the parties had agreed that it should be a condition for such a termination. In such situations, the premises may be unsuitable for a couple and kids, due to limited facilities. Lease of land may also come with a restriction over its use. If a lease agreement for putting up residential buildings require that within three years of the lease taking effect, the lease should have commenced building works on the land or forfeit same, a failure on the part of the lessee within that time would mean that the lessor has a right to regard the lease as having been terminated. This will however not operate automatically in Ghana due to statutory restriction in section 29 of the Conveyancing Act which requires that a written notification of the breach ought to be brought to the attention of the lessee by the lessor and being given a reasonable time within which to remedy the said breach.

3. Termination by Notice-

Parties to a lease may expressly agree that notwithstanding the fact that the lease has a definite date on which it would come to an end, any of the parties can terminate the lease by giving notices to that effect. The lease must contain the details of such notice by indicating the length of the notice, exactly when it should be given, and the mode for the giving of the notice. In holding 1 **of Savage v GIHOC [1973] 2 GLR 242**, the court stated:

> ***"a lease or tenancy for a fixed period could not be determined by notice unless this was expressly agreed upon. The length of the notice required, the time when it was to be given and other related matters depended on the terms of the lease and in the absence of such provision the lease would continue for the full period. Since the notice to quit was a unilateral act performed in the exercise of a contractual right it must conform strictly to the terms of the contract, and the onus of proving its validity lay upon the person by whom it was given."***

Although for long leases, a minimum of six months is usually given by either party so that the lease may be brought to an end, it is not a fixed rule and the parties are at liberty to agree on the length of such a notice.

4. Termination by Surrender

Before the expiration of the lease, a lessee may decide to give up the remainder of his interest in the lease to the lessor. When he does so and this is accepted by the lessor, it is said that the lessee's lease merges with the landlord's reversion interest, and this terminates the lessee's lease with the lessor. The lessee or tenant who makes surrender is called a *"surrenderor"* and the lessor or landlord to whom the surrender is made is called a *"surrenderee."* Surrender may be made expressly by the parties or by

implication (operation of law). For surrender to take place, the following conditions must exist;

a. The lessee should give up all his interest in the lease to the landlord. If the lessee still retains any portion of the lease, a merger would not arise.

b. Unless it is an implied surrender (operation of law), the lessor should expressly consent to the lessee giving up the lease

c. The lease must be surrendered to the immediate lessor (landlord) and to no other person. If the lessee gives up his remaining interest to another person other than the lessor, it would be regarded as an assignment and not 'surrender'.

Surrender by implication arises when through the conduct of the parties, it could be inferred that the lessee has surrendered his lease and therefore terminated the lease. An example is when a lessee accepts a fresh lease from his lessor in respect of the same land, and whose commencement date is to start from the same date as the original lease. In this case, the grant and acceptance of the new lease implies that the lessee has given up the original lease which has become terminated. It is immaterial that the new lease is for a duration which is different from the original lease.

5. Termination by Merger

A merger is similar to surrender. A merger occurs when a lessee acquires the reversion interest of the lessor while still retaining the original lease. Here, the original lease has not been surrendered. When this happens, the larger interest of the reversion swallows the lease, so that instead of having two interests simultaneously subsisting, there is only one interest, being the reversionary interest. The law frowns upon one person existing as both a lessor (landlord) and a lessee (tenant) at the same time. This is known by the maxim, *"nemo potest esse tenens et dominus"* which means *"no one can at the same time be a tenant and a landlord (in respect of the same land or building"*

Where there is another interest existing between the lease and the reversion, a merger does not occur. Therefore, where there is a sublease, a merger cannot occur.

6. Forfeiture

This refers to a right vested in lessor or a landlord to re-enter land or premises in a lease or a tenancy so as to terminate the lease or the tenancy because of a breach of a covenant or a condition by the lessee or tenant, subject only to statutory restrictions.

There is a distinction between a condition of a lease and a covenant. A condition refers to a major undertaking by a lessee, failure to perform of which is regarded serious enough to bring the lease to an end. Covenants are also undertakings but their non-performance does not necessarily bring the lease to an end, unless this has been

expressly agreed upon by the parties. Damages may be awarded to a lessor for such breaches of a covenant.

Restrictions on Forfeiture under the Conveyancing Act

Re-entry unto the land by a lessor is however restricted. This can be seen in several ways:

a. Section 29(1) of the Conveyancing Act requires that the lessor should send a written notice to the lessee, requiring him to remedy the said breach. It is only when the lessee does not do so within a reasonable time that the lessor can exercise the right of re-entry. Section 29 (1) of the Conveyancing Act reads;

"(1) A right of re-entry or forfeiture under a provision in a lease for a breach of a covenant, condition or an agreement in the lease is not enforceable, by action or otherwise, until

(a) the lessor serves on the lessee a notice, --

(I) specifying the particular breach complained of,

(ii) requiring the lessee to remedy the breach, if the breach is capable of remedy,

(iii) requiring the lessee to make reasonable compensation in money for the breach, except where the breach consists of a non-payment of rent,

(b) the lessee has knowledge of the fact that the notice has been served, and

(c) the lessee fails, within a reasonable time after the service of the notice under paragraph (a), to remedy the breach, if it is capable of remedy, and except where the breach consists of a non-payment of rent, to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

b. Where the breach can be adequately compensated for in damages, and the lessor has been adequately compensated, he would not be allowed to exercise the right of forfeiture.

c. Forfeiture of a lease under the common law can be enforced by self-help. This is done by the lessor peacefully re-entering the land, which is the subject of the lease. However, where it will result in a breach of the peace, the lessor would need to do so through an action in court for possession of the land. However, in the case of **ID & Leo Lawoe Amegashi II V Francis Amihere & Another, suit No HI/159/**2007 delivered on 25th October 2012, the Court of Appeal held that a lessor is entitled to enforce the breach for forfeiture under section 29 of the Conveyancing Act by "action or otherwise." The court interpreted the "action or otherwise" to mean the issuing of a writ for possession. This of course is debatable.

d. There is no time limit within which the lessor should exercise his right of forfeiture, but the courts are not likely to give their blessings to a lessee who fails to act timeously.

e. With regard to a lease of premises, forfeiture can only be enforced through the court by virtue of Section 17 of the Rent Act, 1963.

f. The statutory intervention in forfeiture as seen in Section 29 of the Conveyancing Act is so crucial that **the parties cannot even contract out of it** in a lease. In other words, the lessor and the lessee cannot insert in their lease that the restrictions imposed by section 29 of the Conveyancing Act on a lessor over his right to forfeit or re-enter the land would not be applicable to them. Section 29(3) of the Conveyancing Act reads:

"This section applies despite a provision to the contrary in the lease".

g. The lessor's right to forfeit a lease is curtailed through a waiver on his part. If there is a breach of a covenant or a condition on the part of the lessee, it is up to the lessor to exercise the right of forfeiture or not. He may decide to waive those breaches, either expressly or impliedly. A waiver by implication arises where the lessor who is aware of a breach of a covenant or a condition in a lease by the lessee entitling him to forfeiture, notwithstanding continues to deal with the lessee as if he has not done anything wrong. An example is where a lessor continues to collect rent from the lessee who is in breach, while keeping quiet about the said breach. Section 32 of the Conveyancing Act however makes it clear that the fact that a lessor has waived his right to forfeiture in respect of a particular breach does not prevent him in future from exercising his right to forfeiture if the lessee commits a different breach of a covenant or a condition.

h. Another restriction on the lessor's right to forfeiture lies in the fact that once the lessor commences processes towards forfeiture, the lessee or a sublesee may apply to court for **relief from forfeiture.** The court may look at the peculiar circumstances of the case and either grant or refuse the application. The court may give relief to the lessee but on conditions, which may include the payment of costs, damages or an injunction on the parties. With regard to a sublesee who applies for a relief, the court is empowered to vest in him the remainder of his term left on the sublease or part of it, subject to terms and conditions.

These are covered by section 30 of the Conveyancing Act which reads;

"30. Relief against re-entry and forfeiture

(1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under a provision in a lease, or for non-payment of rent, the lessee of the property and also a sublease of the property comprised in the lease or a part of the lease may, in the lessor's action or in an action brought by that person for that purpose, apply to the Court for relief.

(2) Subject to subsection (1) of section 29, where a lessee applies to the Court for relief, the Court may grant or refuse the relief having regard to the proceedings and conduct of the parties and to the other circumstances.

(3) A relief granted under subsection (2) may be on the terms as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain a similar breach in the future, that the Court in the circumstances of each case thinks fit.

(4) Where a subleasee applies to the Court for relief, the Court may make an order vesting, for the whole term of the lease or a lesser term, the property comprised in the lease or a part of the lease in that subleasee on the conditions as to execution of a deed or any other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise that the Court in the circumstances of each case may think fit, but the subleasee is not entitled to require a lease to be granted to the sublease for a longer term than the subleasee had under the original sublease."

7. Termination by Frustration

A lease is a contract and therefore prone to all the vicissitudes associated with a contract. Therefore, certain unexpected factors may make it impossible for a lease to commence or to continue to exist. Certain factors which could be legal, physical or whatever reason which goes to the root of the lease may make the continued existence of the lease impossible.

Under the common law however, the doctrine of frustration is not applicable to executed leases unless the parties had expressly made provision for it in their lease. In instances therefore that premises have been burnt down, or destroyed by lightening, floods or by enemy fire, the courts refused to accept them as factors that had terminated the lease by frustration. The lessee was therefore still liable to pay rent to the landlord notwithstanding the destruction

of the subject matter of the lease. The court has also held that even if the land which is the subject of the lease gets submerged under the sea, the lease has not been frustrated and so the lessee will still be required to pay rent.

Matthey v Curlin [1922] 2 A.C 180

The idea behind this being that once the lessee has been put in possession by the lessor, whatever occurs later on with the land should not affect the lease. Mere hardship or inconvenience in continuing with the lease is not sufficient to regard it as frustrated. Unless prohibited by statute, the payment of rent by a lessee is not something which can be frustrated.

Commissioners of Crown Lands V Page [1960] 2 QB 274

There is an indication that the strict doctrine of the non-application of the rules on frustration to a lease may not always be absolute. The House of Lords gave this indication in the case of National **Carriers, Ltd v Panalpina (Northern), Ltd [1981] A.C 675.** In this case, the lessee had taken a lease of premises to be used exclusively for warehousing. The access road to the premised was closed by the local authority. It became impossible for the lessee to move goods to and from the premises. The lessee argued that the lease had been frustrated. The lessor on the other hand argued that under the common law, the doctrine of frustration was inapplicable. The court held by a majority decision that the notion that the doctrine of frustration can never be applicable to leases has no basis. However, in that particular case the court refused to hold the contract as having been frustrated as the closure of the access road was only temporary (20 months).

8. Dissolution by a company

What happens when a party to a lease is a company, which is an artificial entity, is dissolved? In the event that the lessee, an incorporated company is dissolved, the company unlike a natural person may not have personal representatives to succeed it and take over its interest. After the dissolution of a company, its shareholders, officers and directors may not be able to act on the company's behalf. It has been argued by some writers that when the lessee is a limited liability company, and it is dissolved, the lease also becomes terminated. This lack of clarity may be as a result of a lack of definite pronouncement in the Company's Code on the subject.

Blackstone states thus;

> ***"But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation; and in this case, their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. The grant is indeed only during the life of the corporation; which may endure forever: but, when that life is determined by the dissolution of the body politic, the granter takes it back by reversion, as in the case of every other grant for life."*** Emphasis mine).

See: Commentaries on the Laws of England, Vol 1, p. 484

If there is a sublease created by the lessee, the status of the sublease after the dissolution of the lessee company is also unclear.

Under the common law, where the lessor is an incorporated person, the dissolution of the company does not lead to a termination of the lease. In such an instance, the property becomes vested in the lessor's grantor. Such a person assumes the position of the lessor and is therefore able to enforce the terms of the lease against the lessee. The lessee in turn is also able to enforce the terms of the lease against the lessor's grantor.

9. Denial of Title (Disclaimer)

As a general rule, it is an implied term in every lease that any tenant who denies the title of his landlord should automatically lose his interest in the lease. This is a common law principle which is equally applicable to leases. This right vested in the lessor to terminate the lease is not grounded on any statute. The denial of the Lessor's title may be express or implied. Currently there is however a little grey area with regard to whether a lessee is entitled to a relief from the court in the event that a lessor seeks to re-enter the land for forfeiture when his title has been denied by the lessee. While Da Rocha and Lodoh are of the view that neither the common law nor equity would grant a relief to a lessee who denies the title of his lessor, Prof Kludze argues to the contrary. Prof Kludze argues that there is no automatic termination of the lease. It only grants the lessor with a right of forfeiture which he may exercise or not. Moreover, the statutory restrictions on a lessor and the right of a lessee to apply for relief in sections 29 and 30 of the Conveyancing Act respectively would be applicable.

It must be noted however that the courts are more likely to uphold a forfeiture of a lease based on the denial of the title of the landlord(lessor) where an opportunity was offered to the tenant (lessee) to be heard before terminating the lease.

See: Adjei v Grumah [1982-83] GLR 985

10. Death:

The death of a lessor or a lessee does not by itself bring the lease to an end. This is because the successors of the parties carry on with the obligations under the lease. Unlike a tenancy in which the tenant is not allowed to transfer his interest in the premises after his death, a lessee can do so. However, there are instances in which the death of either a lessor or a lessee could bring the tenancy to an end.

A lessor who has only a life interest in an immovable property may while he is alive give out a lease of that property to another person as a lessee. However, the death of the lessor would automatically terminate the lease. This is because his interest in the land ceases to exist when he dies. A lessor's life interest on his own life is known as *cestui que vie.* The one to whom the property devolves afterwards (remainder man) would not be bound by the lessee's interest. The lessor cannot therefore have any interest in the said property to give out after his death. And since one cannot give out what he does not have, the principle of *nemo dat quod non habet* becomes applicable.

A lease may also be granted to a lessee, in which the parties have expressly agreed that it should not extend beyond the lessee's lifetime. Under the common law, this would

automatically terminate the lease upon the death of the lessee. Sometimes it may be couched in terms like *"for the life of the lease or 30 years, whichever comes first."* In this case, whichever of these two events that occur earlier would effectively terminate the lease.

11. Compulsory Acquisition by the State (Refer to the notes on 'Compulsory Acquisition')

12.Voidable Conveyance

Under section 17(1) of the Conveyancing Act, any transfer of land which is made with the intention of defrauding creditors is voidable, and can be set aside by the creditor. The creditor would therefore be required to take steps to set aside this conveyance as void within a reasonable time of having knowledge of such fraud.

Section 17(1) of NRCD 175 reads;

> ***"(1) Subject to subsection (2), a conveyance of an interest in land made with intent to defraud creditors is voidable at the instance of a person prejudiced by that conveyance."***

Unconscionability

A transaction is referred to as unconscionable when the terms are so unjust or overwhelmingly one-sided in favor of the party who has the superior bargaining power that they are contrary to good conscience.

Whenever there is a transfer of an interest in land under circumstances that may be regarded as unconscionable, the court could modify the terms or set it aside altogether. Section 18(1) of the Conveyancing Act reads;

"The Court may set aside or modify an agreement to convey or a conveyance of an interest in land on the ground of unconscionability where it is satisfied, after considering the circumstances, including the bargaining conduct of the parties, their relative bargaining positions, the value to each party of the agreement reached, and evidence as to the commercial setting, purpose and effect to their agreement, that the transaction is unconscionable."

Illegal Lease / Assignment /Sublease

Although section 22(7) of the Conveyancing Act allows for the modification of implied covenants, the law frowns on any transaction that is entered into for the purpose of defeating the clear intentions of a statute. Such a transaction would be regarded as illegal. The Supreme Court stated in **Zagloul Real Estate Ltd V British Airways Ltd [1997-98] 2GLR 428** thus;

> ***"…an agreement by dishonest devises to defeat the clear intention of some statutory provisions was illegal and therefore unenforceable both in law and equity."***

REFERENCES

1. **A.K.P KLUDZE:** The Ghana Law of Landlord and Tenant, pages 181-190, 261-647, 797- 856

2. **B.J Da ROCHA & C.H.K LODOH**: Ghana Land Law & Conveyancing, 1995 pages 15-41

3. **D.D ADJEI**: Land Law, practice and Conveyancing in Ghana, pages 181-203

TUTORIAL QUESTIONS

1. a. What is a lease?

   b. What are the main features of a lease?

   c. Why should a lease be in writing?

2. What are equitable leases, and how are they created?

3. Examine the implied covenants on behalf of a lessor, a sub lessor and an assignor.

4. Examine the implied covenants on behalf of a lessee, a sublesee and an assignee.

5. Which remedies are available to a party for breach of a covenant in a lease?

6. a. What are fixtures?

   b. What are the criteria for the determination of an object as a fixture or not?

7. Under what circumstances are a tenant's right to remove trade fixtures restricted by law?

8. *"As a general rule, a fixture is regarded as part of the land and unless there is a contrary intention between the parties or it forms part of an exception to the general rule, it cannot be removed by the lessee or the tenant after the expiration of the lease."*

   Discuss the exceptions to the general rule.

9. Discuss five (5) different ways in which a lease can be terminated.

10. Explain the following procedures for terminating a lease:

a. Surrender

b. Merger

c. Forfeiture

d. Death

e. Dissolution of a company

11. Explain the term **"forfeiture"** in a lease. What are the restrictions on a lessor's ability to exercise the right of forfeiture of a lease under the Conveyancing Act, 1973 (NRCD 175)?

TENANCIES

It would be recalled that at the commencement of the topic, 'Interests in Land', mention was made of lesser interests, including tenancies and rights granted under contractual and sharecropping arrangements. This is one of the interests which had been recognized and outlined in Section 19 of the **Land Title registration law, 1986 (PNDCL 152).**

There are therefore two types of tenancies which shall be examined. These are;

a. Landlord and Tenant Relationships

b. Customary Tenancies (Agricultural tenancies)

LANDLORD AND TENANT RELATIONSHIP

The relationship of landlord and tenant arises when the owner of an estate in land, expressly or impliedly grants to another person an interest in the same land which is less than a freehold interest and which is less than the interest held in the land by the grantor, for a fixed period of time. This relationship therefore arises usually out of an agreement (contract) between both the landlord and the tenant. Tenancies are sometimes used interchangeably with 'leases' because of the similarities between them. In reality however, tenancies are of shorter durations than leases with limited interests in the land, unlike leases.

Types of Landlord & Tenant Relationships

Broadly, the following are the types of landlord and tenant relationships;

1. Periodic Tenancies

2. A Tenancy at Will

3. Tenancy at sufferance

4. Statutory Tenancy

1. PERIODIC TENANCIES

They are also known as 'tenancy from period to period.' They continuously renew themselves until the landlord and tenancy relation has been brought to an end. Periodic tenancies can be brought to an end by the giving of reasonable notice to the other side. Any purported attempt to bring a periodic tenancy to an end without notice is void. In Ghana, the **Rent Act, 1963 (ACT 220),** governs the termination of tenancies.

These types of tenancies may or may not be in writing. Generally, under Section 3 of the Conveyancing Act, 1973(NRCD 175), an interest in land which is transferred to another, not beyond 3 years needs not be in writing, even if the agreement is subject to a renewal.

The type of periodic tenancy is largely ascertained by reference to the mode of fixing the rent. It is not how the tenant pays up the rent. In other words, if rent is fixed at GHC20 per month, but the tenant pays upfront for a year, the tenancy is a monthly tenancy, and not a yearly tenancy. The following are the main types of periodic tenancies;

a. Yearly Tenancy: Here the rent is calculated on a yearly basis. Even if the tenant chooses to pay it on a monthly or quarterly basis, it does not change the fact that it remains a yearly tenancy. It is brought to an end through a valid notice to the other party. The length of notice can be agreed upon by the parties themselves. Where it is not expressly agreed upon, it has been held that at least half yearly notice would suffice.

b. Quarterly Tenancy: This arises when the rent for the tenancy is calculated on a 3-month basis. This tenancy also goes on indefinitely until it has been properly brought to an end through the giving of a valid notice. In respect of quarterly tenancies, they may be terminated after the giving of a 3-month notice, at the beginning of the tenancy.

c. Monthly Tenancy: This a type of periodic tenancy in which the rent is fixed on a monthly basis. This seems to be the most common form of tenancy in Ghana. Although tenants are sometimes compelled to pay upfront for a period of years, like 2, 3 or more as rent to the landlord, it remains a monthly tenancy. It can be brought to an end by a month's notice, or by a mutually agreed period for such notice.

2. TENANCY AT WILL

This comes about when a person takes up possession of land or house, without a fixed duration and with the consent of the landowner, on the understanding that the tenancy could be brought to an end by any of the parties. Unless otherwise agreed between the parties that no rent is to be paid for the period of the tenancy, the owner is entitled to some form of

compensation for the use and occupation of the land. The payment of rent is therefore not a necessary condition for the creation of this type of tenancy.

A tenancy at will may arise in any of these ways;

I. where a tenant's lease has expired, but he continues to be on the land with the permission of the landlord, without regularizing it into a periodic tenancy.

ii. where the landlord allows a person to occupy a house, without paying rent.

iii. where a purchaser has been let into possession pending completion of a purchase agreement.

A tenancy at will comes to an end when;

I. it becomes converted into a periodic tenancy, either expressly agreed upon by the parties or impliedly when the tenant pays rent, which is accepted by the landlord at regular intervals.

ii. the tenant does an act which is inconsistent with his status as a tenant at will. This automatically terminates the tenancy.

3. TENANCY AT SUFFERANCE

This arises when a tenant who has been let into possession lawfully, wrongfully remains in possession after the tenancy has come to an end. Unlike a trespasser who unlawfully enters a property, a tenant at sufferance entered the property lawfully. It just happens that with the tenancy having come to an end, his continue occupation of the property has become unlawful. He may originally lawfully have been in occupation either as a periodic tenant or a tenant at

will. A tenancy at sufferance does not involve the payment of rent by the tenant. The tenant is however required to compensate the landlord for the wrongful use of the property.

4. STATUTORY TENANT

This type of tenancy is similar to tenancy at sufferance. There is however a thin line of difference. A statutory tenancy arises when a tenant's tenancy has come to an end, but he is protected by statute (law) to continue to be in possession, and pay rent. The tenant at sufferance's continued possession of the land is unlawful, but that of the statutory tenant is not unlawful, because of the intervention of statute to protect him. The protection of a statutory tenant is not based on an agreement with the landlord but based on protection bestowed upon him by statute.

In the case of **Union trading Co Ltd v Karam [1975] 1 GLR 212**, the court reiterated the principle that any tenant who after the expiration of his tenancy agreement continues stay in the premises originally let out to him becomes a statutory tenant.

Statutory tenant is a person without an estate or interest in the land but enjoying only a personal right of occupation or status of protection under the rent Act. Consequently, before a statutory tenancy can come into existence, the prior contractual tenancy should first have been terminated. — **Boateng v Dwinfour [1979] GLR 360**

The Statutory tenant's continued occupation of the premises, would ironically still be governed by the terms of the expired tenancy agreement.

Under Section 29 of the **Rent Act (Act 220)**, the statutory tenant has the following obligations;

a. To hold the premises as a monthly tenant, i.e. payment of rent on a monthly basis.

b. To bring the statutory tenancy to an end by giving a lawful notice of one month to the landlord.

c. In the event of failure to pay rent, the landlord can exercise all powers that can be exercised against a monthly tenant for the payment of arrears of rent.

The tenancy of a statutory tenant can be brought to an end under the following circumstances;

a. When any of the conditions in Section 17 (1) (a) - (j) of Act 220 have been properly invoked.

b. where he denies the title of his landlord he can be ejected by the landlord.

Memuna Amoudy v Kofi Antwi [2006] 3 MLR 183

GBO v Antie [2008] 116 MLR 5

c. voluntary vacation by the statutory tenant.

d. where he sublets premises without the consent of the landlord (Section 22 of Act 220)

e regularization of the tenancy into a periodic tenancy

LANDLORD & TENANT RELATIONSHIOP UNDER THE RENT ACT, 1963 (ACT 220)

Scope of the Rent Act, 1963 (Act 220)

The **Rent Act, 1963 (Act 220)** regulates the relationship of landlord and tenant where the tenant is expected to pay rent. This means that periodic and statutory tenancies would be covered by the Act, while excluding tenancy at will and tenancy at sufferance.

In the case of **Safo and Another v Badu [1977] 2 GLR 63 @67** the court stated;

> ***"The Rent Act, 1963. (Act 220), sought to regulate the relationship of landlord and tenant only where the consideration of rent is a feature of the lease or tenancy, but left untouched tenancies existing under the common law where landlords did not exact rent as consideration for the letting of premises. Thus, the rights of the landlord and tenant at common law, in cases where the consideration of rent is not a feature of the letting of premises, are unaffected by Act 220."***

The Rent Act is not applicable to bare land. (**See: Section 1(2)(b) of Act 220)**

The Rent Act is also not applicable to customary tenancies, like Abunu and Abusa.

The Rent Act is however **applicable** in respect of all premises, unless they have been **expressly excluded** in Section 1(2) (a) – (h) of Act 220. These include the following;

a. Premises given to a public officer as duty post (because of his official duties), and which is owned by the government.

b. a lease under a law in connection with a concession

c. any government property though let out on rent is not giving any financial returns to that effect. This would be supported with a certificate from the Minister for the sector.

d. A market stall owned by the District, Municipal and Metropolitan Assembly

e. A lease for a land with premises on it at the time of the execution of the lease, but the premises being destroyed and new premises being put up within 5 years of the grant of the lease.

Under section 36 of Act 220, **"premises"** means;

> ***"any building, structure, stall or other erection or part thereof, movable or otherwise, which is the subject of a separate letting, other than a dwelling house or part thereof bona fide let at a rent which includes a payment for board or attendance, and includes land outbuildings and appurtenances let together with such premises at a single rent when adjoining the premises let therewith."***

The Rent Regulations, (L.I 369) also compliments the Rent Act (Act 220) in its' work.

PAYMENT OF RENT

Rent which is paid in advance, in respect of a monthly or a shorter tenancy is not to exceed one (1) month. In the case of a tenancy which is more than six (6) months, the Act requires that it should not exceed 6 months.

If this provision is violated, it constitutes a criminal offence under Section 25(5) of Act 220. It reads that;

> ***"A person who as a condition of the grant, renewal or continuance of a tenancy demands in the case of a monthly or shorter tenancy, the payment in advance of more than a month's rent or in the case of a tenancy exceeding six months, the payment in advance of more than six months' rent, commits an offence and is liable on conviction by the Rent Magistrate to a fine not exceeding two hundred and fifty penalty units."***

The payment of a yearly rent in advance would therefore also be unlawful, by virtue of section 25(5) of Act 220.

THE RENT OFFICER (Section 5)

Section 5 (1) (a-I) of Act 220 sets out the functions of a Rent Officer. He plays a crucial role in the implementation of the Act. He works with the Rent Magistrate in giving teeth to the Act.

Section 5 (1) of Act 229 reads;

> ***"(1) Subject to this Act, a rent officer***
>
> ***(a) may assess the recoverable rent of any premises, whether or not the premises are occupied, on an application made by a landlord a tenant or any person interested in the premises, after an enquiry conducted by the rent officer;***

(b) shall investigate, in the manner that the rent officer thinks fit, complaints by a landlord against a tenant in respect of arrears of rent and complaints by a landlord, tenant or any other person interested in the premises against any other person in respect of any other matter in this Act, and shall make a determination on that complaint or matter;

(c) shall investigate and determine in the manner that the rent officer thinks fit, a matter relating to this Act referred to the rent officer by the Minister or a Rent Magistrate;

(d) shall prepare rent registers and any other prescribed documents and specify in the registers or documents the prescribed particulars;

(e) shall maintain a register of vacant premises for prospective clients and on application made by a client, shall furnish information concerning those premises;

(f) may examine a landlord, tenant or any other person for the purpose of ascertaining whether this Act or of a statutory instrument made under this Act is being observed;

(g) may take measures against tenants who have absconded from the premises and may, for that purpose, force open the doors of, and search, any premises under the authority of an order made by a Rent Magistrate;

(h) may make complaints to a Rent Magistrate that an offence under this Act has been committed for the purpose of investigation and determination by the rent officer, and may subject to article 88 of the Constitution, conduct the prosecution of the offender before the Magistrate, but a public prosecutor appointed generally may intervene and assume the conduct of the prosecution; and

(I) shall perform any other functions for the purpose of carrying into effect the principles of this Act as directed by the Minister."

In the case of **Hamid v Okata [1989-90] 2 GLR 420**, the Court held that the Rent Officer's investigations can be extended into ejectments from premises by the landlord.

The rent officer, however has no power whatsoever under the Act to make an order of ejectment but he is empowered to make the necessary investigation relating to an ejectment complaint and refer the facts obtained including, of course, any available documents to the rent magistrate or the judge for him to decide whether an ejectment order is justified or not.

See: SACKEY AND OTHERS v. KUMAH [1978] GLR 361-368

In the performance of his work, section 5(2) of Act 220 empowers the Rent officer to take several administrative and quasi-judicial measures to that effect. It includes powers to subpoena witnesses, order the production of documents, inspection of premises, invitation of experts or assessors to assist in the determination of issues before him, and requesting for information from landlords.

RENT MAGISTRATE (Section 6)

The Rent Magistrate refers to the District Magistrate of the area in which the premises are situated. The District Magistrate therefore sits as the Rent Magistrate. He is required to observe the same procedure as a magistrate. He must therefore act fairly and observe the rules of natural justice. Where the Rent officer failed to properly use the law, or the recommendations to the Rent magistrate have no basis, the magistrate is expected to do whatever the law allows by either varying the order or by setting it aside and taking evidence de no vo.

Section 6 lists his functions as;

> ***"A Rent Magistrate***
>
> ***(a) may by order, on an appeal by a landlord, tenant or any other person interested in the premises, who is dissatisfied with the amount of the recoverable rent of the premises as assessed by the rent officer, vary the amount;***
>
> ***(b) may by order, on an appeal by a landlord, tenant or any other person interested in the premises from a determination of a rent officer under this Act on any other matter, decide that matter;***
>
> ***(c) may by order, on a reference made by the Minister, assess the amount of the recoverable rent of any premises; and***
>
> ***(d) may make an order for the ejectment of a tenant from premises situated within the area of jurisdiction of the rent officer."***

OBLIGATIONS OF THE LANDLORD

1. Rent increase resulting from increase in rates (section 19): The landlord is enjoined not to collect an increased rent based on the fact that there had been an increase in the property rates unless he had given due notice in writing to the tenant.

2. Issuing of Rent cards (Section 20): Within seven (7) days of the commencement of the tenancy, the landlord is required to issue to the tenant a rent card containing the following information;

(*a*) the name and address of the landlord of the premises,

(*b*) the name and address of the tenant of the premises,

(*c*) the amount of the recoverable rent of the premises, and

(*d*) and any other prescribed particulars.

3. Compensation for improvements (Section 21): A tenant who has made improvements to the premises with the approval of the landlord is requested by the landlord to vacate the premises before the expiry of the tenancy, the tenant shall be compensated by the landlord, the extent of improvement so made.

4. **Prohibition on serving notice to quit (Section 23):** Where the Rent Officer or the Rent Magistrate has assessed rent in respect of premises, and this has not been appealed against,

the landlord is not to serve any notice on the tenant to quit, unless the tenancy is expiring within the two years.

5. **Control of sub-letting (Section 22):** No tenant can sublet the tenancy without the written consent of the landlord. The landlord is therefore obliged to control subletting of tenancies in respect of his premises.

RECOVERY OF POSSESSION / EJECTMENT OF A TENANT FROM PREMISES

The mere fact that a tenancy agreement has come to an end is not by itself a ground for the recovery of possession of premises. And in fact, any ground which is not found in either Act 220 or not covered by the common law will not be a valid ground for the ejectment of a tenant from premises or recovery of same.

Bassil v Sfarijilani (1967) CC 20

Sarkodie v Karam & Sons Ltd [1975] 1 GLR 411

It is however necessary to note that the tenancy should always be brought to an end before taking steps to recover the premises from the tenant. Therefore, where the tenancy has not expired, the landlord should terminate the tenancy by giving notice to the tenant.

Legal Bases for the ejectment of a tenant.

A tenant can therefore lawfully be ejected from the premises only under the following provisions of the law;

a. Section 17 of Act 220

b. Section 25 (2) of Act 220

c. Section 28 of Act 220, and

d. The common law

A. RECOVERY OF POSSESSION UNDER SECTION 17 OF ACT 220

Under Section 17 (1) of Act 220, the landlord can recover the premises from the tenant on the following grounds;

1. Non-Payment of Rent

Where the rent which is due to be paid by the tenant has not been paid for at least one month of the rent becoming due.

Section 17(1) (a) reads;

> ***"where a rent lawfully due from the tenant has not been paid, or tendered within one month after the date on which it became lawfully due"***

The one-month grace period is for the benefit of the tenant who may not be having any money to instantly pay for the rent when it becomes due.

On a literal interpretation of the section, it would mean that the fact that a tenant has substantially paid up his rent but left with only a small part of its outstanding can still be ejected from the premises, for non-payment of rent.

What happens when a tenant who is being ejected through the court for non-payment of rent suddenly pays up the outstanding rent arrears?

The rule is that if the tenant pays up the rent arrears before the commencement of legal proceedings against him, then the court will not make an order for his ejectment. On the other hand, if the landlord has already commenced legal proceedings against him, merely paying the rent will not prevent the court from ordering his ejectment. The tenant may however seek for relief under section 17(3) of the Rent Act.

In the case of **Gyato v Pipim [1980] GLR 71**, a landlord brought an action to eject the defendant due to some arrears of rent of 11 months. Just before the hearing of the case, the defendant rushed to pay up the full arrears. The court however ordered for his ejectment on the ground that he was a chronic defaulter. The defendant appealed.

The appellate court in dismissing the appeal held that the mere fact that a tenant rushes to pay up his arrears of rent, once the landlord has already begun action against him for ejectment, does not mean that the action against him has become abated. The court can however exercise its discretion under Section 17(4) of Act 220 to grant the tenant relief against the order or judgment for the recovery of possession.

2. Broken obligation

Where an obligation in the tenancy agreement (apart from the obligation to pay rent) has been broken or not performed by the tenant, the landlord is entitled to recover possession.

Section 17(1) (b) reads;

> ***"where an obligation of the tenancy, other than that specified in paragraph (a), so far as that obligation is consistent with this Act, has been broken or not performed."***

The obligation which has been broken by the tenant should however be a lawful obligation, not prohibited by the Rent Act. An example would be the act of a tenant subletting the premises or part thereof without the consent of the landlord. (section 21(1) of Act 220).

This section is however subject to section 29 of the **Conveyancing Act, 1973 (NRCD 175)**. The landlord is enjoined to notify the tenant in writing of the said breach, requesting him to remedy same. It is only when the tenant fails to remedy same within a reasonable time that he can be deemed to have breached section 17(1)(b) of Act 220.

Section 29 of NRCD 175 reads;

> ***"1) A right of re-entry or forfeiture under any provision in a lease for a breach of any covenant, condition or agreement in the lease shall not be enforceable, by action or otherwise, until—***

(a) the lessor serves on the lessee a notice:

(I) specifying the particular breach complained of;

(ii) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(iii) (except where the breach consists of a non-payment of rent) requiring the lessee to make reasonable compensation in money for the breach; and

(b) the lessee has knowledge of the fact that such notice has been served;

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy and, (except where the breach consists of a non-payment of rent) to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

3. Nuisance or Annoyance

Where the tenant or anyone living with the tenant has been engaged in nuisance or annoyance to adjoining occupiers, the landlord can recover possession.

Section 17 (1) (c) reads;

"where the tenant or a person residing with the tenant has been guilty of conduct which is a nuisance or an annoyance to adjoining occupiers."

It is not that easy to determine what constitutes ‘nuisance’ or ‘annoyance’. Act 220 did not define them. In its ordinary meaning, it can be said to be an unreasonable conduct of a person which substantially interferes in another’s enjoyment of his land.

Justice Ofori Boateng in an article titled **“NUISANCE, ANNOYANCE AND ADJOINING OCCUPIERS [1971] VOL. III NO. 1 RGL 67—72”**

The fact therefore that there is no precise definition for "nuisance" does not mean that anything can properly be classified as "nuisance." …ordinary everyday speech, petty discomforts and insults are termed "nuisance," but in legal parlance the expression means something more precise than that. Although the expression has been used with meanings varying in extent by both ancient and modern writers, and what may constitute a nuisance in one set of circumstances may not be a nuisance in another set, both ancient and modern cases show that questions of nuisance have always arisen out of user of land.

"Annoyance" has been defined in Stroud, Judicial Dictionary,4 in the words of Bowen L.J. in Tod-Heatley v. Benham, thus:

"Annoyance is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth . . . if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance although it may not amount to physical detriment to comfort."

The Black's Law dictionary also refers to a number of authorities which have attempted to define the term nuisance thus:

*"… **A nuisance may generally be defined as anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the enjoyment of his legitimate and reasonable rights of person or property; or that which is unauthorized, immoral, indecent, offensive to the senses, noxious, unwholesome, unreasonable, tortious, or unwarranted, and which injures, endangers, or damages one in an essential or material degree in, or which materially interferes with, his legitimate rights to the enjoyment of life, health, comfort, or property, real or personal. A nuisance may exist not only by reason of doing an act, but also by omitting to perform a duty." Joseph A. Joyce & Howard C. Joyce, Treatise on the Law Governing Nuisances 22 (1906). "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."** Village of Euclid v. Amber Realty Co., 272 U.S. 365, 388, 47 S.Ct. 114, 118 (1926).*

Generally, there are two types of 'Nuisance';

a. Public nuisance: This is an unreasonable interference with a right which generally affects the public. It may consist of activities which are deemed injurious to the public health, public safety or the comfort of the public. These are usually forbidden by statute and punishable as criminal offences, as pertains under Section 296 of the Criminal Offences Act, 1960 (Act 29).

Section 296 (2) of Act 29 reads;

"A person commits a criminal offence and is liable to a fine not exceeding ten penalty units who-

(2) in any town commits a nuisance in any public place or open space, or in any place being an appurtenance of or adjoining a dwelling-house."

b. Private nuisance: A private nuisance is a wrongful interference with the use or enjoyment of land in the possession of another. The main test, is said to be how reasonable or otherwise the conduct complained of would amount to nuisance. Emitting smoke from burning wastes on the premises is an example.

In some circumstances, the same act may fall within both categories of 'nuisance'.

What constitutes a nuisance may be a question of fact. The factors used in assessment of whether an act constitutes a nuisance or an annoyance may include the situation of the premises (locality), the customs and culture of the area, the particular class of tenants in the premises as well as the adjoining premises.

In **Mensah v Addison [1981] GLR 784**, the tenant's wife was found to be cooking on the verandah instead of the kitchen, therefore making the house untidy. She was also fond of drying cassava and frying gari on the premises. These were found to be acts of nuisance upon which an order of ejectment was made against the tenant, under Section 17 (1) (c) of Act 220.

In an old English case of **Leeman v Montagu [1936] 2 AER 1677,** the crowing of cockerels was held to be a nuisance. In Ghana, it is doubtful if this would amount to

nuisance, because of the accepted practice of rearing fowls at home. The crowing of cocks in the villages at night or at dawn are even used by some to determine the time of the day. There is an African proverb that;

> ***"The cock may belong to one household, but when it crows, it is for the benefit of the whole community."***

Annoyance is said to have a wider meaning than nuisance. While nuisance may generally involve some physical act on the use of the land, annoyance may not necessarily involve a physical act. Any act which reasonably troubles the mind and pleasure of an ordinary person is said to be an annoyance. Thus, a detestable conduct of a tenant may therefore fall under either a 'nuisance' or 'an annoyance.'

There is also the use of the term, "has been guilty of…." Does it mean that the tenant should actually have been found guilty in a court of law before the landlord could bring an action against him for ejectment?

4. Immoral or Illegal Use

Where the tenant or anyone living with him has been convicted of using the premises for immoral or illegal purposes, the landlord can recover possession.

Section 17 (1) (d) reads;

> ***"where the tenant or a person residing with the tenant has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose."***

The word 'convicted' which is derived from the word 'conviction' is defined by the Black's Law Dictionary to mean:

"The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty."

The implication here is that there must be a conviction for an illegal or immoral purpose on the part of the tenant before the landlord can elect him from the premises under this section. According to Prof A.K.P Kludze in his book **"Ghana Law of Landlord and Tenant" @ page 886;**

> ***"To confer a jurisdiction under this subsection, there must have been a conviction of a criminal offence committed on the demised premises by the tenant or a person residing with him. Even an overwhelming evidence of illegal or immoral user, if not provable by a criminal conviction, is not sufficient to justify the ejection of the tenant under this sub-section; but it may bring the matter within sub-section 17(1)(c) as a nuisance for which the lease may be forfeited."***

An example of such immoral act that may result in justifying the ejectment of a tenant by a landlord would be knowingly using or allowing the premises to be used as a brothel

or for the purposes of prostitution under Section 277(b) of the Criminal Offences Act, 1960 (Act 29). The section reads;

> **"*Whoever—***
>
> ***(b) being a tenant, lessee or occupier or person in charge of any premises, knowingly permits the premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution; or***
>
> ***……shall be guilty of a misdemeanor."***

5. Waste or neglect of premises

Where the court takes a decision that the condition of the premises has deteriorated due to waste or neglect by the tenant or anyone living with him, the landlord can recover possession.

Section 17 (1) (e) reads;

> ***"where the condition of the premises has in the opinion of the Rent Magistrate or judge deteriorated owing to acts of waste by, or the neglect or default of, the tenant or a person residing with the tenant."***

Waste refers to any conduct which leads to a substantial damage to land or a house, thus reducing the value of the reversion interest, vested in the landlord. Any act of a tenant which changes the nature of the house or the land is technically regarded as a

waste, whether or not it leads to an improvement or not. That brings in the distinction between ‘Ameliorating waste’ and ‘Depreciation Waste’.

Ameliorating waste arises where the conduct is unauthorized, resulting in an alteration to the nature or character of the premises, which improves the value of the property. In this instance, the act is of benefit to the property.

Depreciating waste arises when the acts of the tenant leads to damage to the property.

It is believed the section can be invoked against a tenant only when the conduct has resulted in a deterioration of the conditions of the premises. Ameliorating waste may therefore not be enough ground to eject a tenant.

Waste can also be termed as ‘Voluntary waste’ or ‘Permissive waste’.

Voluntary waste is where the tenant positively does anything to the house or land like cutting down trees or removing ceiling, etc.

Permissive waste is when a tenant who is obliged to do an act fails to do so, resulting in deterioration of the premises. For example, refusing or failing to weed the premises or to take good care of electrical and plumbing installations by getting them replaced.

A tenant may be in breach of this section whether or not his conduct is permissive or voluntary waste provided that it could amount to a depreciating waste.

6. Tenant’s intention to quit

This arises where the tenant gives notice of his intention to quit the premises to the landlord and as a result the landlord offers to sell or let the premises, or so alters his position as a result of that notice. The tenant may however change his mind. Here if the court comes to the conclusion that the landlord would be greatly at a disadvantage if the tenant is allowed to stay, the tenant would be ejected.

Section 17(f) reads;

> ***"where the tenant has given notice of the intention to quit <u>in writing</u> and in consequence of the notice the landlord has contracted to sell or let the premises or has taken any other steps as a result of which the tenant would, in the opinion of the Rent Magistrate or judge, be seriously prejudiced if the tenant could not obtain possession."***

The notice should be in writing as a verbal notice would not suffice under the section. Such notice cannot also be inferred by conduct on the part of the tenant. The insistence on a written notice has been subjected to a lot of criticisms. This is due to the fact that there is a high illiteracy rate, and the creation of tenancies in themselves are exempted from writing provided it does not exceed three years **(section 3(1)(f) of the Conveyancing Act of 1963, NRCD 175)**

7. Occupation of Landlord, his family member or employee

Where the landlord honestly requires the premises for his own occupation, a member of his family or his employee, the landlord would be justified in recovering the premises from the tenant. This is however subject to the court satisfying itself that there is no alternative accommodation, and no greater hardship would not be occasioned to the tenant, and whether it was the usual practice for the landlord's employees to be given accommodation.

Section 17 (1) (g) reads;

> ***"where the premises are reasonably required by the landlord for personal occupation as a dwelling house by the landlord, a member of the family of the landlord or a person in the whole-time employment of the landlord, the premises being constructed to be used as a dwelling house, but***
>
> ***(I) the circumstance that the premises are reasonably required by the landlord for personal occupation by someone in the employment of the landlord shall not be a sufficient circumstance if the Magistrate or judge is not satisfied that the landlord usually provides premises for occupation by an employee of the class to which that employee belongs, and***
>
> ***(ii) an order shall not be made if the Rent Magistrate or judge is satisfied having regard to the circumstances of the case, including an alternative accommodation available for the person for whose occupation the premises are required or for the tenant, that greater hardship would be caused by granting the order than by refusing it."***

Conditions precedent for the grant of an order of possession of and ejectment from premises under section 17 (1) (g)

I. Notice to the Rent Officer:

The landlord is required to comply with Regulation 18 of the Rent Regulations, 1964 (L.I 369) by furnishing a statutory declaration to the Rent Officer giving the reason for the seeking the recovery of possession.

II. Constructed as a Dwelling House:

The premises being recovered by the landlord should have been originally constructed to be used as a dwelling house. Rooms and the design used in the construction of a dwelling house are generally different from those constructed for business purposes. It is mainly a question of fact in determining whether a house was constructed for use as a dwelling house or not. The location of the building may also count as for instance permits would not be granted for the building of a residential building in an industrial

area. The fact that out of necessity people may be using a house constructed for business purposes as a dwelling house may not be a valid excuse for recovering it for a dwelling house.

III. Requirement for a Dwelling House:

Apart from the fact that the house should have been constructed as a dwelling house, the landlord needs to prove that the house is required for personal occupation as a dwelling house. He cannot therefore recover the premises and then rent it out to another tenant.

Under section 17(7) of Act 220 therefore, where a landlord recovers possession under section 17(1)(g) in favor of persons he had named, to use as a dwelling house, he is not allowed to give the premises out to any other person within two years of recovering possession from such tenant. The section reads;

> ***" A landlord in whose favor an order for recovery of the possession of, or the ejectment from, premises on any of the grounds specified in paragraph (g), (h) or (k) of subsection (1) has been made or given shall not, within two years from the date of the order, let such premises or any part thereof without an order of the appropriate Rent Magistrate, except, in the case of an order on grounds specified in the said paragraph (g), to the person or persons for whom the premises were stated to be required in the proceedings in which such recovery or ejectment was obtained."***

But nothing stops a landlord from subsequently putting the building to his own commercial or business use, once the premises comes into his possession or that of a member of the family, initially as a dwelling house. In **A.K.P Kludze's** own words in the "Ghana Law of Landlord and Tenant @ page 900;

> ***"Such a user….is not in contravention of section 17(7) of the Rent Act because the premises are not let out to another person. So long as the premises remain in the possession of the person named in 17(4), of the Act as the person who is to occupy the premises, the nature of the use to which they are subsequently put does not seem to be subject to either control or restriction under the Rent Act."***

IV. Occupation by member of family:

Apart from recovering the premises for the landlord's own use, he may also recover possession of the premises if reasonably required for the personal occupation by a member of his family. According to Section 36 of Act 220, **"member of the family"** means the father or mother, a wife, husband, child, brother or sister, or such other person as may be prescribed. In the absence of any other persons who have been so prescribed in the Act, other relations are therefore excluded.

In the case of **Yawson v Brako [1987-88] 2 GLR 370**, the appellate court held that the trial judge erred in concluding that since the plaintiff gave the one room vacated by the defendant to her sister and her children to occupy, the plaintiff did not need the

premises for the occupation of herself and her family. By the provisions of section 17 (1) (g) of Act 220 a judge of a court of competent jurisdiction was entitled to make an order for ejectment of a tenant where the premises were reasonably required by the landlord for personal occupation as a dwelling-house by himself or a member of family. Section 36 of Act 2.20 defined family to include a sister. Accordingly, the plaintiff's sister was a member of the plaintiff's family and since she was in distress she was equally entitled to protection**.**

It must be noted that if a child, brother or sister of the landlord needs the premises for occupation, their ages are irrelevant under the law. The fact that the child is actually an adult may not matter.

This issue came to the fore in the case of **Saka v Lokumal [1991] 1 GLR 312.** This was an action was brought by the plaintiff-landlord to recover possession of dwelling-premises he had let out to the defendant on the ground that it was required for occupation by his married daughter together with her two children and husband, counsel for the defendant contended, inter alia, that a “child” within the meaning of the Rent Act, 1963 (Act 220) did not include a married daughter.

The court held that since a landlord could recover possession under sections 17(1)(g) and 36 of the Rent Act, 1963 (Act 220) for the benefit of his adult sister or brother, it would be absurd that the landlord’s own natural son or daughter of whatever age or marital status should be excluded. Hence, the definition of “child” urged by counsel for the defendant could not be the intent of the legislature. The court would, consequently,

use the purposive approach to the interpretation of statutes which took into consideration the mischief the framers intended to cure or the right intended to be conferred and would define "child" to mean son or daughter irrespective of his or her age or marital status.

> ***"I do not think a landlord can ever want a house for a "child" in the real sense of the word as we know it for the simple reason that it is difficult to see how that child is even going to live in that house. Children live with their parents, not on their own or alone. Again, when a sister or brother falls within the class of persons for whom a landlord could recover possession, is counsel saying it is meant a "child sister" or "child brother?" My argument is this that if an adult sister or adult brother of whatever age, married or unmarried, enjoys this right how absurd would it be that a landlord's own natural son or daughter of whatever age or marital status must be excluded! This definition cannot be the intent of the legislature. "Child" must be interpreted to mean son or daughter irrespective of his/her age or marital status."***

On the other hand, in the case of **Owusu v Asante [1973] 2 GLR 220,** the landlord was denied an order of recovery of possession of the premises in Kumasi when he wanted them for the occupation of his nephew. This was because the definition of member of family does not include a 'nephew'.

Taken to its logical conclusion, it means that a step - father and a step - mother may be excluded as coming within the ordinary definition of a '**member of family'** unless a court

decides to give it a more purposive interpretation, or there has been a formal amendment to the Act to include step fathers and step mothers.

See also: **Nimako v Archibold [1966] GLR 612** where it was also held that a landlord had no duty to provide a tenant with alternative accommodation before recovering possession.

V. Occupation by Employee;

A landlord can also recover the premises for the personal occupation of an employee in his whole-time employment. The court would however have to satisfy itself that it is the usual practice of the landlord to provide such accommodation. An excuse by the landlord that, that is the first time he is providing accommodation to that class of employee may not satisfy the requirement. This requirement has been inserted to prevent an abuse by Landlords who would be tempted to use it as an excuse to eject tenants and then rent the room out to others.

VI. The Reasonably Required rule

Whether the premises are for the occupation of the landlord, member of family, or an employee, the landlord can only recover possession if he demonstrates that the premises are 'reasonably required'. The act does not define what constitutes 'reasonable' and therefore it would largely be a question of fact. The onus lies with the landlord in proving that the premises are reasonably required. It has been held that the fact that the landlord only requires part of the premises and not all of it for his own occupation does not mean that he does not reasonably require the premises.

Kelly v Goodwin [1947] 1 AER 810

Other considerations may be how close the premises are to the place of work, and whether or not the landlord has an alternative and convenient accommodation.

VII. The test of greater hardship:

The court is required to do a balancing act, looking at all the circumstances of the case to find out whether it is the landlord or the tenant who will suffer more hardship before making such an order. If the tenant would suffer more hardship, then the order should not be made. If on the other hand, it is the landlord who will suffer more hardship, then the order for the ejectment of the tenant can go ahead.

Boateng v Dwinfour [1979] GLR 360

Who bears the burden of proving greater hardship?

In an action for recovery of possession under section 17(1) (g) of the Rent Act, 1963 (Act 220), the determination of the comparative hardships between a landlord and a tenant was a question of fact for the trial judge and his finding could not be disturbed if there was evidence supporting his conclusion.

Donkor v Dzokoto [1993 –1994] 1 GLR 193

In **Acquah v Oman Ghana Trust Holdings Ltd, [1984–86] 1 GLR 157-171,** the court stated;

> ***" The only statutory caveat provided by section 17 (g) of Act 220 is that the court should decline to make an order for possession if:***

> ***"having regard to all the circumstances . . . including any alternative accommodation available for the person for whose occupation the premises are so required or for the tenant, that greater hardship would be caused by granting the order than by refusing it."***

It must however be noted that it is the tenant who bears the burden of proving that he,(and not the landlord) would suffer greater hardship if an order is made by the court for his ejectment.

In **Adu v Clegg [1981] GLR 173**, the court held thus;

> ***"Section 17 (1) (g) of Act 220, among other things, stipulates that the order for possession should not be granted if the court finds that by granting it greater hardship would be caused to the tenants. The question is, was there evidence before the learned trial judge on which he could decide for the plaintiff and against the defendants on the issue of greater hardship?***
>
> ***On the true construction of the proviso (ii) to section 17 (1) (g) of the Rent Act, 1963, we are of the view that the onus of proving "greater hardship" is on the tenants and not on the landlord. Once the landlord has been able to satisfy the court that the dwelling-house or premises are reasonably required by him for the occupation of himself or any member of his family, then the court is entitled to draw the inference that some hardship would be caused to the landlord by refusing to grant possession. At that stage, the burden is then***

> ***shifted to the tenant to prove that he would suffer greater hardship by granting possession than by refusing it."***

Dadson v Rana Motors [1992] 1 GLR 345, the plaintiff was the Anglican Bishop in Tamale and the presiding bishop. He rented out his house in Accra to the defendant company, which used it to accommodate two families. The plaintiff wrote to terminate the agreement, as he needed it for his personal use. According to him, the nature of his job required that he comes to Accra from time to time. Since the church failed to make an accommodation available to him, he had to sleep in hotels or with friends whenever he came to Accra. The issue at the trial court when he sued for recovery of possession was whether greater hardships would be afflicted on the plaintiff or the defendant.

The trial judge dismissed the action on the ground that even if the church failed to provide him with accommodation on his short visits to Accra, it was easier for him to put up with friends, relatives and even sleep at hotels. Moreover, the court was of the view that since the defendant company was using the house to accommodate two families, more hardships would be meted out to them than the plaintiff. The plaintiff appealed.

The appellate upheld the appeal, holding that plurality of the occupants of a house had never been a criterion for determining the relative hardship which would be caused in an action for ejectment. The court found that the respondent company had done little to look for alternative accommodation for its workers as the appellant had given them about three years to do so.

> ***"The facts disclose that the appellant comes to Accra quite often on official duties. He is not provided with any accommodation by the church. It is***

> ***unreasonable to expect a whole bishop to be continually scrounging at the doors of benefactors supplicating for a place to lay his head while he himself has a house in Accra. The appellant may be priest all right but it has not been established that he maintains a charitable family to sacrifice his own convenience for the sake of the respondents. Even the Bible enjoins Christians to "love thy neighbor as thyself" but not "more than thyself."***

8. Landlord's Business Use

Where the landlord requires the premises for his own business provided the premises were originally constructed for that purpose, he would be entitled to recover the premises, provided that a minimum of 6 months' notice had been given to the tenant.

Section 17(1)(h) reads;

> ***"where the lease has expired and the premises are <u>reasonably required by the landlord</u> to be used by the landlord for the landlord's own business purposes, the premises being constructed to be used as business premises, if the landlord has given not less than six months' written notice to the tenant of the intention to apply for an order for the recovery of the possession of, or the ejectment from, the premises."***

Conditions precedent for the grant of an order of possession of and ejectment from premises under section 17(1)(h)

I. Business Premises

The premises should have been constructed to be used as business premises. This apparently excludes dwelling houses. The onus therefore lies on the landlord to prove that the premises were constructed for business purposes. In the case of **Sfarijilani v Basil [1973] 2 GLR 260**, the court held that premises used for business purposes were deemed to be premises constructed to be used as business premises.

II. Expiration of the Lease

The lease should have come to an end before the landlord would qualify to recover the premises under this section. The use of the term 'the lease has expired' creates the impression of a situation of statutory tenancy. This is because the section contemplates of a situation in which the lease has come to an end but without recourse to the court, the tenant cannot be ejected. It is a statutory tenant who fits into this description. Ordinarily, at common law, when a lease proper comes to an end, the lessor or the landlord need not seek judicial intervention before taking up possession.

III. The Reasonably Required rule

Just like a landlord who seeks to recover possession of premises for his personal occupation, a recovery by a landlord for his business use would only be granted if he establishes that he reasonably requires the premises for that purpose. As to what

constitutes 'reasonable requirement', this has not been defined by the Act and so it remains a question of fact for the court to decide. However, the onus will be on the landlord to prove that he reasonably requires it for his business use.

The law is that where the landlord of a business premises satisfies the court that he reasonably requires his premises for his own business purposes, the court is entitled to exercise its discretion in favor of the landlord.

In the case of **Joseph v Farisco Gh. Ltd [1991] 2GLR 151**, the Court of appeal held that section 17(1)(h) of the Rent Act, 1963 (Act 220) which required a landlord who sought to recover possession of his business premises to satisfy the court that he reasonably required the premises to be used by him for his own business purposes, was a statutory requirement which the landlord was under a duty to discharge. Hence, even if the point was not pleaded or raised by the tenant, no court, whether original or appellate, could make an order for possession unless it was shown that it was reasonable to make the order. In the court's own words;

"In coming to a conclusion as to whether or not a landlord reasonably required his premises for his own business, and in exercising his discretion as to whether or not to grant an order for recovery of possession, the trial judge was duty-bound to take account of all relevant circumstances which existed at the time of the hearing in the broad commonsense way of a man of the world and give such weight as he thought right to various factors in the situation. The judge should have regard on the one hand

to the general scheme and purpose of the Act and on the other to the special conditions, including, to a large extent, matters of domestic and social character."

In the case of **Sfarijlani v Basil [1973] 2. GLR 260**, the landlord who was a foreigner brought an action to recover a house rented out to the tenant and of which part was being used by the tenant as a shop. The landlord said that he needed the shop for his own business. The landlord was the proprietor of a perfume factory. At that time, the Busia government had passed the Ghanaian Business (Promotion) Act, 1970 (Act 334), regulating the participation of non-Ghanaians in engaging in business activities in the country. The court held that since the landlord was not a Ghanaian his business concerns in the country were caught by the provisions of Act 334. He could only carry on the business of wholesale or retail trade if he had a valid permit under Act 334; he was however unable to prove that he had one or was confident of obtaining one. Consequently, he could not reasonably require the premises for his own business purposes.

In an old case of **Owusu v Aidoo (1946) D.C (Land) '38-47, 241**, the landlord rented out his own store in Kumasi to the tenant. He then rented a nearby store from his wife for his own use. A quarrel ensued between the landlord and the wife. The landlord then vacated the woman's store and decided to recover his own store from the tenant, for his business use. The issue was whether the landlord 'reasonably required' the premises. The court came to the conclusion that he did not reasonably require the store for his use. This was because merely having strained relations with his wife was no basis

for him to move out of the store which he had rented from the wife, as he was not obliged to do so.

In **Farage v Maloni (1969) C.C 24**, the court was of the view that the fact that the landlord had other premises which he could use for his own business purposes, meant that he did not reasonably require the premises for his own use.

Should the test of 'greater hardship' between the landlord and the tenant also be considered just as under Section 17(1)(g) of Act 220?

Section 17(1)(h) of Act 220 is silent on it. The courts have held that it should not be taken into consideration. In the case **John Lawrence Chemists Ltd v Obeng-Ansong [1995-96] 1 GLR 146** the court held that it is immaterial whether the tenant would suffer greater hardship or not. This is because under section 17(1) (h) of the Rent Act, 1963 (Act 220) the court is not required to consider the issue of hardship in determining the rights of the parties.

Some writers are however of the view that it should be taken into consideration despite the fact that the subsection is silent on it.

IV. Landlord's Use

The premises should be required for only the landlord's use. Unlike Section 17(1)(g), the landlord cannot recover the premises for the business use of other members of the family.

In the case of **Dankwa v Anokwa [1989-90] 2 GLR 63,** the plaintiff, the customary successor of the original landlord, brought an action in the High Court for recovery of possession of business premises and an order for ejectment against the defendant-tenant on the ground, inter alia, that the premises was required by the son and niece of the deceased original landlord for their business.

The court held that a landlord was entitled to an order of ejectment and recovery of possession of his premises under section 17 (1) (h) of the Rents Act, 1963 (Act 220) only if the premises were reasonably required to be used by him for his own business; he would not be so entitled if (as in the instant case) it was required for use by a member of the landlord's family. The condition that the premises must be reasonably required by the landlord himself, a member of his family or any person in his whole-time employment as stated in section 17 (1) (g) was inapplicable in cases under section 17 (1) (h).

VI. Notice to the Rent Officer

The landlord is required to comply with Regulation 18 of the Rent Regulations, 1964 (L.I 369) by furnishing a statutory declaration to the Rent Officer giving the reason for the seeking the recovery of possession.

Where the landlord seeks to recover possession of business premises under section 17(1)(h) of Act 220, he is mandatorily required to comply with the provisions of regulation 18 of the Rent Regulations, 1964 (L.I. 369). However, the said regulation 18, which did not fix any time for the delivery of the required declaration by the landlord, is duly complied with if the declaration is filed before the end of the case; and the court could itself make an order for the filing of the declaration before the execution of its judgment.

Joseph v Farisco Gh. Ltd [1991] 2GLR 151

VII. 6 month's Written Notice

The landlord is required to give six months' written notice to the tenant before applying for the recovery of the premises from the tenant. An oral notice to the tenant would not suffice. Where the requisite notice has not been validly given, the court cannot make an order for the recovery of the premises in favor of the landlord.

Farage v Maloni (1969) C.C 24

In another case of **Alawiye v Agyekum [1984-86] I GLR 179**, the court also held that before a court could order recovery of possession of a business premises in favor of a landlord it must in accordance with the provisions of the Rent Act, 1963 (Act 220), s 17 (1) (h) be satisfied by the landlord that he reasonably needed the premises for his own business and that the requisite statutory notice of at least six months was given to the tenant and furthermore, that the landlord had in compliance with the Rent Regulations,

1964 (LI 369) given an undertaking that he would not re-let to another tenant within a certain specified period.

What is the effect of non-compliance with Regulation 18 of Rent Regulations?

It is provided by the Rent Regulations, 1964 (L.I. 369), reg. 18 that:

> ***"18. Where a landlord requires his premises for the purposes of section 17 (1) (g), (h), (I) or (k), he shall furnish to the appropriate Rent Officer a declaration as in Form 14 of the First Schedule hereto."***

Regulation 18 of the Rent Regulations, 1964 (L.I. 369), therefore makes it imperative that where a landlord requires his premises for the purposes of section 17 (1) (g), (h), (I) or (k) to furnish to the appropriate rent officer with a declaration as in form 14 of the First Schedule to L.I. 369.

Darko v Imadi [1991] 2 GLR 206

Asamoah v. Zweness [1980] GLR 867-872

The courts have however held that mere failure to comply with this directive does not mean that the court cannot go ahead and make a determination as to whether the landlord reasonably requires the premises for his own business use. In other word, non-compliance with this statutory requirement does not oust the jurisdiction of the court to hear the substantive matter. Regulation 18 must however be complied with before an order for ejectment made by the court would become effective.

See: Gbedema v Ofori [1991] 1 GLR 345 in which the court stated;

> ***"The real question is when can a landlord apply for possession under section 17(1)(g) of the Rent Act? Can he [p.350] go to the rent magistrate for an order when the statutory requirement has not been complied with? The answer will depend to a large extent on the nature of the rent magistrate's power to make such an order under section 17(1)(g). The exercise of the magistrate's power however is not dependent upon the statutory requirement, but upon satisfactory evidence shown that the landlord reasonably requires the premises for his own use. Non-compliance with the aforementioned regulation of the Rent Regulations does not therefore oust the jurisdiction of the rent magistrate... What then is the purpose of the statutory requirement stipulated under regulation 18 of the Rent Regulations? It is to ensure fair-play so that a landlord who has obtained possession of his house, does not turn around to let it to another tenant for a higher rent…. The order therefore that the plaintiff should comply with regulation 18 of LI 369 before the judgment became effective was proper. If the law required that no action should be brought without compliance with the regulation, it would have said so. In any case, no substantial miscarriage of justice was occasioned by the plaintiff's failure to comply with regulation 18 of LI 369."***

Where, however, the landlord comes under any of the provisions of section 17 (1) (a), (b), (c), (d), (e) or (f) of the Act, he is not required to comply with regulation 18 of L.I. 369. This is because when a tenant, for instance, fails to pay due rent, or where he is in

breach of a covenant in the tenancy agreement, or where, as in the present case he is guilty of conduct which is a nuisance or an annoyance to adjoining occupiers, he automatically forfeits his right of occupation of the premises under Act 220, and the landlord is entitled to, and may come to court direct and ask for ejectment, if the tenant refuses to quit.

Mensah v Addison (supra)

9. Reconstruction, Remodeling or Redevelopment

This is where the tenant is a statutory tenant and the landlord requires the premises for the purpose of pulling down the premises and reconstruction of new premises, remodeling or for redevelopment and these works cannot be done while the tenant is still in occupation.

Section 17 (1)(I) reads;

> ***"where the lease has expired and the tenant is a statutory tenant and the landlord—***
>
> ***(I) intends to pull down the premises and construct new premises,***
>
> ***(ii) intends to remodel the premises and the remodeling cannot be carried out with the tenant in occupation, or***
>
> ***(iii) requires possession of the premises to carry out a scheme of re-development, if the landlord has given not less than six months' written notice***

to the tenant of his intention to apply for an order for the recovery of the possession of, or the ejectment from, the premises, so, however, that—

(aa) the Magistrate or Judge may, on making or giving an order under this paragraph, make it a condition that if the landlord fails to carry out his intention within such period as may be allowed by such Magistrate or Judge the landlord shall reinstate the former tenant as a statutory tenant at the same rent as that formerly payable or pay to the tenant such compensation as the Magistrate or Judge may consider reasonable,

(ab) the Magistrate or Judge shall cause a copy of such order to be served on the appropriate Rent Officer for the area where the premises are situated and such officer shall take such proceedings as are necessary to ensure compliance with the terms of the order, and

(ac) the making or giving of an order under this paragraph in the circumstances specified in paragraph (I) (ii) of this subsection shall be subject to any option of the tenant to acquire under the provisions of section 18, a new statutory tenancy of any premises remodeled to which such an order relates."

Conditions precedent for the grant of an order of possession of and ejectment from premises under section 17(1)(I)

I. Notice to Rent Officer

The landlord is required to comply with Regulation 18 of the Rent Regulations (L.I 369) and furnish a formal declaration to the Rent officer. This enables the court orders to be monitored by the Rent Officer. The court would usually give time lines for the works to be undertaken by the landlord.

II. Expiration of the Lease

The subsection cannot be invoked during the subsistence of the tenancy. The tenant should therefore be a statutory tenant. On the other hand, the landlord can lawfully terminate the tenancy (written notice) if it is still in force and then go ahead to recover it under this section.

III. Intention must be honest (genuine)

To avoid an abuse by the landlord who may under the pretext of recovering the premises for remodeling, reconstruction or re-development, seek to recover the premises, the court is enjoined to scrutinize the genuineness of his intention. Usually, the court may order the landlord to carry out his intentions within a time frame. If the landlord is unable to carry out his intentions within the condition set by the court, the tenant would be reinstated in the house or in the alternative he would be compensated by the landlord.

IV. Written notice in respect of Scheme of Re-development

The landlord is to give to the tenant a written notice of 6 months where the premises are being recovered for the purpose of carrying out a scheme of re-development.

Construction of New Premises

Where the landlord intends to demolish the premises, and build a new one on the site, the tenant cannot remain in the premises. The tenant can be ejected to enable the work to go on. The court has the power to indicate when this demolishment must take place, failing which the former tenant can be entitled to be re-instated as a statutory tenant. The former tenant may if he chooses not to go back to that house be awarded compensation by the court, payable by the landlord. This is to avoid abuse on the part of the landlord who may use this section as a ruse just to throw out the tenant and bring in another tenant.

Remodeling

The Act failed to define what was meant by 'Remodeling'. According to the Construction Dictionary, 'Remodeling' means;

> ***"Making alterations to an existing structure such that it will be better suited to current needs. This type of work may involve changing the use of interior space by repositioning walls, replacing bathroom or kitchen fixtures, or other such modifications."***

Where the landlord seeks to undertake remodeling of the premises but it cannot be carried out while the tenant is living in the premises, he may be allowed to recover the premises. Where the remodeling can be done while the tenant is in occupation, the landlord cannot recover the premises. The onus is on him to prove that the remodeling cannot be undertaken with the tenant in occupation. Trivial structural works may not be enough ground for ejecting the tenant.

In the case of **Seraphim V Pacific stores [1974] 1 GLR 301**, the court ruled that where the landlord had the drawings of the proposed remodeling prepared and a permit had been secured from the Town and Country Planning Dept., it constituted bonafide intention of remodeling the premises. The court however sparked a **controversy** when it stated that the fact that the landlord had failed to show that he had the present means or ability to do the remodeling does not mean that he cannot be allowed to recover possession of the premises under this 17(1)(I) of Act 220.

Scheme of Re-development

The Act failed to specify what is meant by the term 'scheme of redevelopment'. 'Development' means the act of expanding, enlargement or improvement of the premises or the facilities thereon. It is believed to be conveying an idea of a more comprehensive type of redevelopment. Drawing a distinction between 'remodeling' and 'redevelopment' is therefore blurred. With separate subparagraphs being used to

describe “reconstruction’, ‘remodeling’, and ‘redevelopment’, each of these is expected to have a different meaning.

This confusion was apparent in the case of **Seraphim V Pacific Stores [1974] 1 GLR 301.** The court referred to an intended demolition of part of an existing building and rebuild same for being weak and old was described by the Court of Appeal as “a scheme of redeveloping and remodeling the building”, and in another breadth as a plan to “reconstruct and redevelop”.

Where the recovery of the premises is being made because of a scheme of redevelopment it is important to remember that;

I. The landlord needs to give a written notice of 6 months to the tenant,

ii. The landlord needs does not need to prove that the redevelopment cannot be done while the tenant is in occupation.

iii. The landlord only needs to show that he requires the premises for redevelopment.

10. Cessation of Tenant’s Employment

This arises where the tenant is living in the landlord’s premises as a result of being in the employment of the landlord, as part of conditions of service but this employment has ceased. In this case, the landlord is entitled to recover possession of the premises from the tenant.

Section 17 (1) (j) reads;

> ***"where the premises were let to the tenant by reason of his employment in the service of the landlord and such employment has ceased."***

It must be noted that a tenant cannot refuse to leave the premises on the ground that the termination of the employment by the landlord was unlawful.

In the case of **Haroutunian v Meds**- **Moroukian [1962] 2 GLR 94–96** the defendant, an employee of the plaintiff, was, as part of his terms of service, given a fully furnished bungalow, free of rent. On the 30th April, 1962, the plaintiff terminated the defendant's appointment. The defendant contended that his dismissal was wrongful, and so took action in the High Court for damages for wrongful dismissal. He refused to vacate the bungalow pending a determination of the suit, whereupon the plaintiff instituted the proceedings under the Rent Control Ordinance, No. 2 of 1952, section 11(1) (f) for recovery of possession.

The court held that the defendant is not entitled to plead the wrongfulness or otherwise of his dismissal as a defense in an action for the recovery of possession of the premises once his employment had been terminated. This is because the Act does not make any distinction between an employee who was wrongfully dismissed and an employee who was lawfully dismissed. Once it is admitted that the employment has ceased, no matter how, the employer-landlord is entitled to an order for recovery of possession.

The court said;

> ***"The defendant's contention that he is entitled to remain in possession of the said house because the termination of his employment is wrongful is***

untenable. The wording of section 11 (1) (f) of the Rent Control Ordinance, 1952, [now s 17(1)(j) does not admit of any interpretation or construction that makes a distinction between a ceasing of employment de facto and a ceasing of employment de jure. It simply says in clear, unambiguous words that "where the premises were let to the tenant by reason of his employment in the service of the landlord and such employment has ceased," the landlord shall be entitled to an order for recovery of possession of the premises. The section means what it says.

No authority has been cited by counsel for the defendant for the proposition that the termination of the employment must be adjudged to be rightful before the landlord or employer can obtain an order for recovery of possession. I therefore give judgment for the plaintiff and order that the defendant should quit and give up possession of the said house to the plaintiff"

11. Recovery of Premises Previously Occupied by Landlord

This arises where the landlord rented out his substantially furnished premises and then left the country or the area of the location of the premises, but has since returned and needs the premises for his personal re occupation.

Section 17(1)(k) reads;

> ***"where the landlord was personally in occupation of the premises and has let the `premises substantially furnished for a term during his absence from Ghana or that area of Ghana in which the premises are situated and has returned and requires the re-occupation of the premises for himself, so, however, that no order granting the possession of, or the ejectment from, the premises shall be granted on or after the commencement of this Act unless the lease is in writing and sets out that the lease has been granted for a term during the absence of the landlord from Ghana or such area."***

The conditions for recovering possession under Section 17(1)(k) are that;

I. There must be a previous personal occupation of the premises by the landlord.

ii. The tenancy should have been rented out in a situation where the landlord is absent from Ghana or absent from the locality in which the premises are situated.

iii. The premises was let out at a time when it was furnished or substantially furnished.

iv. The tenancy (lease) must be in writing, indicating that it was granted during the absence of the landlord or where the landlord was not in the locality of the location of the premises

v. The landlord has returned to the area where the premises are situated and he requires the premises for his personal reoccupation.

B. RECOVERY OF POSSESSION UNDER SECTION 25 OF ACT 220

Where a principal tenant is convicted of any of the offences listed in section 25(1) of Act 220, the court may order the ejectment of the tenant.

Section 25(2) of act 220 reads;

> ***"Upon the hearing of a charge alleging the contravention of the provisions of subsection (1), it shall be lawful for the Magistrate, in addition to imposing a fine if the accused is convicted, to order the accused to pay the tenant such one or more of the following sums as may be appropriate to the case… Upon such hearing the Magistrate may, also if the accused is a principal tenant order his ejectment.***

C. RECOVERY OF POSSESSION UNDER SECTION 28 OF ACT 220

A statutory tenant is prohibited from asking to be paid any premium (goodwill) or consideration before giving up vacant possession of the premises. If the statutory tenant is convicted for infringing this law, the court may order for the ejectment of the statutory tenant.

Section 28 reads;

> ***"Where a statutory tenant demands or receives the payment of a fine or premium or any other consideration for giving up possession of premises to the landlord or to any other person with or without the knowledge or approval of the landlord, the tenant commits an offence and is liable on conviction by the Rent Magistrate to a term of imprisonment not exceeding three months or to a***

fine not exceeding one hundred and fifty penalty units or to both the imprisonment and the fine.

(2) For the purposes of subsection (1) the demanding or receiving of a price or consideration for furniture, fittings, fixtures or any other articles in excess of a reasonable price or consideration constitutes the demanding or receiving of a premium.

(3) On the hearing of a charge alleging the contravention of a provision of subsection (1), the Rent Magistrate on conviction of the accused and in addition to imposing a fine,

(a) may order the accused to pay the person from whom the fine, premium or the other consideration has been received the amount of the fine, premium or the other consideration wrongfully received, including the amount by which the price or consideration paid for the furniture, fittings, fixtures or any other articles exceeds the reasonable value of those articles, and

(b) <u>may order the ejectment of the tenant</u>."

D. RECOVERY OF POSSESSION UNDER THE COMMON LAW

The main ground for the recovery of possession of the premises from the tenant under the common law is when the tenant denies the title of the landlord. Section 27 of the Evidence Act, 1975 (NRCD 323) reads;

> ***"*Estoppel of tenant to deny title of landlord**
>
> ***Except as otherwise provided by law, including a rule of equity, against a claim by a tenant, the title of a landlord at the time of the commencement of their relation is conclusively presumed to be valid."***

Where the tenant denies the title of his landlord, it is enough ground for the landlord to recover the premises from the tenant.

Memuna Amoudy v Kofi Antwi [2006] 3 MLR 183

G.B.O v Antie [2008] 116 MLR 5

Criminal LIABILITIES OF THE LANDLORD

Under the Rent Act, 1963 (Act 220) and the Conveyancing Act, 1973 (NRCD 175), certain actions of the landlord may result in his incurring criminal liability, and subsequent prosecution accordingly. These are;

1. Rent advance

Reading sections 25(5) and 25(1)(b) together, landlords are prohibited from demanding or receiving rent which is more than one month, in respect of a monthly or a shorter tenancy. Where the tenant takes a tenancy for a duration of more than six (6) months

however, the landlord is required not to demand or receive more than 6 months' rent advance.

Section 25(5) of Act 220 reads;

> ***"(5) A person who as a condition of the grant, renewal or continuance of a tenancy demands in the case of a monthly or shorter tenancy, the payment in advance of more than a month's rent or in the case of a tenancy exceeding six months, the payment in advance of more than six months' rent, commits an offence and is liable on conviction by the Rent Magistrate to a fine not exceeding two hundred and fifty penalty units."***

Section 25(1)(b) of Act 220 also reads;

> ***"1) A person who, in respect of any premises-***
>
> ***(b) demands or receives a consideration, whether in money or in kind or in any other manner and whether by way of rent, fine, premium or otherwise, for the grant, renewal, continuance or assignment of a tenancy…….***
>
> ***commits an offence and is liable on conviction by the Rent Magistrate to a fine not exceeding two hundred penalty units or to a term of imprisonment not exceeding six months or to both the fine and the imprisonment."***

2. Inducing a Tenant to Quit

Under Section 27 of the Rent Act, it is an offence for a landlord to do any act or refrain from doing any act which he is obliged to do as a means of compelling the tenant to quit from the premises, even though the tenancy has not come to an end. Some of these acts may include removing doors, windows or the roofing of the premises, disconnecting the tenant's access to electricity and water, preventing access to the use of the bathroom and toilet facilities and any other acts that lead to the inconvenience of the tenant. The landlord may also refuse to undertake any repairs that he may be obliged under the tenancy to do. The landlord may commit those acts by himself or through his agents.

Section 27 of Act 220 reads;

> ***"Offence for inducing tenant to quit***
>
> ***(1) A person who does an act or refrains from doing anything which the conditions of the tenancy require that person to do, with intent to compel the lessee of premises to give up possession of the premises, commits an offence and is liable on conviction by the Rent Magistrate to a fine not exceeding one hundred and fifty penalty units."***

3. Issuance of Rent Cards

Under section 20(1) of Act 220, every landlord is required to issue a rent card to the tenant within 7 days of the tenancy coming into effect. This card is expected to contain

particulars of the parties, the premises, the rent and address of the parties. Section 20(1) of Act 220 reads;

> ***"Rent cards***
>
> ***(1) A landlord of premises on monthly or shorter tenancies shall issue to the tenant of the premises, within seven days after the commencement of the tenancy, a rent card specifying***
>
> ***(a) the name and address of the landlord of the premises,***
>
> ***(b) the name and address of the tenant of the premises,***
>
> ***(c) the amount of the recoverable rent of the premises, and***
>
> ***(d) and any other prescribed particulars."***

The Act does not expressly make an infringement of section 20(1) an offence. However, by the provisions of section 25(1)(I) of Act 220, failure to comply with any provision of the Act is a criminal offence and upon conviction by the Rent Magistrate, the offender would be made to pay a fine not exceeding two hundred penalty units or to a term of imprisonment not exceeding six months or to both the fine and the imprisonment.

4. Failure to issue receipt

A landlord is required under section 33 of Act 220 to issue receipts to a tenant whenever he receives rent from him. It reads;

> ***"Receipt for rent to be supplied***
>
> ***At the time of payment to a landlord of a sum of money in respect of rent for premises, or of rent for premises and for the use of furniture or fixtures, the landlord shall provide the person making the payment with a receipt in writing duly stamped if a stamp is required under any other enactment, specifying the premises in respect of which the rent is paid, whether the premises are furnished or unfurnished, the amount paid, the period in respect of which the payment is made and the name of the tenant."***

Just like 20(1), no express provision has been made criminalizing a landlord's failure to comply with section 33. But recourse can once again be made to section 25(1)(I) of Act 220 which makes it an offence for provisions of the Act to be flouted.

4. Other General Offences

Under section 25 of Act 220, there are a whole list of general offences that could be committed by the landlord or any other person who contravenes the Act. Section 25 reads;

> ***"Offences***
>
> ***25. Offences, general***
>
> ***(1) A person who, in respect of any premises***

(a) demands or receives more than the recoverable rent for those premises despite a lease to the contrary,

(b) demands or receives a consideration, whether in money or in kind or in any other manner and whether by way of rent, fine, premium or otherwise, for the grant, renewal, continuance or assignment of a tenancy,

(c) being or acting as an agent or broker or go-between demands or receives for services in connection with the procuring of a grant, renewal, continuance or an assignment of a tenancy, a consideration which exceeds five percent of the recoverable rent for one year of those premises,

(d) where the purchase or hire of furniture, fittings, fixtures or any other articles is required by that person as a condition for the grant, renewal, continuance or assignment of a tenancy, demands or receives a price or consideration for the purchase or hire in excess of a reasonable price or consideration for the purchase or hire,

(e) enters into or carries out a fictitious or an artificial agreement which has the effect of attempting to defeat the objects of this Act,

(f) being a landlord fails to furnish an information the landlord is required to furnish by or under this Act,

(g) being a landlord of premises ejects a tenant of the premises for failing to pay more than the recoverable rent of the premises,

(h) being a landlord and having remodeled premises after obtaining possession under paragraph (a) of subsection (2) of section 17 fails to comply with the requirements of section 18, or

(I) contravenes any other provision of the Act,

commits an offence and is liable on conviction by the Rent Magistrate to a fine not exceeding two hundred penalty units or to a term of imprisonment not exceeding six months or to both the fine and the imprisonment."

BY: G. AYISI ADDO

MANAGEMENT OF FAMILY PROPERTY

It may sound a bit weird that a study the law of immovable property should bother itself with the study of the family. In fact, some may even see it as a deviation into the realm of at best, family law or the law of succession, and at worst, into sociology. To many who may not be used to the incidents of immovable property in Ghana, this subject area is bound to be played down in significance. A study of immovable property law in Ghana, however, would not be complete without throwing the searchlight on the family. The reason is obvious.

Much of the lands in the country are owned by various families. These families hold the allodial interest and others, usufructuary interests in the lands. In some instances, the family unit may also be having a leasehold interest in land depending on the mode of acquisition. In the Ga - Adangbe areas like Prampram, Shai and Ningo, the allodial interests are vested in families. This makes the families the highest interest holders in those lands.

As stated above, there are instances when the family as a unit also exercises the rights of a usufruct owner when a family occupies portions of stool lands by virtue of being subjects to the said stool which wields the allodial interest. It must be noted that a family usufruct owner of land is at liberty to sell or gift a whole or part of it to any person without reference to the stool. It cannot however alienate the allodial interest in those lands, and not even the stool as the allodial owners can stop them if they so wish.

They also play a very instrumental part in the alienation of lands in the country. Other entities therefore acquire lands from them under various terms with different interests. Besides this, it is the individual members of the family who constitute the family unit. The various interests and rights of these individual members with regard to the family property has resulted in various rules and principles of law evolving to regulate them.

Sometimes, people’s self-acquired immovable properties may end up as family property and vice versa, by the operation of law. It is therefore necessary to study the family unit and how the law seeks to regulate its operation.

FAMILY

This may be ambiguous if it is not clarified. This is because of the various meanings attributed to it, depending on the context.

Firstly, family could be used to refer to husband, wife and children.

Secondly, family could also refer to a collective body of persons who live in one house under one head or management.

Thirdly, 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.

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.

By "family" is meant members who hail from the same family root. "Family" in this context cannot include members of the same clan like Oyoko or Asona. To illustrate this further, there are Asonas in various regions or places such as Ashanti in Tepa, Nkwatia in Kwahu, and Kade in the Eastern Region. Their common bond is that they are all described as Asona and use similar clan symbol but are not related in any way. An Asona from Kwahu cannot claim to belong to an Asona family from Kade in any other way. An Asona from a different place cannot claim land belonging to the Asona family in a place totally different from its own Asona family.

Patrilineal & Matrilineal Societies

Literally, Patrilineal societies are societies in which inheritance and royal succession trace through the father of the family. Matrilineal societies are those in which royal succession and inheritance trace through the mother.

In relation to practices in other jurisdictions, the Jewish culture is an example of one that has matrilineal descent. For example, in many communities, if a person's mother is Jewish and father is not, the child still counts as Jewish since the line traces through the mother. In some matrilineal societies, matrilineal surnames are passed down from mother to daughter instead of the more traditional patrilineal surnames that go from father to son.

Most cultures in Europe were patrilineal, such as the one in England. Even when a woman inherited power, such as with Elizabeth I, it happened only because there were no other men who qualified in the line. Elizabeth still inherited the title from her father, Henry VIII.

Types of families under customary law

There are two main types of families under customary law. These are;

(a) The Matrilineal

(b) The Patrilineal

(a) The Matrilineal family

This refers to all persons, both male and female who descend from a common ancestress. They trace their descent though the mother. The children would identify with their mother's family

and would therefore not inherit or succeed from their father, but rather through their maternal uncles.

In the case of **Mills v Addy (1958) 3 W.A.L.R 357,** the court explained it thus**;**

> ***"In the matrilineal areas of Ghana every woman who, being married, has children, originates a family. The family so originated is a branch of the wider family to which the originator belongs. The self-acquired property of such an originator, dying intestate, becomes the family property of her family (although it may be subject to prior life interests in the mother and the collaterals of the deceased). Upon the failure of her family and the subfamilies created within it by her daughters or remoter female issue in the female line, this family property reverts to the wider family of which the originator was a member: "once family property, always family property"***

Asantes, Assins, Fantes, Kwahus, Bonos, Wassaws, Ahantas, Akims and some parts of Akwapim recognize only the matrilineal system of inheritance. Succession to property is therefore matrilineal, in these societies.

(b) The Patrilineal family

Family systems which trace their descent through the father are known as patrilineal societies. A patrilineal family **c**omprise all persons, male and female who identify themselves by tracing their origin to a common ancestor. Almost all the ethnic groups in the Northern, Upper East and

Upper West are patrilineal as well as Volta, Greater Accra and the Nifa and Benkum divisions of the Akwapim Traditional Authority are patrilineal and the mode of inheritance is through their father's lineage.

RIGHTS OF MEMBERS OF THE FAMILY

1. Where the family holds the allodial interest in land, each member exercises the same rights of a subject of a stool, entitling the member to either an implied or actual grant of any uncultivated portion of the land as a usufruct owner.

Obli v Armah [1958] 3WALR 486

2. A family member who has been able to reduce a portion of the land into his effective possession after acquiring same through either actual or implied grant, can maintain an action for possession against the Head of family. The family cannot therefore recover possession of the land from the family member unless he denies the family's title to the land

Heyman v Attipoe [1957] 3 WALR 101

Amoabimaa v Okyir [1965] GLR 52

3. A family member who is in possession of land may be able to maintain an action for rights of possession against strangers and other family members. As a member of the family the defendant is entitled to occupy any vacant portion of the family land. Once he occupied it, he

acquired a limited right to it and cannot be ejected therefrom at the will of individual members of the family;

Nunekpeku v Ametepe [**[1961] GLR 301**

4. Right of Ingress and Egress: Ingress is defined as the right to enter the property and egress is defined as the right to exit the property. This is a limited right granted to an owner of land to be able to have access to his land and also to leave the land.

The rights of ingress and egress are often secured by easements. An easement is a legal right to a limited use of another's property. You may need an access easement to cross over someone else's property to enter or exit your own property. When various people acquire the use of lands, there is a tendency to have others being 'landlocked' to the extent that sufficient provision may not have been made for the landowner to have direct access to his land. Invariably he ends up having to make use of other people's land in order to access his property. Since such a person risks being held for trespass, the law has made provision as a matter of necessity for such a person who is 'landlocked' to be able to access other people's property in order to access his land.

It is this right which is granted to a member of the family who may need to access family land, whether or not the lands he uses may also be in the occupation of others. The law however requires that the right must be balanced with that of others whose lands would be utilized by the family member.

5. Right to Residence in Family House: Any member of the family has a right to reside in the family house.

6. Payment of funeral and other expenses upon member's death.

7. General Support for Education, Business, etc.

OBLIGATIONS OF MEMBERS OF THE FAMILY

1. **Payment of Family Debts:** It is the responsibility of the members of the family to contribute to defray any debt that may have been incurred by the family. This is to avoid bringing shame upon the family. One notable way in which the payment of family debts is seen is with regard to contributions towards defraying the funeral debt of a member of the family. Other areas that members may be required to contribute would be in respect of debts arising out of lawsuits against the family or expenses incurred on land. Each member of the family in such circumstances is liable not only to his proportionate share but for the whole debt.

If an individual member of the family redeems family property pledged for debt, the redeemed property reverts to the family and not the individual. In **Bruce v Adjah (1925) D.C 21-25, 192,** family property was sold in execution of a judgement debt. A member of the family purchased the property. The court held that the land was purchased for the family.

2. Payment of funeral expenses of deceased members; Members are required upon the death of a fellow member of the family, to contribute to defray the funeral debt of the deceased.

3. General assistance to needy members.

4. Protection of the family property.

THE NATURE OF FAMILY PROPERTY

Family Land: This in its simple form refers to land which is owned by a family. And as already indicated the land may have allodial, usufructuary or a leasehold interest in the land depending on the mode of its acquisition.

Does the definition of stool land include family land?

Ordinarily, it is very easy to just quickly answer a 'yes' or 'no' depending on one's understanding of the stool land and family land. The confusion of whether family land is part of stool land may have arisen because of the definition of stool land under the 1979 and 1992 Constitution.

Article 213(1) of the 1979 Constitution defines stool land thus;

> ***""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 the community or family."***

'Stool land' was given a wide meaning under the 1979 Constitution to include family lands. This does not seem to be the case in respect of the 1992 Constitution. The 1992 Constitution defines 'Stool land' in Article 295(5) thus;

> ***"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"***

Conspicuously missing from the 1992 Constitution is the reference to 'family land', unlike the 1979 Constitution. In fact, the courts have had to take a decision on way or the other when disputes arose as to whether currently, a definition of stool land includes family lands. In the case of Okwan & ors. v Amankwa II [1991] 1 GLR 213, the court held that;

> ***"… the omission of the word "family" in Article 295(5) of the 1992 Constitution which is different from definition of stool land as provided in Article 213(1) of the Constitution, 1979 meant or implied that the Committee of Experts who drafted the 1992 Constitution saw no reason to equate family lands with stool lands. It is our candid view that the case of OKWAN VRS. AMANKWA II (supra) is on all fours with this ground of appeal. And as was held in that case, Stool lands are separate and distinct from family lands. Stool lands inure for the beneficial enjoyment of all the subjects of a stool while family lands are exclusively enjoyed by the members of a family and as such, are in their truest sense, private properties and are in no way restricted by the Constitution, 1992. This is because the Constitution, 1992 did not seek to regulate their enjoyment and made no provision for their management. To us, any interpretation of Article 267(5) of the Constitution, 1992, in a manner which suggests that family lands are coterminous with stool lands with the same legal consequences would produce a plainly unjust result"***

In another case of **Republic v Regional Lands Commission [1997-98] 1GLR 1028-1038,** the main issue for determination was whether or not a stool land includes family land under the Constitution. The Court, in resolving the issue referred to a related definition under the 1979 Constitution and held as follows;

"Admittedly, the 1979 Constitution in defining stool land expressly included family/clan lands. On the other hand, the framers of the 1992 Constitution in their wisdom obviously decided to depart from that novel trend and rather defined stool lands to exclude family land."

Although this seems to have put clarified the position, there is still a lingering confusion when one takes a critical look at the definition of 'stool land' under the 1992 Constitution. Instead of just giving a straight forward definition of what 'stool land' means, it rather stated that, "***"stool land" <u>includes</u> any land or interest in, or right over, any land controlled by a stool or skin……"***

When the term "includes" is used, it implies that the list is not exhaustive and therefore could involve other things. A similar analogy has been made in reference to a definition of 'land'. It would be recalled that Section 45 of the Conveyancing Act, 1973(NRCD 175) stated that;

""land" <u>includes</u> land covered by water, a house, building or structure, and an interest or a right in, to, or over land or water."

Justice Sir Dennis Adjei in his book 'LAND LAW, PRACTICE AND CONVEYANCING IN GHANA" at page 1 rightly stated that;

> ***"The definition of land in the Conveyancing Act is not exhaustive as the text discloses that it may include other things not spelt out…."***

In the case of **Republic v Yebbi & Avalifo [2000] SCGLR 149**, money belonging to the National Democratic Congress (NDC) was allegedly stolen by the two accused persons who were the bodyguards of Dr Obed Asamoah, who incidentally was the chairman/ treasurer of the party. One of the issues which came up for interpretation was *"whether or not the stealing of the moneys belonging to a political party is a crime against the state or the public interest*" and for which matter could be tried by the Regional Tribunal.

The court held inter alia (in holding 1) that;

> ***"The stealing of moneys belonging to a political party was an offence against the public interest as defined in article 295 (1) of the 1992 Constitution, namely, 'public interest' includes any right or advantage which ensures or is intended to inure to the benefit generally of the whole of the people of Ghana." It was significant that the word used in defining public interest was "includes" and not "means". The word "means" when used in defining a word usually implied that the meaning of the word was restricted to the scope indicated in the definition section. However, the word "includes" was often used in order to enlarge a meaning or phrase occurring in the body of the statute; and when it was so used those words or phrase must be considered as comprehending not only***

> ***such things which the interpretation clause declared that they should include. Therefore, the word "includes" used in defining public interest in article 295 (1) did not restrict the meaning of public interest as to the scope indicated in the definition but also to the interest of only a section of the population."***

This brings into sharp focus the fact that without subjecting the word, "includes" to a critical assessment, it cannot just be dismissed that family land is not part of stool land, under Article 295 of the 1992 Constitution. That may be a lazy approach. Of course, one can always hide under the excuse that whenever the Constitution intends that 'family land' should be part of 'stool land' it expressly says so as it did under article 213 of the 1979 Constitution in which 'family land' was specifically included in the definition of stool land. Therefore, if the framers of the 1992 Constitution have expressly excluded family land from the definition of stool land, then it could be implied that they did not intend that the definition should cover family land, the use of the word "includes" notwithstanding.

The current Land Bill is seeking to clear the air by bringing in a new definition of a "stool" to specifically include family. It reads;

> ***""Stool" includes a skin as well as any person or body of persons having control over skin or community land <u>including family land</u>, as a representative of the particular community."***

Article 295 of the 1992 Constitution defines a stool as;

"stool" includes a skin, and the person or body of persons having control over skin land."

As to whether a constitutional provision could be amended through the back door is all open to a debate because, the law is well established that where a law, especially the constitution or a court of competent jurisdiction defines a word or a legal term, there is a presumption that it is that definition that ought to prevail over any other.

In the case of the Constitution, since it is the fundamental and supreme law of the land to which no other law and for that matter any law which is inconsistent with or in contravention of any provision of the Constitution should, to the extent of its inconsistency be declared void by the Supreme Court, there are interesting legal minefields lying ahead of the new Lands Act.

In the meantime, will 'family land' be part of those 'other things' not included in the current definition of Stool lands? Probably not, because of the express decisions of the court on that issue as already referred to earlier on.

Mode of acquisition: The family may acquire land through the following methods;

1. Purchase

2. Gift

3.Lease

4. Failure of successors

5. Grant from allodial owner for use as usufructuary owners

Under what circumstances would a Privately acquired property become family property?

1. Substantial Contribution

For a self- acquired land of a family member to become a family property, the family's contribution in respect of the development of the property ought to be substantial, such as;

a. Where the land is acquired by a family member but was substantially or wholly financed by the members of the family

b. Where a land acquired by a member of the family is improved or developed with a structure which is substantially built or wholly built with income from the family's property.

c. Where the land is acquired by a family member but a substantial part of labor or the whole labor used on the building or in the cultivation of cash crops was provided by the family.

Larbi v Cato [1959] GLR 35

2. Operation of Law

When a member of family dies intestate, his self-acquired properties will devolve by operation of law to the immediate family and not the wider(extended) family. The immediate family is distinct from the nuclear family. By Fante custom, it refers to the mother of the deceased and her descendants.

See Andrews v Hayford [1982- 83] GLR 214

With the passage of PNDCL 111, after the household effects, a car and a house has been given to the surviving spouse and children, the rest of the property is shared by a formula which initially guarantees two-sixteenths to the customary successor. The customary successor holds this percentage on behalf of the family Where the member dies without surviving spouse, parent or child, then his whole properties would devolve unto the immediate family

3. Failure of successors

When an individual die and there is no one to succeed him, under customary law his privately acquired properties would devolve to the family.

4. Gift to the family

A member of the family may either during his lifetime or in his will may gift out his movable or immovable property to the family. Therefore, if he gifts out his privately acquired land to the family, it would become family land.

The Position of the member of family with regard to family land

1. 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.

2. 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.

3. 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 the case of **Larbi v. Cato (1960) GLR 146**, A. O. Larbi died on 30th September, 1956. In 1937 he had built House No. C276/1, Nsawam Road, Accra 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 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. Evidence at the trial indicated that the deceased took 30 pounds as a loan from the family fund but the overall cost of the building was 2500 pounds.

The court held that those members of the family who make contribution to the building of a house are entitled to share in 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 recognizes that he is building a house for the family. It is quite otherwise when 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 the building.

The court further held that the customary law of Ghana does not impose upon sons of the family who have received a professional education with the support of family funds an obligation of repayment, nor do the earnings of such sons take upon themselves the character of profits earned by the use of family funds.

4. 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.

Boafo v. Staudt (Extracted in Ollennu PCLLG).

5. Where a member makes an extension to existing family farm or improves same, the essential character of the farm remains family property.

Nkonnua v. Anaafi (1961) 2 GLR 559.

In this case, evidence proved that a farmstead belonging to the royal aduana family was developed into a cocoa farm by the chief when he was enstooled. The court held that the cocoa

farm remained the property of the family. The court further held that where a person acquires property with the assistance of a member of his family, that property becomes family property.

Therefore, if an occupant of a stool acquires property with the assistance of a member of his family the property is not stool property but the family property of the stool occupant. In the instant case, the evidence establishes that the plaintiff assisted Nana Akese, physically and financially, in making the cocoa farm. The farm is therefore family, not stool property.

6. Where a member extends or improves existing family building such improvement does not change the character of the building which remains family property. He cannot therefore alienate the family building.

Kumah v. Asante (1991-93) Part 1 GBR 328.

7. 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.

8. Under customary law, where family members kept a common purse, whatever is acquired from the common purse has the character of family property and unless it was partitioned between the two of them in their lifetime, upon the death of any one of them, it does not become the sole property of the surviving member, but remains as full family property.

In the case of **Yoguo v. Agyekum (1966) GLR 482**, the plaintiffs were brothers. During the lifetime of their deceased father, he cultivated cocoa, jointly with his late brother on family land. Their father and his brother jointly saved the proceeds from their respective cocoa farms, and then used the proceeds to build a house. The plaintiffs claim that their father during his lifetime gifted the house to them. The court dismissed the claim of the plaintiffs. The court held that where two family members. kept a common purse, whatever was acquired from the common purse, had the character of family property and unless partitioned during their lifetime became full family property on their death.

9. Where social obligations require some individuals to assist another person, and 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**.**

Yoguo v. Agyekum (1966) GLR 482,

10.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."

Amissah-Baidoo v Abaidoo [1974] GLR 110

Current Position of a member's interest in Family Land

Family members have no interests in their family land and a member who develops a family land would only have a life interest in it and cannot alienate it in his will. This was the position

of Ollenu in the cases of **Ansah v Sackey [1958] 3 WALR 325 and Santeng v Darkwa [1940] 6 WACA 52**

The Supreme court has adopted this principle in the case of **in Re Yalley (decd); Yalley v Kells [2001-2002] SCGLR 762.**

Perceived correct position of the law

The supreme court while adopting Ollenu's position in **in Re Yalley (decd); Yalley v Kells [2001-2002] SCGLR 762,** may have lost sight of the fact that Ollenu, later on in his book, 'Principles of Customary Land Law in Ghana' reviewed his previous decisions on the principle he espoused in the in Re Yalley case and Santeng v Darkwa to restate the law.

He said a distinction should be drawn between a family member developing an undeveloped and unpossessed land acquired by the family, and a land with a structure on it. He stated that in the former case, the family member who uses his own resources to develop it could alienate it.

In the second scenario, a family member who uses his own resources to develop a family land which the family is in possession of has a life interest in it and could alienate it only with the consent of the head of family and the principal members of the family. This means that a member of the family who builds his house on a family land in which the family is seen as being in effective occupation, acquires only a life interest and will not be clothed with the capacity to alienate it without the consent of the family.

Ollenu and Woodman said;

> ***" It is submitted however, that the correct statement of custom is that if a member of that of the family is granted a portion of the general family land i.e. a site which has not been previously granted to another individual member of the family, or a site which another individual member has not previously 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 the building which an individual member of a family is permitted to erect on family land in use by the family e.g. a site on which a family property of any sort exists, is property in which the individual member who builds has a life interest only; is to be used and treated in every respect as his property except that he cannot create an interest in it which may subsist after his death."***

This new position of the law was applied in **Amissah-Baidoo v Abaidoo [1974] GLR 110.** In that case, during his lifetime, the deceased erected by his own individual effort and means, and with the consent of his family, a dwelling-house on land which was in effective occupation by his family and which was a portion of land with a building thereon, earlier conveyed by a deed of gift (exhibit A) by the deceased's father to his wife, i.e. the mother of deceased, his children by her and their "heirs and assigns" with a direction in the deed that the property was to be enjoyed by the donee as family property in accordance with "native law and custom." Deceased's mother supervised

the construction of the house in his absence and his sister also rendered him other services such as cooking.

The court held that the nature of the contributions offered by deceased's mother and his sister (i.e. supervising the construction in his absence and rendering him other services such as cooking) did not constitute "substantial contribution" as to even taint the house with family character. However, since the family was in effective occupation of the land on which deceased had built the house, deceased had only a life interest in the house with no alienable interest which he could dispose of by will.

ALIENATION OF FAMILY PROPERTY

The family has a right to alienate property belonging to it. The family is at liberty to alienate its interest in property belonging to it. Where the family holds a usufructuary interest in land in which the stool is the allodial owner, it may sell or gift whole or part of it to any person without reference to the stool. Where the family holds allodial interest, it can alienate its absolute interest in the land. It must be noted that family land belongs to the family. The family as a unit communally owns the land.

1. As a general rule or at least by best practice, a family meeting should be convened in order to obtain the necessary consents required for a valid alienation of family land.

Awortchie v Eshon (1872) Sarbah F.C.L. page 170

2. Only the head of family, with the consent and concurrence of the principal members of the family can alienate family land.

Allottey v Abraham (1957) 3 WALR 280

3. There can however be a valid disposal of family land, if the alienation was done by the head of family with the concurrent of some, but not necessarily all the principal elders of the family.

In the case of Allottey v Abraham (1957) 3 WALR 280, @ 286, the court held;

> ***"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 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 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."***

4. An alienation of family land by the head of family alone without the consent and concurrence of the principal members of the family is voidable, and not void. This position is different from

alienation of stool land in which where the principal elders of the stool are not privy to the alienation of the stool land, it is rendered void.

Adjei v Appiagyei (1958) 3 WACA 401

5. Alienation by family head alone is voidable but the elders can bring a timeous action to set it aside and restore grantee to his position before the sale.

In the case of **Beyaidee v Mensah (1878) (Sarbah F.C.L) @171,** the court held that;

> ***"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 the case of **Ata v Aidoo (1968) GLR 362**, the court refused to set aside an alienation of land through a pledge because of not taking action until twelve years after the pledge.

6. Where an action to set aside a voidable transaction has been made by the family, the following conditions must be satisfied;

a. That the person seeking to set aside the transaction was the proper person to represent the family in a suit relating to family land.

b. That the members of the 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 the court on avoiding the transaction, can restore the one to whom the alienation of the land was made to his former position.

e. That the family had acted timeously and with due diligence.

Adjei v Appiagyei (1958) 3 WACA 401

7. Where the head of family does not participate in the transaction, such alienation is void ab initio.

Agbloe v Sappor (1947) 12 WACA 187. The court explained that;

> ***"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 ab initio and the respondents derive no right of absolute ownership by virtue thereof"***

8. In a family where there is no head of family, the most senior male member in the family and can alienate family land with the consent and concurrence of the family.

Atta v Amissah [1970] CC 73

9. A land could be owned by two or more families. A land owned by two or more families shall be alienated by all the heads of the various families. An alienation by only some of the heads of families which jointly own the land is void, unless there is evidence that the other head(s) of family or families consented to the alienation either expressly or by conduct, like acquiescence.

In the case of **Dzefi v Ablorlor VI [1999-2000] 2 GLR 101,** the court in holding one (1) stated that;

> ***"By Ewe customary law, any disposition of family land made without the consent and concurrence of the head was absolutely void ab initio. Hence where, as in the instant case, land was owned by two or more distinct families, the head of each of these families must be a consenting party in any alienation of the family land to a stranger. An alienation by one or two heads without prior reference to the third will be void, unless he concurred in the grant either expressly or by conduct, through silence or inaction, after he became aware of it. However, if there was evidence that the three families had a common overall head, then it was this head, as against the heads of the various families, who had the right to alienate the family land with the concurrence of the other individual heads of family. And where the majority agree to alienate, the minority should not unreasonably withhold consent."***

The head of family whose consent was not sought on becoming aware of the alienation by the other heads of families will have to act timeously, in taking steps to invalidate the alienation.

LITIGATION IN RESPECT OF FAMILY PROPERTY

1. The general rule is that an action to protect family property such as land must be instituted on behalf of or as representing the family by the head of family. It is a function of the head of family to protect family properties. The head of family is the one who may therefore sue and be sued on behalf of the family.

Order 4 rule 9 (2) of C.I 47 reads;

> ***"The head of a family in accordance with customary law may sue and be sued on behalf of or as representing the family."***

Kwan v Nyieni (1959) GLR 67

2. To this general rule there are exceptions in **certain special circumstances,** any member of the family can take action on behalf of the family, 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.

Kwan v Nyieni (supra)

The court further held in that case that where such special circumstances are established in an action by any member of the family, the action would be entertained by the court, or upon proof of necessity provided the court is satisfied that the action is instituted to preserver the family character of the property. It stated;

> ***"In any such special circumstances, the court will entertain an action by any member 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."***

Order 4 rule 9 (3) of C.I 47 reads;

> ***"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."***

Any member of the family who comes under the exceptions is therefore required to explain the reason why he is suing on behalf of his family, when he is not the head of family. An ordinary family member may sue on behalf of the family with the authority of the family. This authority may be express or implied.

3. It must be noted that the three exceptions are **not exhaustive** and any family member may sue to protect the family where he can demonstrate special circumstances as to why he should be allowed to sue on behalf of the family. The principle now is that the rule in Kwan v Nyieni is not cast in stone. As long as the facts of the case suggest that there is necessity, the courts

would entertain an action by the member of the family without necessarily proving that there is a head of family who has refused to sue. Once necessity is proved, the rules are relaxed.

Agbosu & ors v Kotey & ors [2003- 2005] 1 GLR 685, also reported as **Ashalley Botwe Lands, Adjetey Agboshie & ors v Kotey & ors [2003- 2004] 1 SCGLR 420.**

4. Further rules on the procedure to be adopted when a member of the family sues on behalf of the family are found in Order 4 rule 9 (4) – (7) as follows;

> ***"(4) Where any member of the family sues under sub rule (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."***

5. Where the capacity of the person suing in representative on behalf of the family is challenged, the burden of proof lies on the person suing to show that indeed he has the authority to sue as representing the family.

Nyamekye v Ansah (1989-90) 2 GLR 152

6. Where 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.

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.

Akrofi v Otenge (1989-90) 2 GLR 245

THE HEAD OF FAMILY

There are four (4) main ways in which a person can become a head of family. These are;

1. by appointment

2. by election

3. by acclamation/ acknowledgement

4. In the absence of (1), (2), (3), the oldest male member; and failing him, the oldest female member.

Generally, and under customary law, no one has an automatic right to be appointed as the head of family. A person can only become a head of family when the family has made such an appointment, at a meeting specifically called for that purpose. In the case of **Hervie v Tamakloe (1958) 3 WALR 342**, the court stated;

> ***"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 members of the family when the post becomes vacant by any means, or he must be acclaimed and acknowledged as such by the 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…where the family consists principally of descendants in the in the direct 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."***

There are further principles which operate with regard to ascending to the office of the head of family. These are:

a. The appointment of the head of family must be made by all the principal members of the family.

b. The meeting at which the appointment is done must be convened specifically for that purpose of appointing the head of family and notices to that effect should be sent to all the principal members.

c. 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.

d. Where some of the principal members are not duly notified, upon proof of such notification, they may move to set aside the decision taken at the meeting.

Lartey v Mensah (1958) 3 WALR 410. The court stated thus;

> ***"According to native law the head of 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 made should be conveyed 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 appointment 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 is unjust that only some of the members of the family should appoint the head when others have not had the opportunity of being heard on the matter."

e. Where there is a division in the family, one faction cannot appoint a head of family for the whole family. A valid appointment can be made after the various factions have been reconciled.

Ankrah v Allotey (Ollenu PCLLG, 1st ed @ 167

f. Strangers (non-family 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.

Banahene v Adinkra (1976) 1 GLR 346

g. The family meeting may be convened by the most senior member, by an eminent member of the family, male or female, or even by the chief. An outsider can also preside over such a meeting when there are divisions in the family, but his presence is just to maintain order. He remains as an independent witness, and has no vote.

Okoe v Ankrah [1961] GLR 109

Acclamation/ Acknowledgement as a form of ascension to the office of the head of family

This arises when although no formal meeting for the appointment or election of a head of family has been made. However, a particular individual has been performing all the functions of the head of family, without any protest and in fact have acquiesced in his performance of the functions of a head of family. Such functions include bringing actions in court on behalf of the family, defending suits on behalf of the family, making grants of land, presiding over funerals and presiding over marriages, and settlement of disputes. He is therefore a *de facto* head of family.

In the case of Amah v Kaifio (1959), the court held that although the plaintiff was not formally appointed as the head of family, he had the authority of the family to take care of family property. By implication therefore, he is the *de facto* head of family, and therefore could litigate on behalf of the family.

The oldest member as head of family

By tradition, usually the oldest member of the family, provided he is in good health, and willing, is appointed as the head of family, as he is deemed as the natural leader. In the absence of the appointment of a substantive head of family therefore, the oldest member of the family usually acts as the head of family, naturally. During this period of acting as the head of family, he exercises all the powers of a head of family. According to Mensah Sarbah;

> ***"….in the absence of the [head], the eldest male member of the family acts as [head], for the long absence or incapacity of the [head] must not prejudice the interest of the family."***

In the case of **Mills v Addy (1958) 3 WALR 357**, the headnote reads;

> ***"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 family is exercisable by the oldest male member of the most senior generation. In the absence of a male in that generation these powers of the head of family are exercisable by the oldest female of the same generation."***

DUTIES OF THE HEAD OF FAMILY

1. Bringing actions in court on behalf of the family.

2. Defending suits on behalf of the family,

3. Making grants of land,

4. Ceremonial functions like presiding over funerals, marriages, rites of passage and performance of rituals on behalf of the family.

5. Settlement of disputes

6. Advisory functions in relation to matters pertaining to the members of the family.

7. Maintenance of discipline and moral upbringing of the members.

8. The head of family, on behalf of the family has a final say over the burial and funeral arrangements of a deceased member of the family. He is however required to first consult with the adult children of a deceased member of the family. In the event of a disagreement however, then he will have the final say.

Okoe v Neequaye (1993-94) GLR 538

9. Receiving all rents and mense profits from family property.

Mesne profits are profits of land taken by a tenant in wrongful possession from the time that the wrongful possession commenced to the time of the trial of an action of ejectment brought against him.

10. Accounting to the family members with regard to family properties that are under his control, possession and custody, as required under PNDC LAW 114

REMOVAL OF HEAD OF FAMILY

The head of family may not necessarily hold office for life. As long as the members of the family repose confidence in him, he would remain in office. He could lose the confidence of the members of the family for any of the following reasons;

a. failing to perform any of his duties listed above

b. mismanagement and misuse of family property

c. Disrespect to family members

d. engaging in conduct likely to bring disgrace to the family

e. physical or mental incapacity, etc.

This list is not exhaustive.

1. The family members are to determine the ground upon which they want to remove the head of family. The court will not interfere with the merits of the family's decision to remove a family head, UNLESS it is proved that there was a substantial departure from the tenets of natural justice.

In **Allotey v Quarcoo (1981) GLR 208,** the respondent, who had been deposed as joint head of the Onamrokor Adain family of Gbese in Accra by a family meeting held on 21 February 1976, filed a writ at the High Court for a declaration that he was still the joint head of family and that he had not been constitutionally and customarily deposed. The respondent, however, did not disclose any specific grounds in support of his claim that his deposition was uncustomary and unconstitutional. The appellants resisted the action on the grounds, inter alia, that the respondent was lawfully, constitutionally and in full accordance with customary law. They also contended that the court had no jurisdiction, original or appellate, to inquire into the merits of the deposition charges. The court in the course of the trial decided to examine the grounds upon which the respondent was removed.

Upon appeal, the appellate court held that the court should not have interfered into doing an assessment of the validity of the grounds for the removal of the head of family,

unless there had been a substantial or complete denial of the rules of natural justice.

Holding 3 of the judgement reads;

> ***"Both the common law and customary law had for centuries reposed jurisdiction to pronounce on the merits of the decision of a family to depose its head at a fully representative meeting and after due notice of the meeting and charges given beforehand, in the families themselves. The courts had only a limited supervisory jurisdiction and would interfere with the family's decision only when there had been a complete or substantial denial of justice; it was not the infringement of any fundamental principle or rule of natural justice or the breach of every procedural step that would suffice to invoke the court's jurisdiction…"***

In another part of the judgement the court stated;

> ***"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…."***

Amin JSC said;

> ***"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 courts will strike the decision down."***

2. The decision to remove the head of family must be taken at a family meeting. All the principal members must be invited to attend this meeting. The head of family can be removed by a decision of a majority of the principal members.

See: **Quatrain v Edu (1966) GLR 406**

In **Abaca V Abrade (1963) I GLR 456**, The defendant had held office as the recognised head of the Ewan Kwahu Annona family at Secondi since 1939. Some elders of the family being dissatisfied with the manner in which the defendant was managing family property authorized one Kwan Aidoo, 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 Kwan Aidoo to call upon him to account, whereupon Kwan Aidoo 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.

The high court gave judgement for the defendants 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.

Upon appeal, the court dismissed it and held that the right of removing the head of family from office is vested in the principal members of the family and the act of the majority would be binding upon the rest, but where a head is removed, as in this case, without notice of the meeting being given to all sectional heads, the act of the sectional heads who were present cannot be binding upon the rest, and unless it is acquiesced in, it is ineffective.

The court further held that in certain circumstances a head of family may be removed in his absence where his absence is without justification. Where a head of family is absent because he is bound by custom to be present at the funeral of a member of the family, (as in this current case), his absence is not without justification.

3 The head of family should be served with the notice to attend the meeting to answer charges for his removal. Where the head fails to attend without good reason, the meeting may proceed and remove him in absentia.

A head of family cannot be removed without notice. A complaint must be lodged against him and he must be summoned to answer it.

Abaca v Abrade (1963) I GLR 456, per the court;

> ***"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 Kwahu Annona 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."***

4. It is not necessary to state in a notice summoning a family meeting that the meeting is being convened for the purpose of deposing the family head because nobody knows whether the head would be removed until the charges preferred against him are proved. It is otherwise when the meeting is summoned to appoint a head of family for, as a matter of course, the headship must first become vacant to the knowledge of the family.

Abaca v Abrade (supra), per the court:

> ***"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."***

5.The burden of proving specific grounds of invalidity of either the appointment or removal of the head of family lies on the particular member of the family seeking to avoid the decision of the family.

Welbeck v Captain (1956) 2 WALR 47

ACCOUNTABILITY OF THE HEAD OF FAMILY

The head of family in the traditional society is seen as a powerful personality, and a symbolic figure within the family unit. As recounted earlier on, his duties include the management of family properties. He is a key figure in the alienation of family lands as

well as receiving all rents and mense profits from family property. As he holds property on behalf of the family, an important issue which arises is whether he is accountable to the family members for his stewardship.

The general rule under customary law is that the head of family is not accountable to the members of the family for his stewardship. If the head of family is therefore even misusing the assets of the family which he is expected to hold in trust for his people, their only remedy lies in removing him from his position as the head of family.

John Mensah Sarbah stated that;

> ***"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."***

Judicial decisions which have been delivered in the past all reechoed the same principle. In **Finn v Gardiner (1953) 14 WACA 260**, the court stated that;

> ***"It is a well settled principle of native law and custom that junior members of a family cannot call upon a head of family for an account. Their remedy is to depose him and appoint a new head."***

This same principle was applied in **Abode V Onion (1946) 12 WACA**

This line of thinking and whether the general principle had outlived its usefulness came to a head in the case of **Hansen v Ankrah [1987-88] 1 GLR 639.**

In this case, The Mantse Ankrah family of Accra comprised three branches—the Ankrah, Ayi and Okanta branches. Each branch had a head of family, but there was an overall family head. A family account was established to be operated on behalf of the family, with any two of them being allowed to operate it. In 1977, the government compulsorily acquired some of the family lands and an amount of ¢13,969.95 was received and paid into the account. Later, the overall head of family received a ¢160,547.40 was received by the overall head of family but instead of paying it into the family account, he paid it into his personal account. An action was brought by two of the family heads against one of the family heads and the overall head of family to account for expenditures made in respect of the ¢13,969.95 and for the ¢160,547.40 to be transferred into the family account.

The trial court gave judgement against the defendants (overall head of family and one branch head). Upon further appeal to the Supreme Court, by a 3-2 decision, the court allowed the appeal, affirming the decision in **Abude v Onano** (supra), to the effect that a head of family was not accountable to the members of the family for his stewardship.

According to the court (majority),

> ***"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 crystallized 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." (holding 2)***

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."***

Justice Apaloo (minority side) was of the view that a head of family who is in the possession of family property was a fiduciary and so ought to be made to account. He further held thus;

> ***"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."***

The majority view prevailed and by the principle of stare decisis, continued to be the law applicable by all the courts in the country. There was a clamor for a legislation to change the traditional notion that a head of family was not accountable to the members of the family. That chance came with the promulgation of the HEAD OF FAMILY (ACCOUNTABILITY) ACT - 1985 (PNDCL 114).

PNDC L 114 has the following features;

1. The head of family is accountable to the family for family property which is in his possession, custody or over which he has control of.

2. The term 'head of family' includes any person who is in possession, control or custody of family property.

3 Apart from rendering account to the members of the family, the head of family is required to prepare an inventory of family property in his custody.

4. Where a head of family refuses or fails to render account to the family members or prepare an inventory of family property, any member of the family who has a beneficial interest in the property can bring an application in court for an order of the court to compel him to do so.

5. Aggrieved members of the family who may wish to apply for a court order against the head of family, need to first attempt a resolution of the matter within the family, before proceeding with the court action.

It must be noted that in the event of a failure or refusal of the head of family to comply with the court order, he can be committed for contempt. The proposed Land Bill currently in parliament seeks to introduce the power of the state to prosecute a head of family who breaches his fiduciary position, and could be sanctioned upon a conviction to pay a fine of not more than 10,000 penalty units or a term of imprisonment of not more than 10 years or both.

For ease of reference, and the fact that it is very short, it is reproduced here in full thus;

HEAD OF FAMILY (ACCOUNTABILITY) ACT - 1985 (PNDCL 114).

1. Head of family is accountable

(1) Despite a law to the contrary, a head of family or a person who is in possession or control of, or has custody of, a family property is accountable for that property to the family to which the property belongs.

(2) A head of family or a person who is in possession or control of, or has custody of, a family property shall take and file an inventory of the family property.

2. Application to Court for an Order to Account

(1) Where a head of family fails or refuses to render account or file an inventory of the family property, a member of the family to which that property belongs who has or claims to have a beneficial interest in the property, may apply by motion to a Court for an order compelling the head of family to render account or file an inventory of the family property to the family.

(2) An application under subsection (1) shall not be entertained by the Court unless the Court is satisfied that the applicant had taken steps to settle the matter within the family and that the attempts had failed.

3. Court to order account

Subject to section 2, a Court may make an order compelling the head of family to render account or file an inventory in respect of the family properties in the possession, control or custody of the head as the Court may specify in the order.

4. Interpretation

For the purposes of this Act,

"Court" means a court of competent jurisdiction;

"family property" includes property, whether movable or immovable, which belongs to the members of a particular family collectively or is held for the benefit of the members and the receipts or proceeds from that property;

"head of family" includes a person who is in possession of or in control of, or has custody of a family property**.**

(By: G. Ayisi Addo)

TUTORIAL QUESTIONS

1. To what extent has the decision in **Kwan v Nyieni [1959] GLR 67** impacted on land litigation in Ghana?

2. Explain the legal principles governing litigation in respect of family property in Ghana.

3. How does the **Head of Family Accountability Act, 1985 (PNDCL 114)** make the head of family more accountable to the members of the family than the period before the passage of the law?

4. What are the principles governing the alienation of family lands in Ghana?

5. Explain the circumstances under which privately owned land could become family land.

6. Discuss the legal principles governing the removal of a head of family.

7. *"There are several ways by which one could become a head of family, and once selected, he is saddled with numerous duties in connection with the management of family property."*

   Discuss