LAND ADMINISTRATION AND LAND TITLES

REGISTRATION IN GHANA

BY

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ABSTRACT

The various communities now comprised in the State of Ghana were, before their absorption into the Gold Coast under British colonial rule, separate independent polities. Boundaries between such traditional states were neither abolished, defined nor demarcated. For over three centuries, the basis of the relation between Britain and the Gold Coast was the import-export trade which did not require direct involvement of British subjects in land exploitation. Thus until the last two decades of the nineteenth century, land problems did not concern the colonial government.

However, the long contact with Europeans led to the reception of English conceptions of tenure. The introduction of commercial agriculture based on permanent cultivation of cocoa and coffee plantations and the development of the mining and the timber industries during the 1880s had significant impacts on the traditional tenure systems. The concession boom which accompanied these developments caused problems.

Land values appreciated and rights to them became keenly contested. Since boundaries remained undefined, there were conflicting and overlapping concession grants. English conveyancing forms and terminology which the grantors could not understand were employed in drafting concession agreements. It was difficult for strangers to identify the persons with legal capacity to deal with the lands which were group-held property. These problems caused insecurity of titles and costly litigation.

The measures contained in the abortive Public Lands Bills, 1894 and 1897 were designed to solve these problems. When they were withdrawn on account of European and native opposition, the establishment of a deeds registration system and special courts established to administer concession grants were relied upon for their solution. The Study investigates the effectiveness of these measures and Land administration in the North where the principles of the abortive Land Bills were applied. The period between 1880 and 1977 is covered by the Study.

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ABBREVIATIONS

A.C.	Appeal Cases (United Kingdom)
D. & F. '11-'16	Divisional and Full Court Judgments, 1911-1916
D.C. (Land) '52-'55	Selected Judgments of the District Courts, 1952-1955
F.C.	Full Court Judgments at Cape Coast, 1919.
F.C.L.	Fanti Customary Laws, 2nd Edition, 1904 (Sarbah)
G.L.R.	Ghana Law Reports (From 1959).
I.C.L.Q.	International Comparative Law Quarterly
J.A.L.	Journal of African Law
N.R.C.D.	National Redemtpion Council Decree
N.T.T.	Northern Territories
P.C.L.L.G.	Principles of Customary Land Law in Ghana (Ollennu)
Ren.	Renner's Reports. 2 vols., 1915. (1868-1914)
R.G.L.	Review of Ghana Law
Sar. F.L.R.	Sarbah's Fanti Law Reports, 1904.
U.G.L.	University of Ghana Law Journal
U.S.T.	University of Science and Technology, Kumasi, Ghana.
W.A.C.A.	West African Court of Appeal
W.A.L.R.	West African Law Reports

PREFACE

The exposition, critique and analysis of Ghana Land law have received considerable attention and the literature on the subject is reasonably large. But not enough attention was hitherto paid to the investigation of the evolutionary history of land tenure and administration, how the systems worked in the past and the effects which social and economic pressures have had on their working at present.

Colonial land policy in the Gold Coast is itself a fruitful area of investigation which has been entirely neglected. The abortive Crown Lands Bills of 1894 and 1897 for example, require far more discussion than they have hitherto received. Despite the fact that a large volume of Official Correspondence and Records on the subject exist in the archives, no attempts have so far been made to carry out any comprehensive investigation of the political and the socio-economic policy objectives which made the introduction of the Bills necessary. Instead, their withdrawal is often cited merely as an exemplary victory of a colonised poeple over an alien authority. This does not go far enough.

An objective and a perspicacious assessment of the merits and demerits of the legislative measures can only be undertaken on the basis of the kind of enquiry which can illuminate the pith and marrow of the problems which they were designed to solve. A historical study of the political and socio-economic forces which have hitherto influenced the evolution of customary land tenure can provide some useful research data from which those concerned with land law reform and policy decisions about land exploitation and administration can draw on the experiences of the past. The formulation of sound and adequate present and future national land policies for Ghana would depend on this kind of inquiry.

It is one of the principal objects of this thesis to fulfil a need for the study of the evolution of customary systems of tenure from a historical perspective. It is a basic assumption of this study that the general principles of the customary land law and the case law built up on them have received sufficient treatment and are generally known. The emphasis is thus not on the exposition and critique of the customary land law but the political and economic forces that have shaped the ways in which the law has evolved and developed.

Over four centuries of trade and commercial contact with Europeans led to the reception of Anglo-American conceptions of tenure. In the last two decades of the nineteenth century, certain economic events that

occurred had significant impacts on the land tenure systems and land values generally. Permanent agriculture based on the cultivation of tree crops such as cocoa, coffee and rubber plantations was introduced in the last two decades of the nineteenth century. The development of the mining and timber industries also occurred about the same time. The thesis centres around the investigation and analysis of the problems which accompanied these developments and the way in which the colonial government tried to solve them.

This study is substantially based on archival materials obtained from the Public Records Office At Kew, London. The records consist of colonial records (CO96) series containing manuscripts of official correspondence and minutes of all manner of proceedings, meetings etc. Reliance was also placed on data obtained from the List of Colonial Office Confidential Prints (CO879) series. Other subsidiary sources include official documents and manuscripts (ADM) series obtained from the Ghana National archives; field research data obtained from a survey of 80 sample villages in Ghana by the Land Administration Research Centre, University of Science and Technology, Kumasi, Ghana in 1976 and personal interviews of lawyers, solicitors, Regional Lands officers, Regional Surveyors of Ashanti, Northern and Volta. Regional town planning officers and some district chief executives in the Regions mentioned above were also interviewed. Files and documents of the Lands Departments of the Regions mentioned were also examined. All these interviews and the examination of the files and records took place between June 1976 and August 1977.

The thesis is divided into four parts. The first part deals with the preliminaries setting out the principal objectives of the study. The understanding of the thesis can be enhanced by some knowledge of certain common but central issues that stand out clearly in the traditional schemes of tenure; issues such as the administration of group-held property and the problems associated with it, the nature of individual rights or interests in land and some terminological issues under the customary law. Thus although the thesis is not primarily concerned with the exegesis of the customary land law in depth, such issues have been discussed in this part in order to lay a sound foundation for the understanding of subsequent discussion of research data within the context of such issues.

Part II of the Study is the meat of the thesis. It deals with colonial land policy. For purposes of clarity, this part is divided into nine chapters. The first chapter treats the period of the Company of Merchants'

rule as an introductory chapter to the discussion and analysis of colonial land policy. The understanding of this part is essential to the appreciation of the issues raised in subsequent chapters. The nature of the quasi-colonial government established in the Forts along the coast and which was taken over by a non-merchant administration during the early 1830s is examined here.

Chapter II is in fact, a continuation of Chapter I in the sense that it highlights the way in which earlier claims by the Imperial Government that it had no soveriegn rights over the native polities were to be used in the future to challenge the rights of the colonial government to enact laws affecting lands. The impact of the industrial revolution, the abolition of the slave trade in Europe, the introduction of permanent agriculture and the development of the mining and timber industries on land values and traditional attitudes to land rights are outlined in this chapter.

The Crown Lands Bill of 1894 is discussed under Chapter III. The events and the debates preceding the introduction of the measure are considered. This is followed by the examination of its provisions against the background of the problems they were designed to solve.

The nature of the opposition to the Bill and the vigorous defence of it by Sir William Maxwell are exhaustively discussed in chapter IV. This is followed by the consideration of the expanded form of the Crown Lands Bill, 1894, under the Public Lands Bill, 1897. The principal objectives of the Bill are critically examined in the light of the criticisms levelled against the measure as being in volation of native rights. The ways in which its principal provisions reflected the communal principles underlying the indigenous conceptions of tenure are highlighted.

In chapter VI, the change in direction of policy after the withdrawal of the Bill on account of active opposition to it is critically examined. In this regard, the examination of the Concessions Ordinance, 1900, and the operations of the Concessions Courts feature prominently. The withdrawal of Sir William Maxwell's Bill and the change in direction of land policy that followed it led to the consolidation and the enhancement of the power and authority of chiefs and traditional authorities in land matters. The way in which the traditional authorities used such powers for land administration purposes are discussed under cahpter VII. The statutory control of stool land administration as a response to the problems arising out of the land control functions of such authorities are also examined in this chapter.

The basic underlying principle of the abortive Public Lands Bill, 1897 was applied to Land administration in the Northern Territories. This aspect of colonial land policy is examined in chapter VIII. Land administration in these parts of the country can be seen as an experiment with Sir William Maxwell's policy, and the relative degree of title security and absence of litigation over land titles there is highlighted as a vindication of the latters foresight and wisdom.

Forest law and policy are examined in the last chapter of Part II. The problems relating to the timber industry and the measures adopted by the colonial administration to solve them are discussed in this chapter. The problems and the measures are discussed in the light of the recommendations and guide lines on forest administration in Southern Nigeria, which H. M. Thompson had supplied to the Gold Coast government to be used as a guide for legislation on forests. The forest Ordinance, 1911, and opposition to it are also examined in this last chapter of part II.

Part III of the Study is concerned with land titles registration in Ghana. It also forms part of colonial land policy; but it is deemed necessary to treat it under a different part because of the specialized nature of the subject. This part is also divided into two chapters. Chapter I deals with the historical aspect of the subject. In the first chapter, the discussion centres around the Land Registration Ordinance, 1883 and the Land Registry Ordinance, 1895 and the problems relating to the administration of the schemes established under them. The failures of the schemes as instruments for securing titles are highlighted.

The concluding part examines the trends towards individualisation under the customary law. The role played by the judiciary and the bar, the increasing use of Anglo-American terminology and conveyancing forms in the disposition of interests in land in the individualisation process is discussed in this part. The issues raised by the individualisation process are discussed in the light of the socio-economic policy objectives which we consider should guide those concerned with policy formulation on land matters in deciding how the land tenure system must evolve and develop.

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I consider myself lucky to have had as my teacher and supervisor Professor A. N. Allott whose knowledge in African Law is well known. His profound knowledge and continuing interest in Ghana Land law has been of great help to me. His didactic approach to supervising the Study has helped tremendously to cure some of the defects of which the work might have suffered. But for his guidance, patience and useful advice, the results achieved in the Study would have been impossible. If there are any imperfections which in any case are bound to be found in any human endeavour, they are entirely my own. I thank him sincerely for his keen supervision which has made this undertaking possible.

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P A R T I

PRELIMINARIES

PART I

PRELIMINARIES

A. Introductory

The basic characteristic feature of land tenure and administration in black Africa generally might be said to be the way in which the land tenure systems are intertwined with the political and social organisation of society. Not only is this so in general terms but Gluckman for one could go so far as to say that the hierarchical system of customary land administration which he describes for the Lozi of Zambia in terms of primary, secondary and tertiary estates of administration is the general pattern in African land tenure.[1] This is to go far too far - not every African society was central nor was its administration hierarchical, but the picture is valid for many of the central states of West, East and Central Africa.

Similar distinguishing features of land administration based on a hierarchy of "chiefly jurisdiction" carrying with it the responsibility for land allocation, distribution and administration is identified by Ian Hamnett in his work on the Sotho.[2] If we now turn to Ghana, we can note the comments of Allott on the pyramidal structure of political organisation and land tenure in Ashanti. He writes:

> "The Ashanti system for the control and enjoyment of interests in land was fundamental to the whole structure of government, so much so that, if one removed the land rights of the chiefs, the basis on which they held their office and exercised jurisdiction over their subjects would be destroyed. This network of land rights supporting the political structure extended both upwards and downwards."[3]

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[1] See M. Gluckman, Ideas and Procedures in African Customary Law, London, 1969, pp. 253 and 257.

[2] Chieftainship and Legitimacy, London, 1975, p. 63 In Lisotho, the fundamental principle of both the administration and the tenure of land is that the land belongs to the nation, a principle which has both legal and political implications.

[3] A. N. Allott, The Ashanti Law of Property, Stuttgart, 1966, pp. 140-141

Although one may not agree entirely with Gluckman that in African traditional systems of tenure, the control, management and administration of lands are universally based on hierarchically organised political structures, such characteristic features are common and identifiable at a general level of investigation in many property systems in black Africa. However, in societies which lack unifying structures or central authorities, land rights are normally enjoyed through voluntary occupation and exploitation of land without the necessity of a formal grant or allocation based on a hierarchy of political administration or chiefly authority.[4] In some other societies, although there may be chiefs exercising jurisdictional rights over land within their areas of authority, such chiefs may not have rights of administrative control over lands at all.[5]

Such minor differences do not make it impossible, even at a general level of investigation, to identify a universal norm which appears to underlie and determine the beneficial enjoyment of rights in land and the nature of such rights or interests under black African traditional land tenure systems. What appears to be such a universal principle of traditional African land tenure is exemplified by the right of the individual member of a social group, such as the polity, the clan, the tribe or the family to beneficially enjoy property as a member of the group or community. A general principle can thus be deduced from the various land tenure systems to the effect that the beneficial enjoyment of rights in land is community-based.

This is so whether the land administration system and land rights are based on hierarchical structures or simply based on the group membership. For claims to benefit from the land are ultimately dependent on membership of one of the social groups mentioned. One can hardly discover any traditional land tenure system in black Africa where the beneficial enjoyment of rights in land is dependent on status in the sense that one is a member of a particular social class or on anything else other than membership of the land-holding community.

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[4] See the discussion of this point by C. M. N. White, in Readings in African Law, Vol. I, p. 225, ed., E. Cotran. White discusses the land tenure systems of the Tonga and some societies in Northern Rhodesia. See also the discussion of the land tenure system of the Arusha based on the family system by P. H. Gulliver in The Family Estate in Africa, London, 1964, pp. 197-229, ed. R. F. Gray and P. H. Gulliver.

[5] The Northern Ewe of Ghana and the Ibo Societies of Nigeria discussed by A. P. K. Kludze and S. N. Obi respectively, afford good examples. See respectively, Ewe Law of Property, London, 1973, pp. 141-143; and The Ibo Law of Property, London, 1963, pp. 3-35.

The appreciation of this factor - the community-based nature of the enjoyment of rights in land in the traditional scheme is fundamental to the understanding of the nature of individual rights in land under African customary law. Once this element in the customary law is understood, it can be employed as a tool of analysis of property relations in African traditional societies. A proper understanding of the community-based nature of rights in land under the indigenous law, will eliminate much of the confusion which usually characterises the discussion, exposition and critique of African systems of tenure. It can also be of help in avoiding the common error of suggesting similarities with other property systems where none exist and dissimilarities where there are practically none.

The recognition and appreciation of community basis of rights in land can restrain the Lawyer and the Land administrator from too readily applying Anglo-American and Roman-Dutch terminology to African traditional schemes of interests in land. This view is closely connected with the main theme and objectives of this work which we shall endeavour to set out below.

B. Objectives

Prior to Colonial rule, the territories now comprised in the State of Ghana were occupied by various independent polities. Although their boundaries were not well defined most of the traditional states had well-organised governments. The people of each community resided in well established towns and villages constituting the fixed bases from where they were engaged in the exploitation of the land and its resources. Members of each community or tribe were united by certain patriarchal and matrilineal traditions owing allegiance to its own individual tribal government.

Each polity, whether it was an Akan, Dagomba, Ewe or Krobo, had its own internal arrangements and rules for the control, management and administration of lands included in the areas it regarded as the territorial confines of its territory. Like the Lozi system described by Gluckman,[6] political and social organisation of society which Allott describes for the Ashanti of Ghana revolved around a hierarchical arrangement of political authority with the political head of government at the upper limits of the hierarchy.[7]

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[6] Op. cit., pp. 253-257.

[7] Op. cit.

Responsibility for the control and administration of lands devolved on the same persons exercising political and other powers associated with government. This description would also be valid for most other Akan communities including some Ga-Mashie areas where the concept of Stool lands[8] was highly developed, although there might be slight variations in the customary law in certain cases.

But in most non-Akan patrilineal communities such as the Northern Ewe described by Kludze in his pioneering work on Ewe Property law, the political heads or chiefs of the Ewe Chiefdoms did not usually perform land control funtions in their capacity as Chiefs.[9] Land administration was carried on by family heads and their principal members. If we now turn to the generally acephalous patrilineal communities of the Upper Region of Ghana which Pogucki studied and discussed in his work, it will be noted that in such societies, the functions of land administration were performed by Religious leaders known as Tindanas who might not necessarily be political functionaries.[10]

In spite of such disparities as might have existed in the internal arrangements for land administration and control in each individual polity in the country, three factors were common to all the systems. They were:

(a) an inherent right in the individual member of a land-holding group to benefit from the land regarded as a common asset and resource;

(b) the recognition of certain members of the community as having

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[8] In its physical sense the Stool is the Wooden Stool which the political ruler of a community or a chiefdom notionally occupies. In those traditional states where it exists, it is believed that it embodies the spirits of the ancestors and the souls of the body politic subject to the jurisdictional authority of the person occupying it. The Stool is not only a symbol of unity of the subjects owing allegiance to it, but also a legal personification of the office which the traditional ruler occupies. The Stool may thus be likened to the modern State concept or what the Crown represents in English jurisprudence or political theory. The paramount title in lands within the territorial borders of those native States in which this concept was developed is held to be vested in the Stool and not in an individual.

[9] A. P. K. Kludze, Ewe Law of Property, London, 1973, pp. 108-112.

[10] See, R. J. H. Pogucki, Gold Coast Land Tenure, Vol. 1, pp. 6-8.

the power of control over how rights to benefit may be exercised and;

(c) the lack of individual ownership of the soil itself, the paramount title of which was accepted by the communities as vested in the groups, such as the Stool, the clan or the family, all of which are corporate juristic entities.

The land tenure systems operated upon the basis of these common factors - factors which could be employed to harmonise the systems within the context of a national land policy.

Since the right to benefit depended on membership of individual polities, tribes or families, in terms of beneficial enjoyment of rights in land, each land-holding group regarded people from other communities as strangers and thus not entitled to benefit from the land unless the permission of those with the power of control over the community's land was first obtained on terms prescribed by the laws of the tribe concerned.

During Colonial rule, all these petty independent polities were absorbed into the Gold Coast Colony under British colonial administration. By an Imperial Charter, a legislative Council was established in 1874.[11] This was followed by the enactment of the Supreme Court Ordinance which made the common law, the doctrines of equity and the Statutes of general application which were in force in England at the date on which the local Legislature was established, operative and applicable within the jurisdiction of the Courts.[12] Subsequently, a Public Lands Ordinance was passed under which lands could be compulsorily acquired in the service of the Colony.[13]

None of the Statutes affected land rights of the natives or the land administration systems significantly. In terms of beneficial enjoyment of rights and land controls, the petty States were treated by the colonial administration as if they still retained their independence and sovereign rights. No attempt was made to use the common features of the land tenure systems to harmonise them. Boundaries remained undefined and undemarcated with the result that boundary disputes between adjoining polities began to cause problems.

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[11] Charter of 24 July, 1874.

[12] Ordinance no. 4 of 1876, S.14, Section 10 of the Ordinance permitted the application of the customary law to "Causes and matters relating to the tenure and transfer of real and personal property" provided such law was not repugnant to the principles of justice, equity and good conscience.

[13] No. 8 of 1876.

In order to deal with such problems, Sir William Brandford Griffith and Sir William Maxwell introduced the Crown Lands Bill of 1894 and the Public Lands Bill of 1897 respectively. Both Bills, particularly the latter embodied the inherent communal principles of benefit and control under the traditional schemes of tenure. Had any one of these Bills come into force, its inherent principles could have been employed to harmonise the various land tenure systems of the Colony and Protectorates under British jurisdiction.

It is one of th main objectives of this work to attempt a justification of the introduction of these Bills and the policy considerations actuating their introduction. The main theme of the thesis is that the principles of the Bill by which the administration of all lands in the Colony was to have been taken over by the colonial government was the natural consequence of the absorption and amalgamation of all the native states into the Colony under British administration. This was a principle understood in many of the polities where the rights of land administration and control devolved on those exercising political power. Even in those communities where such rights were not necessarily exercised by those wielding political power, the right in certain Elders of the Community to exercise control over communal property was recognised.

It is intended to show by this study that upon the establishment of the Colony under the colonial government, the Imperial government should have proceeded to abolish boundaries between the various traditional states and to have assumed the land control functions of the traditional authorities as was done in the Northern Territories of the Gold Coast and Northern Nigeria. Under such a policy, in place of the narrow individual community membership basis of enjoyment of rights in land, membership or citizenship of the Colony would become the broad basis for the enjoyment of such rights. The main objective is to prove through the historical analysis of the evolution of land tenure and administration that a policy of the kind could have solved the major land tenure and administration problems of the past and the present. During the course of the discussion attention will be drawn to the need to go back to the policies and principles of the abortive Land Bills of Sir William Brandford Griffith and Sir William Maxwell, at least in a modified form. It will be shown that policies of the kind hold the key to a lasting solution of the present and future land tenure and administration problems, such as insecurity of title and costly litigation, inequitable distribution of resources, problems relating to the introduction of improved and modern techniques

of land use and development and diminishing returns on agricultural productivity.

Such policies were successfully opposed in the past, as will be shown, on account of the threat they posed to vested economic interests of the native middle class consisting of the lawyers, merchants and the elite, and European firms and financial institutions. The traditional authorities, mainly the chiefs, as a result of their ignorance, illiteracy and selfish economic interests supported the opposition to such measures. The economic and political power associated with land controls and rights therein constituted the key obstacle to the implimentation of such policies in the past and will continue to be the major stumbling block to the resurrection of such policies at present.

But such possible objections should be regarded as the inevitable consequences of land reform which normally implies redistribution of political and economic power. It may involve the mass of the presently excluded farmers in the rural communities gaining a voice in the shaping of public programmes and policies. Decisions concerning land reform inescapably imply not only economic and social policy considerations, but political action. The view to be urged in this work is that land reform requires bold political decisions within the context of sound national land policies, formulated in accordance with the socio-economic policy objectives of the country. Unlike the colonial government which dragged its feet when such bold and decided action was required, present independent governments ought to master pressure groups, particularly those of peasant organisations within the rural community, through public education to counter the expected opposition of the minority of strong powerful interest groups and push such measures through.

The thesis seeks to draw attention to the fact that if a reasonable level of agricultural productivity is to be maintained, then the formulation of sound national land policies will be inevitable. Firstly, lands or interests in land will have to be made cheaply and easily accessible to as large number of people as will require them for cultivation and development. Secondly, modern techniques of agricultural production ought to be given the proper attention that they deserve. Thirdly, perhaps the most important of all, the peasant farmer who needs direction ought to be supplied with and taught the efficient application of fertilizers, manure and other inputs necessary for improving the productive capacity of the soil.

Since peasant farmers do not have the capital for the necessary modernisation required for improving productivity, the responsibility

for giving advice and supplying inputs devolves on the government. But this can be done more effectively if farmers are assisted in groups or co-operatives. It will be a sensible policy for large tracts of land to be made available to a large number of farmers where resources can be concentrated at places where a large number of people can make use of them. This will be better and easier than the situation where assistance will be given to individuals cultivating lands of uneconomic sizes scattered all over the country.

Vesting of the administration of all unoccupied lands in the country in the government in the manner proposed in the abortive Land Bills of 1894 and 1897 can provide a sound basis for organising productivity in the manner suggested. For this reason, it is intended to highlight the present trends towards individualisation of interests under the customary law - trends which will not only undermine the traditional tenure systems but the success of the sort of policies we seek to urge in the thesis.

Since the withdrawal of Sir William Maxwell's Bill, the tendency had been to encourage the evolution of customary interests in land into individual freehold titles of the English type. As early as 1891, William Brandford Griffith, son of Sir William Brandford Griffith advised his father that the primary objectives of the Crown Lands Bill of 1894 should be the creation of Freehold titles[14] and sought to promote this view relentlessly at the courts of the Gold Coast where he became the Chief Justice.[15] Bentsi-Enchill regards the process of individualisation of interests as progressive[16] and Asante holds the view that the evolution of the customary interest into the "freehold is not necessarily incompatible with the trusteeship idea, which is essentially an ethical justification of property."[17] Today, the Law Reform Commission of Ghana has recommended legislation for the transformation of the land user-rights of individuals under the customary law into what it calls , "Customary freehold".[18]

One of the ways in which individual titles is sought to be established is the introduction of a system of Land titles registration in the country. It is intended to draw attention to the fact that although individualisation

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[14] Secret Dispatch from Sir W. B. Griffith to Ripon, 29 August, 1894, C0879/46.

[15] See his decision in Lokko v Koklonfi (1907) Ren. 450.

[16] K. Bentsi-Enchill, Ghana Land Law, London, 1964, 88.

[17] S. K. B. Asante, Property Law and Social Goals in Ghana 1844-1966, Accra, 1975, 31.

[18] See The Report of the Law Reform Commission on Proposals for the Reform of Land Law, Accra, Nov. 1973.

of interest has never been stated as one of the objectives of introducing such schemes, their implementation usually tends to promote it and has that effect. The objective is to show that apart from the expense involved, the consequences for the land tenure system, the economic, social and political implications for the country have never been seriously considered. Moreover, there are formidable obstacles to the implementation of such programmes, since for them to be successful, rights in land would have to be defined and settled, qualified personnel for the survey of lands and other equipment necessary for the programme would have to be provided.

It is the aim of this work to focus attention on the failures of the system through a historical account and examination of the way the system had worked in the past and the analysis of the data collected on the way the system is working at present. In the process, efforts would be made to shed light on the short-comings of the system which would be found to be due mainly to lack of surveys and qualified personnel, equipment and public education on the programme. The intention is not only to demonstrate the failures of the system with regard to the attainments of its primary objectives of securing titles and thus prevent costly litigation, but to bring into relief, the desirability of vesting land administration in the government as a better alternative to the expensive and the already unsuccessful programmes of land registration.

This is where the policies of Sir William Maxwell exemplified in his abortive Land Bill of 1897 will come into focus. It is intended to draw attention to the success of that kind of policy in the Northern Territories as affording a good example of the feasibility of similar policies in the whole of the country.

The thesis is thus not concerned with the exegesis of all aspects of the customary land law in depths. It is concerned with the discussion of the evolution of customary land tenure and administration in terms of the already familiar rules and procedures. Questions relating to legal capacity to dispose of interest in group-held property, the nature of individual interest in land under the traditional land tenure systems and issues concerning the appropriate choice and use of terminology will be discussed only to the extent that such discussion can serve as a preliminary information to the reader who is not already familiar with such questions.

Such treatment of the subject is also intended to enhance the understanding and appreciation of the nature of the land tenure and administration problems which emerged during colonial rule and the measures adopted

to solve them. The aim is to highlight such factors as the reception of Anglo-American ideas of tenure, the development of the mining industry and the concession boom which accompanied that development in the last two decades of the nineteenth century, the introduction of permanent agriculture through cocoa and coffee plantations and the considerable appreciation of land values consequent upon these developments. These developments had a great impact on customary schemes of tenure and caused land administration problems which had to be solved.

In discussing the rules relating to customary land administration and individual interest in land, the main objective will be to show that once the nature of individual rights under the indigenous law is appreciated in terms of rights of benefit and control, the measures adopted under the abortive Land Bills of the last decade of the nineteenth century to solve land tenure problems would be understood from the right perspective. It should become obvious that such measures would not necessarily have infringed individual property rights as the opponents of the measures would make it appear. Instead, such measures would most probably have protected individual rights against the improvident, ignorant and generally greedy traditional authorities in whom land control functions were vested and against the powerful European speculative capitalists and their native middle class intermediaries.

C. Group Titles

One of the most central but common themes of traditional property systems in Ghana, as in many traditional African property systems, is the recognition of non-natural including super-natural entities as in some ways participating in the legal order.[19] Related to this peculiar feature of the customary land laws is the great importance attached to social and political organisation of society in property relations. The customary land laws were, thus, particularly in the past, based on groups and communities in the same manner as the beneficial enjoyment of rights in land was dependent on membership of a social group or community.

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[19] See A. N. Allott, "Legal Personality in African Law", in Ideas and Procedures in African customary Law, London, 1969, p. 180; see also S. N. G. Obi, op. cit., p. 25 ed., M. Gluckman,

Thus under the indigenous schemes of tenure in Ghana, the Stool or the Oman, the village community, the clan, the family or dzotinuwo are corporate juristic entities of the customary law. They are accorded legal personality and are capable of suing and being sued. Bentsi-Enchill writing about this distinctive feature of the customary law in relation to land titles says:

> "The title to property owned by a group such as the family or clan, the village community or State or Oman or Stool is vested not in any member of the collectivity, but in the group regarded as a unit; i.e., such title is vested in the corporation and not in the corporators."[20]

This is one fact on which all students of the customary law are agreed. Allott commenting on the attribution of rights and duties to such legal entities under Akan law says that the Stool has both plural (Corporation aggregate) and singular (C. F. Corporation sole) characteristics.[21] In Akan communities where the concept of stool lands is highly developed families often have stools occupied by family heads. Such stools symbolise the unity and identity of particular kinship groups in which title in property held by them is vested.

In most non-Akan patrilineal communities of Ghana such as the Ga-Adangbe, the Ewe or the generally acephalous communities of the Northern Territories, the concept of stool lands is not highly developed. In communities like those of the Northern Ewe for example, there are stools symbolising the unity of the chiefdom or kinship groups. But title

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20 Kwamena Bentsi-Enchill, op. cit., p. 41. See also J. M. Sarbah, Fanti Customary Laws, London, 1968, 3rd ed., 62, where he writes: "The village community is a corporate body, of which the members are families, or family groups, residing in the several household, and including the joint as well as patriarchal families." For further discussion of the issue see the following: A. N. Allott, "Legal Personality in African Law", in Ideas and Procedures in African Customary Law, op. cit., p. 179; Gordon Woodman, "The Family as a Corporation in Ghana and Nigerian Law", 11 African Law Studies, pp. 1-36; J. B. Danquah, Akan Laws and Custom, London, 1928, p. 200; A. P. K. Kludze, Ewe Law of Property, London, 1973, chapter five, and N. A. Ollennu, Principles of Customary Land Law in Ghana, London, 1962, chapter 2.

21 Loc cit., p. 191.

in landed property is not vested in such stools. Instead, paramount title in land is vested in families or kinship groups. Like the Stool in Akan law, such families or dzotinuwo are corporate juristic entities of the customary law.[22] The conclusion to be drawn from various expositions of the customary law is that the paramount title in Lands is generally vested in corporate groups and not in individuals. Rights and duties are attributed to the groups as artifical legal persons of the customary law and are separate and independent of their natural constituents.

D. Group Administration

We have seen that the paramount title is vested in artificial legal persons of the indigenous law. Therefore natural persons are often selected or elected to represent and act on behalf of the Stool, the family or any of the artificial legal persons concerned. Under Akan and other systems of law where the concept of stool land is developed, the paramount chief and his councillors act on behalf of the stool. For the family, such land control functions devolve on the head of the family and his principal members. The rules which govern the control and administration of such property are practically the same whether it is a Stool, family, clan or a village community land.[23]

In exercising control over Stool or family lands the customary law does not permit either the Stool occupant or the head of the family to manage affairs on his own. The former is obliged to consult his council of subordinate chiefs and elders. In a similar way the latter is required to act in consultation with his principal members. When the head of

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22 Like the Ewe, most of the patrilineal communities of the Northern and Upper Regions have kinship groups in which the paramount title in land is vested. These groups referred to by Pogucki as maximal lineages or clans acquired their titles by settlements. See J. H. R. Pogucki, Gold Coast Land Tenure, Vol. 1, pp. 6-9. In this discussion of the customary land law and administration, the traditional tenure systems of the North are not important for our purposes, since the administration of all lands there is vested in the government. The nature of land administration in that part of the country is treated fully below. See pp. 254-293.

23 In the discussion of the land control functions of traditional authorities, the emphasis will be on the head of the family and its principal members; but it should be borne in mind that the rules are practically the same in each case. The nature of Akan-type family interest in land may differ from those of a partrilineal family interest in land in the sense that while the latter may be paramount, the former may be subordinate to the Stool. Nevertheless they are both persons of the customary law.

tha family and his principal members of the stool occupant and his council of Surbordinate Chiefs and elders are acting together on behalf of the family or stool, they constitute what is called a "management committee".[24] The head of the family or stool occupant may thus be referred to as the chairman of the management committee when acting in a representative capacity of the family, or the stool.

The general rule governing the administration of any such group-held property is that for any act done on behalf of the customary legal entity which the management committee represents to be valid, the chairman of the management committee must act in concert and with the consent and concurrence of other members of the committee.

E. Consents necessary for valid alienation of property.

It has already been pointed out that beneficial enjoyment of rights in land under the traditional law is community-based in the sense that membership of the community or a land-holding group confers an inherent right on the member to benefit and enjoy rights in land through the development and occupation of vacant land. A non-member of one land-holding community is thus a stranger in another. In order to enjoy property rights in a community where he is a stranger, he would have to approach the management committee of the land-holding group concerned and acquire it in accordance with the rules prescribed by the customary law.

One of the most important but common problems for prospective acquirers of interest in land who are strangers is how to identify the persons with the legal capacity to deal with the property. Even where the chairman of the management committee - the head of the family or the stool occupant and other members are known, the rules relating to their land control functions are unclear. When the customary law says that the chairman of the management committee must act in concert and with the consent and concurrence of the other members, does this mean that the chairman must be joined in every transaction by:

(a) all the other principal members,

(b) a majority of them, or

(c) a minority of them?

If the chairman of the committee does not participate in the act, can all the other members or a majority of them take a legally binding decision?

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[24] Bentsi-Enchill coined the phrase, see his Ghana Land Law, op. cit., p. 49.

On those occasions where the Chairman is acting in concert with all the other members, is it a unanimous or a majority decision that will bind the group?

These are some of the pertinent questions relating to the consents necessary for the disposition of family or stool lands for which the customary law does not provide a clear and ready answer. As will be seen from this discussion, the difficulties of identifying members of the management committee, the uncertainties in the law and certain exceptions to the general rule which will be discussed, constitute some of the major sources of insecurity of title and costly litigation in the land tenure systems of the country. These problems are exemplified in the management of family property which will be discussed in order to draw attention to the difficulties.

(i) The head of the family acting alone.

It is clear from Sarbah's work that the head of the family has no legal capacity to deal with family land in his own rights. He writes:

> "Neither the head of the family acting alone, nor the senior members of a family acting alone, can make any valid alienation nor give title to any family property whatsoever." [25]

The logical basis for this proposition seems to be that as the management committee represents the family - the artificial legal entity in which title is vested, it will be necessary for the management committee to be properly constituted in order to be in a position to act in that representative capacity. Thus where the head is acting alone, he cannot be said to be doing so in the name of the management committee or as a representative of the group. Similarly, neither all the principal members without the head nor the head with some, but exclusing some principal members can constitute the group or the management committee which alone has the legal capacity to act on behalf of the family.

It follows that acting in concert by members of the committee is a condition precedent to the validity of any action performed in the name of the family. Here, a distinction must be drawn between a concerted and a majority action. It should be expected that not all members of the committee will approve of a particular kind of action in the name of the family. But it is important that all members of the committee should be present or given the opportunity to be present and to make their views known. Where after deliberation on the issue a majority

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[25] H. M. Sarbah, op. cit., p. 79. Emphasis supplied.

decision is taken, it will be a concerted action albeit a majority and not a unanimous decision. It will not be a concerted action where some of the principal members are ignored and decisions taken without their knowledge or participation. In such a case the committee would not only be failing to act together but would not be properly constituted as a representative of the family.[26]

This would seem to be the logical and legal basis for certain decisions of the courts in which it was held that the disposition of interest in family property by the head of the family without the consent and concurrence of the principal members was invalid or void. Thus in Awortchie v Eshon,[27] where a family land was sold by the head of the family without the concurrence of the principal members, the sale was set aside and the head of the family was ordered to pay the purchase price. In Gaisiwa v Akraba[28] the head of a family at his discretion sold family property in order to defray family expenses incurred in litigation. Members of the family were not informed before the sale. It was held to be invalid. A similar conclusion was reached in the 1899 case of Insilhea v Simons[29] where the family had sold the property without the consent of the principal members. In its judgment the court said:

> "It is a settled rule of native law that the family property cannot be sold except by the head of the family with the concurrence of the elder members . . ."

It is thus clear, on the strength of these authorities that the head of the family has no legal capacity to dispose of family property in his own right.

(ii) Disposition of family property by principal members alone.

From what has been discussed about the constitution of the management

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26 In Awortchie v Eshon (1872) Sar., F.C.L., 170, it was held that a family meeting must be called to discuss the alienation. It should be pointed out, however, that it will not always be possible for all principal members to attend. A principal member may fall sick, travel or deliberately refuse to attend. In such cases, the authorities suggest that notice to such a person would be enough. The following cases: Tamakloev Attippoe, Unreported, Civil Appeal, No. 38/52, W.A.C.A.; Welbeck v Captan (1956) 2 W.L.R. 47 and Okoe v Ankrah /1961/ G.L.R. 109; all suggest that if a principal member is informed and he refuses to attend the family meeting he cannot challenge a decision reached later. See also. N. A. Ollennu, op cit., p. 147 and pp. 245-256. In Assraidu v Dadzie (1890) Sar., F. C. L., 174, a principal member of the family who travelled to Salaga and remained there for 8 years was held bound by an alienation in which he did not concur. See also Akakpo v Afafa (1952) D. C. (Land), '52-'55, 116.

27 (1872) Sar., F.C.L. 170.

28 (1876) Sar., F.L.R. 94.

29 (1899) Sar., F.L.R. 104 at p. 105

committee, it is obvious that the principal members alone as a group can have no legal capacity to alienate family property. In the 1947 case of Agbloe v Sappor[30] where the issue came up for determination, the West African Court of Appeal came to the same conclusion, although upon a different reason which as will be seen,was wrong.

In that case, family land was pledged by the head of the family. He was unable to redeem it and the family land was in danger of being lost. Sappor, an enterprising member of the family redeemed the land from his own resources. In appreciation of his action, four out of the six principal members of the family made a gift of part of the redeemed land to Sappor. One of the two principal members ignored in the transaction was the head of the family.

At the West African Court of Appeal where the validity of the transaction was challenged, Harragin C. J., observed that there were two points for serious consideration in the case.[31] Firstly, did the so-called conveyance by four of the principal members of the family land in fact, according to native law and custom, convey the land to the respondent's predecessor in title? Secondly, because the head of the family was at variance with the majority of its members, would this automatically give the majority the right to dispose of the family land?

The main issue for the consideration of the court thus turned on the question as to whether it was possible for the principal members alone or the majority of them alone (without the head of the family) to perform the functions of the management committee and bind the family. In order to answer the question, the court made reference to the case of Insilhea v Simon referred to above[32] and concluded that the family land could not be alienated except by the head of the family with the concurrence of the elder members. The court regarded it as important the fact that throughout Sarbah's work on Fanti customary laws, it was assumed that in every case the land ought to be alienated by the head of the family and to be concurred in by the principal members.[33]

But the court did not base its decision on the authority of Sarbah's work or the cases referred to. Instead, the Court quoted with approval, that portion of Lord Haldane's judgment in Amodu Tijani v Secretary of Southern Nigeria[34] in which his Lordship said that the head of the family

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30 (1947) 12 W.A.C.A. 187.

31 Ibid., at p. 188.

32 See Note 29.

33 Agbloe v Sappor (1947) 12 W.A.C.A. 187 at 189

34 /1921/ A.C. 399 at 404

was to some extent in a position of a "Trustee" and as such held the land in trust for the use of the community or family. Accepting this proposition as the correct statement of the law, Harragin C. J., concluded that the head of the family was in the position of a trustee. Upon the basis of this conclusion he declared:

> "The head of the family may be considered to be in an analogous position to a trustee from which it follows that it is quite impossible for land to be legally transferred and legal title given without his consent. The alleged deed exhibit 'B' was therefore void ab initio, and the respondent derived no right of absolute ownership by virtue thereof."[35]

One would agree with the conclusion of the Chief Justice that the transaction was void in this case, but not with the basis upon which such conclusions were founded. Under the customary law, the head of the family is not in an analogous position to a trustee in the sense in which the term is employed under English law.[36] As pointed out already, without the participation of the head of the family in the transaction, the management committee would not be properly constituted so as to be in a position to act as a legal representative of the family.

This would seem to be the reasoning behind many of the cases in which transactions concluded by the head of the family alone, all the principal members alone or a minority of them alone without the participation of the head were held to be void or invalid. If the proposition that the head of the family is a trustee were correct, then he would be in a position to transfer legal estate in the family lands. But this would be impossible under the customary law.

In Bassil v Honger[37], the Court of Appeal declared the transaction invalid because the principal members of one branch of the family whose consent was necessary for the validity of the transaction was ignored. Similarly in Nelson v Nelson[38], it was the head who made the conveyance of the family property without the concurrence of the principal members of the family. It was declared invalid. Again in Owiredu v Moshie,[39] it was the head of the family together with some of the principal members of the family who leased the property without bringing other principal members whose consents were necessary into the decision making process.

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[35] Loc. cit.

[36] See a fuller discussion of this at pp. 56-59.

[37] (1954) 14 W.A.C.A. 569.

[38] (1951) 13 W.A.C.A. 248.

[39] (1952) 14 W.A.C.A. 11.

In this case also, the transaction was declared void. If the head of the family were a trustee, the transactions in all the cases referred to would have been valid, subject to the equities of the family members. It can thus be concluded on the basis of the authorities discussed that neither the head of the family alone nor the majority of the principal members alone can make valid disposition of family property.

(iii) Voidable grants

If this view of the indigeous law has been consistently followed, the problems relating to the valid disposition of interest in group held property under the traditional law would have been minimised. But this is not the case. Against the judicial views discussed above is a school of thought which holds the view that such violations of the rules do not necessarily render the transactions void but only voidable under certain conditions.

This view was established in an early decision of the Full Court in Quaisie Bayaidee v Quamina Mensah.[40] In this case, the plaintiff sought to recover from the defendant a piece of land the possession of which he claimed the defendant had unlawfully deprived him. It appeared from the facts that the plaintiff purchased the land in dispute from one Kofi Aigin who was occupant of the family Stool 14 years earlier. The latter sold the property on the understanding that it was his individually "owned" property. The plaintiff remained in possession, developed it and remained in occupation until the action was begun.

The lower court gave judgement in favour of the plaintiff. The defendant appealed on the grounds that the land was family property and that the vendor, Kofi Aigin although the occupant of the Stool at the time of the sale had no power to make a valid sale of the land without the concurrence of the family members. It was alleged that one of the members of the family, Eccua Assibill, protested against the sale at the time but the head of the family ignored her protest and went ahead with the sale.

On the basis of these facts, the full court held that whatever right of challenging the sale the family had was barred by their acquiescence and the plaintiff's continuous undisturbed possession for so long. The main grounds of the decision were contained in the following statements:

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40 (1878) Sar.F.L.R. 171.

> "Now although it may be, and we believe it is the law, that the concurrence of the members of the family ought to be given in order to constitute an unimpeachable sale of family land, the sale is not in itself void, but is capable of being opened up at the instance of the family, provided they avail themselves of their rights timeously and under circumstances in which, upon rescinding the bargain, the purchaser can be fully restored to the position in which he stood before the sale." [41]

It should be pointed out that the court erred in its view that the transaction was not void but voidable. The law says that the transaction must be concluded by the head of the family in concert and with the consent and concurrence of the principal members of the family. The facts of the case showed that it was only the head of the family who disposed of the property - a clear violation of the rule on alienation of group-held property under the customary law. As argued earlier, title vests in the family and not in the head of the family. He alone cannot constitute the management committee which alone has the legal capacity to act on behalf of the family. By the operative effect of the rule that nemo dat quod non habet therefore, he had no title to pass under the transaction and was thus void. Surely, to say of a transaction that it is voidable presupposes the existence of a valid contract which on the basis of the facts of this case did not exist.

Notwithstanding the apparent flaws in the arguments of the court in this case, its principles have been followed in some cases. In Manko v Bonso,[42] a case in which the validity of the sale of a family house by the head of the family without the requisite consents was challenged, the West African Court of Appeal said that if the decision in Bayaidee v Mensah was sound, and the contrary was not suggested by the appellants' counsel, "then it appears clearly that the sale of 1885 was not void, but merely voidable and the plaintiffs having taken no steps to set it aside have no title to the land in dispute."[43]

This view of the law was restated in Yaoga v Yoaga[44] where a grant made of family property by the head of a patrilineal family without the requisite consents was in issue. Although the case of Bayaidee v Mensah was not referred to, its principles influenced the Court in its decisions.

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41 Ibid., p. 172.

42 (1936) 3 W.A.C.A. 62.

43 Per Petrides, C.J., at p. 63. See the criticism of this decision by K. Bentsi-Enchil in his Ghana Land Law, op. cit., pp. 54-56.

44 (1958) 3 W.L.R. 309.

The court said:

> "A sale of family property by the head purporting to be with the concurrence of the principal members of the family is voidable, not void, if not in fact made with such concurrence, and it can be set aside at the instance of the family if members of the family act timeously."[45]

It must be said that not only are these views inconsistent with that line of authority which maintains that the non-compliance with customary rules for valid alienation of group-held property is void, but do not state the customary law correctly. Koker suggests that the result of the cases shows that an irregular alienation of family property would be void or voidable according to the description of the property sold. If the property is described as family property and is being sold for and on behalf of the family or by and with the consent of the family, the sale may be merely voidable. If on the other hand, it is described as individually held property, then it is of course void, as the maxim nemo dat quod non habet applies.[46]

Koker cited among Nigerian cases for these propostions, the Ghana case of Manko v Bonso discussed above. It should be pointed out, however, that even if such a distinction is made in Nigerian cases, it is doubtful if the courts in Ghana draw any such dichotomy, and it should be added that even if a distinction in respect of the way the property is described has been made, it will be one as to form and not of substance.

It would have been possible for the courts to achieve the same results in those cases in which the unconsulted family members were in danger of losing their rights in the family lands without necessarily declaring the transactions voidable and not void. As Bentsi-Enchill points out, the fundamental issue of justice presented in such cases "is the one of deciding as to which of two innocent parties - the purchaser or the unconsulted members of the family - is to bear the loss in the case of a purported sale of family property not made by the proper persons."[47]

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45 Ibid., at p. 311. But see the decision of Dao v Klu [1961] 2 G.L.R. 555 by the same judge. He implied that a grant made by the family head to the execution-debtor without the knowledge of the family was invalid. He regarded the lack of knowledge by the family as fatal to the claimant's case "because its effect would be that the grant to the execution-debtor is null and void and he acquired no interest whatsoever in the property which can be attached." at p. 557. Emphasis supplied. See also his Customary Land Law in Ghana, op. cit., pp. 127-128 where he writes: "Any conveyance made by the occupant of the Stool alone, or by the head of the family alone, is null and void ab initio, and any alienation made by the principal elders alone without the occupant of the Stool or the head of the family is likewise null and void ab initio,"

46 G. B. A. Koker, Family Property Among the Yorubas, 2nd ed., London, 1966, p. 97.

47 K. Bentsi-Enchill, op. cit., p. 56.

This means that in most of the cases in which it was decided that an irregular grant was not void but voidable, both legal and policy considerations come into play. The policy considerations here, as Woodman points out, involve the conflict between the interests of families and those of purchasers of family property.[48] If a head of family is to be able to make unauthorised grants of family property which after a time will become binding on the family, a family may lose property without the management committee ever consenting to its alienation. If such sales were held void, the family would lose the property if it were itself guilty of acquiescence.[49] If on the other hand the family did not sleep on its rights and acted timeously, it should be able to recover its land and the purchaser would be free to pursue his remedies against the irregular seller of the property.

Such policy considerations involve equitable principles of acquiescence, estoppel and larches. Such principles would seem to be the controlling factor in the decisions. Thus in Bayaidee v Mensah itself, Abbey v Ollenu[50], Bokitsi Concession[51] and cases of similar nature were decided on the equitable principles of laches, acquiescence and estoppel. The courts could have employed such equitable principles in the decision making process to achieve just results without the necessity of introducing the concept of voidable transactions. This unnecessarily complicates and confuses further, the problems relating to the disposition of group-held property under the customary law and the uncertainty of title which is consequent upon it.[52]

(iv) Insecurity of title

It may be observed from the discussion of the cases, some of the problems associated with the administration and management of group-held property, such as family, Stool or community lands. The most obvious of these problems concerns the difficulty faced by strangers in identifying members of the management committee. The uncertainties in the law can make easy the perpetration of fraud on strangers. The problems which frequently

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48 Memorandum on the Reform of Land Law in Ghana, Accra, 1975, p.76.
49 Ibid.

50 (1954) 14 W.A.C.A. 567.

51 Concession Inquiry No. 38, (1903) Sar.F.L.R. 159.

52 For some discussions of the problem of void and voidable grants see the following: E. D. Kom, "Unlawful Disposition of Family Land - Void or Voidable?" (1967) 4 U.G.L.J. 111; G. Woodman, "A Note on Voidable Grants in Customary Law", 3 Law in Society (Ahmadu Bello University, Nigeria) (1967) 59; E. D. Kom, "Limitation of Action to Recover Land", (1968) 5 U.G.L.J. 13 at pp. 61-63.

arise from lack of clarity in the rules and the diffiiculties faced by prospective purchasers of group-held property were adequately described by Coussey J., in Clerk v Okai[53] when he said:

> "The time of the courts is frequently occupied with cases where one or more members of a family, perfectly aware of a contract and its terms, keep in the background their identity more or less clouded, to declare, if it suits them, at a later occasion, that they had no knowledge of the transaction and to claim to set aside the transaction."

Apart from the difficulties outlined above, there is also the uncertainty about whether it is the majority or unanimous decision of the committee which shall be binding on the group or the family. Sarbah provides a clear authority on the point. He writes:

> "The head of the family cannot, without the consent of all the principal members or the greater part thereof, that is the ebusuafu, alienate the immovable ancestral or family property.[54]

It is clear from this statement that in Sarbah's view, either the unanimous or the majority decision of the management committee will be enough. In the analogous case of the election of a family head, Sarbah says that "all", or "the majority" of the principal members of the family must be present and consent in his election.[55]

But against this view are some authorities suggesting unanimity as to consent on the alienation. In Bassil v Honger,[56] the court said obiter, that . . ."the concurrence of all those persons who claim to be the principal members" would be necessary. It was also implied in Solomon v Codjoe[57] that a unanimous decision was required. In Kwan v Nyieni[58], the Court of Appeal made the emphatic declaration saying:

> "In our opinion the principle of law is that a deed of conveyance, mortgage or lease of family land which is on the face of it executed by the head and another member, upon proof timeously made that its execution was without the knowledge and consent of all the principal members of the family, is null and void."

It is clear from these cases and what Sarbah says on the point that there is no certainty as to what proportion of the management committee can take a decision on behalf of the family and which will be binding. All these constitute a recipe for uncertainty of title and costly litgation as is evident from the volume of litigation arising from these doubts.

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53 (1950) D. C. (Land) '48 - '51, 270.

54 J. M. Sarbah, op. cit., pp. 78 and 90. Emphasis supplied.

55 Ibid., p. 38

56 (1954) 14 WACA 569. But see comments of Woodman, Memorandum on the Reform of Land Law, op.cit. 71.

57 (1954) D.C. (Land) '52-'55, 265.

58 /1959/ G.L.R.67. Emphasis supplied.

(v) Some Exceptions to the General Rule.

The problem of identifying members of the management committee and the prevention of fraud on stranger-purchasers of group-held property have been made even greater by certain exceptions to the general rule on land alienation. In Vanderpuye v Botchway,[59] it was held that children of a sixth-cloth marriage under Ga-Mashie law were entitled to a share of the self-acquired property of their father if he died intestate. This means that under Ga-Mashie law, although children may not be members of the family or principal members of the family, they can challenge the validity of any disposition of the family property by a properly constituted management committee on the grounds that they have not been consulted. It follows that a stranger-purchaser of such property is required, not only to look for and identify the members of the management committee, but should also make a further inquiry as to whether some persons such as the children of a sixth cloth marriage have interest in the property.[60]

Allott suggests another possible exception to the general rule similar to the one just discussed. He suggests that a family may have a personal right in family property distinct from the communal right of the family.[61] For example, a family member may have a right of residence in a family house. In such a case a sale of the house without his knowledge and consent may be sufficient to invalidate the transaction.[62]

As Woodman argues, on the basis of this view, a right would be vested in junior members and in persons like the children of a male member of a Matrilineal family to prevent a proposed sale of family property.[63] But even in these exceptional cases it is not clear whether such persons need only to be consulted or whether their consent must also be had. The

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59 (1951) 13 W.A.C.A.164

60 Sarbah reports Edmund Bannerman's opinion supporting this view. See his F.C.L., op. cit., pp. 109-110. See also Ankrah v Odamten (1952) D. C. (Land) '52-'55, 72 where it was held that the consent of all such children would be necessary for the valid alienation of any such land. Woodman is of the view that this follows that each child will have a right of veto, unless the decision of all of them (perhaps by a majority vote) was needed. Memorandum on the Reform of Land Law, op. cit., p. 58.

61 A. N. Allott, Essays in African Law, London, 1960, pp. 305-6.

62 Ibid. See Woodman's comment in "The Alienation of Family Land in Ghana", (1964) I.U.G.L.J. 26.

63 Woodman, Memorandum. Op. cit., p. 58.

question is whether despite their dissent a unanimous or a majority decision of the management committee will be sufficient to enable the latter to dispose of the property against the wishes of such persons. These are questions for which the customary law on the administration of groupheld property does not provide ready answers. The result is insecurity of title and costly litigation which has been a characteristic feature of land transactions under the customary law. These problems are made worse by an unnecessary dichotomy which the courts draw between what is termed the wider and immediate family. A problem faced by the prospective purchaser of family land is whether he should deal with the wider or the immediate family. Is the latter a legal person of the customary law, separate and independent of the former of which it is a mere segment?

If so, can the management committee of either of them dispose of the property managed by it in such a manner as to divest the other of any expectant or reversionary interest that it might have without the consent of the other? The courts have not as yet provided clear cut answers to the questions raised by the distinction drawn between the wider and immediate family.[64]

Bentsi-Enchill would seem to suggest, as a solution to the problems of identifying the members of the management committee, the recording of their names and thus create an official record which can assist outsiders seeking to transact business with the family. The onus of keeping the list of names up-to-date could then be placed on the family concerned.[65]

The weaknesses of such a proffered scheme become obvious when it is realised that for it to be effective as a means of providing information to the general public, it would require more than a mere production of records listing the names of the members of the management commitee of families, Stools, clans and communities of all sorts. Is the registration of names to be accompanied by photographs or identity cards of members? How is the purchaser to know that the names given correspond to the persons he is dealing with?

For such a scheme to be effective, not only the names should be recorded

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64 For authorities favouring the immediate family view, see Arthur v Ayensu (1957) 2 W.A.L.R. 357; Re Eburahim deceased Ansa v Ankrah, (1958) 3 W.A.L.R. 317; Larkai v Amorkor (1933) 1 W.A.C.A. 323; Enin v Prah / 1959/ G.L.R. 44. For the wider family view, see Amarfio v Ayorkor (1954) 14 W.A.C.A. 554; Pobee v Arhin / 1964/ 1 G.L.R. 42. For the discussions of the problem see G. Woodman, "Two problems in Matrilineal Succession", (1969) 1 R.G.L. 6; Bentsi-Enchill, op.cit., pp. 132-142. Kludze, op.cit., Ewe Law of Property, op.cit., p. 272. Allott, "Family Property in West Africa: Its Juristic Basis, Control and Enjoyment", in Family Law in Asia and Africa, ed., J. N. D. Anderson, London, 1968, p. 132.

65 K. Bentsi-Enchill, op.cit., p. 51.

but the lands over which the management committee has control would have to be clearly defined, surveyed, demarcated and recorded. This would amount to a form of land titles registration. But if the past and present machineries of land titles registration have failed to solve these problems primarily due to the lack of facilities for accurate surveys, then the suggested method of solution is less likely to succeed.[66] Assuming that the mere recording of the names will have a measure of success, the exceptions to the general rule on alienation of group-held property could still operate to make the purchaser's title insecure, since he would not from the recordings of the names alone become aware of any junior member who might have acquired a right in the proprty the valid disposition of which would be subject to his consent.

It should be borne in mind that the inherent problems of the rules relating to land administration under the traditional law did not come into the open until colonial rule.[67] Until European mining firms began the acquisition of mining concessions on a large scale in the last two decades of the nineteenth century and the introduction of permanent agriculture at about the same period, economic activity involving land use and development was limited to the production of goods at a subsistence level.[68]

Land rights were thus not keenly contested as there was no need to do so. For such reasons, the inherent problems of the land tenure systems remained dormant and were only stirred up by economic activity in the last two decades of the nineteenth centurey. The introduction of the Crown Lands Bill in 189[illegible] and the Public Lands Bill of 1897, as we shall see, were measures designed to deal, among other problems to be discussed, with the insecurity of title to which the difficulties involved in identifying members of the management committees and the uncertainties relating to the rules governing the disposition of interest in land under the indigeous gave rise.[69]

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66 See the discussion of the past and present machineries for land titles registration in the country and their failures at pp. 343-432

67 See the discussion of this point at p p. 79-87.

68 Ibid.

69 See Part II.

F Individual Rights in Land

It can be seen from the discussion of group-held property and its administration under the customary law, the prominence given to the control function of the management committees of families, Stools, village communities and clans. The attention which is often focused on the functional role of such committees with regard to the disposition of interest in land and the problems associated with it often tend to overshadow the role which the individual plays in land exploitation and the nature of his rights and interest in the property.

The value of discussing individual rights in respect of group-held property under the traditional law is that, it will assist in dispelling some misunderstandings regarding the nature of such rights and to expose the confusing use of terms suggesting similarities with terms in Anglo-American systems of tenure where none exist and dissimilarities where there are practically none. One of the main objections raised against the Crown and the Public Lands Bills of 1894 and 1897 respectively was that such Bills would have the effect of infringing individual rights in land or at least that, they would be employed deliberately to achieve that result. However, as will be seen from the discussion of colonial land policy, the Colonial Office in London accepted such arguments against the measures contained in the Bills partly because of certain misconceptions about the nature of individual interest in land under the indigenous law.

Shedding light on the nature of such rights as a sequel to the discussion of colonial land policy is thus essential for the appraisal and analysis of the Land Bills from the right perspective. Such a discussion will also have the additional advantage that in Ghana where the introduction of a system of lands titles registration is under serious consideration, attention will be focused on the definition and classification of registrable interests which will be some of the essential preliminary undertakings under the scheme.

As already indicated, individual rights in land under the customary law is community-based. In polities where the paramount title in lands is not vested in the Stool or the village community, such a title is vested in families, clans or lineages. The Northern Ewe and those societies of Northern and Upper Regions of Ghana described by Kludze and Pogucki respectively provide good examples. The former quoting with approval the oft-quoted and criticised Report of Rayner, C. J., in which the latter stated that the notion of individual ownership was foreign to native ideas, says that this statement expresses the tradional view of Ewe Land law.

He writes:

> "The acquisition or holding of the paramount or absolute interest in land by an individual was unknown to the Northern Ewe. The paramount or absolute interest in land could be vested only in the families or dzotinuwo as legal entities." [70]

Undoubtedly, the paramount title-holding families or lineages within such traditional states are large agnatically organised lineages consisting of extended families. Though there is a process of segmentation whereby nuclear families are formed, they remain part of the maximal lineage. These minor segments regard themselves as part of the major segment and members of a large community united by common descent with an inherent right to benefit and enjoy property held by or vested in the group as an entity. Similarly, in his study of some extended families known to have common rights in land in the North, Pogucki found that the Balun clan of Wa in the Upper Region numbered 140 persons and the Ambrebissi clan numbered 2,000 people.[71]

Like the subject of the Stool, therefore, an individual member of the paramount title-holding family is a member of a community where his enjoyment of rights in land is community-based. In the property systems, differences in the rules and the manner of land administration and the enjoyment of rights in property certainly exist in some respects in one community and another. However, there are certain central but common unifying factors which include:

(a) the community basis of enjoyment of rights in land;

(b) the recognition and protection of individually created wealth;

(c) the notion of land as a community asset and resource, an ancestral heritage which ought to be preserved for posterity and to which no individual should be permitted to lay an absolute claim and;

(d) the similarity in the general rules governing the administration of the communal property.

(i) User Rights

Individual rights in land under the traditional tenure systems falls short of ownership of the soil. It can be described as a user right.[72]

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70 A. P. K. Kludze, op. cit., p. 114 :

71 R. J. H. Pogucki, Gold Coast Land Tenure, Vol. 1, p. 19.

72 Community-based prescribed user right has been suggested as an appropriate terminology to describe such interest. See p.55.

The right of a member of the land holding group is to benefit from the community resources, the land, through land exploitation. Rights are enjoyed concurrently or in common in respect of things found naturally on the land. The "public character"[73] of such land is exemplified in the exercise of such common and concurrent rights. The collection of fruits growing wild on the land, such as snails and firewood, the cutting of timber for building shelter, common rights of game, water resources and the right to enter upon any unappropriated land without committing trespass are the exercise of rights all of which underscore the communal or "public character of landed resources."

Although such rights may be exercised in common, as soon as the individual or group of individuals appropriate any of these things to themselves, there arises exclusive individual rights in respect of the thing appropriated. The acquirer of the thing is entitled to exercise exclusive individual rights in respect of it against the whole world including the community of which he is a member.

Apart from the common and concurrent rights the most important individual right is that which inheres as a result of membership of the community. By the exercise of this right, individual and exclusive rights can be established over a portion of the community's land. The individual can do this by means of any form of permissible development of the land. The wealth created on the land through such individual enterprise becomes the creator's property to which he has an exclusive individual right. The property systems thus recognise and protect individual effort in the creation of wealth.

However, the important point which must be borne in mind in understanding the indigenous land law is that, although through the exercise of his membership rights the individual can establish exclusive individual rights to the portion of the land reduced to occupation by him, he does not thereby become "owner" of the soil in the sense in which the term ownership is applied to land under English conception of tenure.[74] His right is to exploit and to beneficially enjoy the wealth created on the land. So long as he continues to use or work the land, no one else, not even the Stool, the village or the family has a right to alienate that portion of the land occupied by him without his consent.[75]

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73 Sir William Maxwell regarded all lands in the Colony as public lands having regard to their communal trappings, see pp. 137-140.

74 See the discussion of this point below at pp. 53-56.

75 The authorities on this point are numerous, some of which are the following: Quarm v Yankah (1933) 1 W.A.C.A.80, Azuma III v Fissian (1955) 14 W.A.C.A. 287, Golightly v Ashirifie (1955) 14 W.A.C.A. 676, Ohimen v Adjei 2 W.A.L.R.275. Kakra v Ampofoa 2 W.A.L.R.303, Baidoo v Osei 3 W.L.R.289 and Bruce v Quarnor /1959/ G.L.R.292.

But where he abandons the land for a reasonable period of time so that it can be said that he has no intention of working it any longer or that no wealth of his creation is left on the land, that portion of the land reverts to the community and other members are free to occupy it in a similar way or the traditional land controlling authority may re-allocate it without reference to the previous occupant.[76] The right of the individual can therefore be seen to be that of user and benefit. The retention of such exclusive rights to the portion of the land developed depends largely on continued occupation and user. If he is no longer using the land or ceases to derive benefit from it, and does not manifest his intention to control or work it in the immediate future, then his individual right in the land becomes extinguished.

It will be observed the way in which the indigenous society places a premium on individual effort in the establishment of the right. The systems thus discourage unearned gain by making individual enterprise the means by which the right comes into being.

(ii) Duration of Interest

The way in which individual interest in land may come to an end or become extinct is through abandonment of land in effective occupation. This phenomenon throws further light on the nature, extent and character of such rights or interests in land. Indeed, the extinction of the interest on abandonment is in itself a logical consequence of how rights are established. If the right does not usually come into being until some positive act of resource exploitation has taken place, a fortiori, the right must cease to exist on cessation of development and user.

Sarbah writing on the consequences of abondonment says:

> "But where a person in possession of a portion of the public land abandons it, or his family have abandoned it for more than ten years at least, the village headman and elders can allow another person to occupy the same."[77]

Ollennu restates the ten-year period stipulated by Sarbah but lends

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76 There is no specific period by which abondonment may become effective. It depends on the circumstances of each case. See Agyeman v Yarmoah (1913) D.&.F. "11 - "16, 56.

77 J. M. Sarbah, op. cit., 67. Emphasis supplied, it is interesting to observe that Sarbah himself regards unoccupied lands as public lands, although he sought to deny this later. See pp. 155.

support to the view expressed in the Shai Hills Acquisition Case[78] in which it was observed that in communities where the mode of land exploitation was by way of shifting cultivation, it might not necessarily amount to abandonment by reason only that the land was not being used at a particular time, either for farming or residence. Abandonment, the court said, consisted not so much in allowing the land to lie fallow, but in the non-exercise or non-active assertion of rights to immediate control.[79]

It is not too clear what may amount to a non-active assertion of right, but it seems that an intention to exercise effective control manifesting itself in overt acts of protest against acts of others which are inconsistent with the interest holders rights might be sufficient. It may well be that although an individual interest in land may become extinct on abandonment, the courts will frequently lean against declaring land abandoned in order to protect individual interests in land.

However, as Watson, J. observed in Agyeman v Yarmoah,[80] not every occupation of land can be regarded as establishing rights thereover. He pointed out that it would be absurd to suggest that if an individual scratched a farm on a piece of waste land and then abandoned it, he or his descendants could return years afterwards and oust anyone who happened to have followed them.

What must be noted is that apart from the ten-year period specified by Sarbah as at least, the time within which abandonment might become effective, there is no other guide line as to what amounts to abandonment. The ten-year period cannot be taken as an immutable stipulation and it appears that the courts have never regarded it as such. What constitutes abandonment must depend on the facts and circumstances of each case.

It is for this reason that the decision in Komey v Korkor[81] must be regarded as unsatisfactory. In this case, the caretaker of a stool granted a building plot to the plaintiff, a subject of the stool. For six years the plaintiff did not put up the building and there was no evidence that he attempted to do so. The caretaker reallocated the same plot to another subject of the stool, the defendant, who promptly put up a building on the land in spite of the protests of the plaintiff. The plaintiff sued for trespass.

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78 Reported by Ollennu, op. cit., p. 177.

79 ibid., at p. 179.

80 D.&.F. "11 - "16, 56.

81 (1958) 3 W.L.R. 331.

One of the grounds on which the plaintiff's claim was upheld was that the subsequent grant of the land to the defendant was without prior notice to the first grantee who was regarded by the courts as being in possession. Ollennu J., accepting the evidence of the Otsiame Yao Boi, linguist to the Asare Stool that the grantor Chief had no right to make the re-allocation without prior notice to the first grantee who ought to have been given a reasonable opportunity to exercise his right of effective occupation upheld the plaintiff's claim and granted the reliefs sought.

It is regrettable that although the court declared that it was applying the native law, the effect of this decision was to negate the very principles upon which the customary law thrives. It is well to remind ourselves that the rights of the defendant to acquire an interest in land or develop a vacant land is independent of a formal grant from the stool occupant or his representative. The defendant could have built on the land without prior request from the chief. Merely by exercising his inherent right as a stool subject, he could have built on the land and acquired an interest which the customary law will protect.

Surely, the chief had no legal right to oust the defendant on the grounds that the exercise of his right of land development was without his prior consent. It is obvious that in city areas like Accra, it is expedient for the chief to be allowed the exercise of land allocation powers so as to bring an order into the system. It is necessary that land development should conform to city lay-out plans. It may also be necessary that land acquisition by citizens should be regulated in relation to population so as to ensure fair and equitable distribution of land in the face of growing demands. Such regulation will rationalise the system so as to avoid conflict. It is for reasons such as these that the control function of the chief in land allocation can become vitally important.

But this does not make the validity of the exercise of the subject's inherent right in relation to the development of unappropriated land dependent on a formal grant or allocation by the chief. Therefore as in this case, where the defendant by his unaided effort, carried out development on vacant stool land with a formal grant from the stool, rights which he could lawfully have exercised without such formal grant, it is unfair to have deprived him of the fruits of his labour as did the court in this case.

It would appear from the evidence that the chief made the re-allocation without prior notice to the plaintiff. This may be a sufficient condition under certain circumstances to deprive the defendant the rights of beneficial enjoyment of his enterprise, but such a reason cannot be a necessary condition

for the validity of the exercise by the defendant of his fundamental rights of land exploitation.

In this case, the first grant was made in 1946. The second grant was made in 1952, six years later. There was no evidence indicating that the plaintiff ever exercised any rights over the land granted to him except that during the course of development by the defendant, the subsequent grantee, he made protests. Are we to regard such belated protests as the "active assertion of rights" which will amount to effective occupation? With respect, the court was wrong in assuming that the land was not abandoned by the plaintiff.

In fact, abandonment presupposes prior occupation. In this case the plaintiff was not shown to have at any time during the six years period ever physically occupied the land in question. Thus the land could be regarded as unappropriated land which the defendant lawfully occupied. What the court ought to have done in this case would have been to order the chief to make a fresh grant to the plaintiff.

As the High Court made clear in Oblee v Armah,[82]

> ". . . by custom a subject who requires land for farming need not obtain expressed permission of the stool to occupy vacant land" . . . "But to avoid clash with other subjects already occupying land in the area it should become necessary for the stool to make an express grant of stool land to subjects for farming, all that the elders would do is to take this subject to the land and show him the boundary from which and the direction in which he can farm." [83]

If this is the customary law, then an express permission of the stool is not a necessary condition for the validity of land acquisition through the exercise of inherent community membership rights. In the case of growing towns like Accra, expressed permission may be required, as the court rightly observed in the above case, in order to limit the extent of land that each citizen may occupy so as to ensure fair distribution. Yet such a rule, if an exception to the general rule ought to be applied within the general principles and framework of the indigeous law which protects and places a premium on individual effort and industry.

As Bentsi-Enchill observes, the interest of exclusive occupancy acquired by the subject of a stool or family member in the portion of group-owned land reduced by him to his occupation is one of unlimited duration. It can lapse in the event of definitive abandonment, and in such an event

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[82] (1958) 3 W.L.R. 484.

[83] ibid, p. 492.

becomes available for occupation by other members of the group.[84]

What must be of considerable interest to us concerning the rules relating to abandonment is that they demonstrably show that individual interest in land comes into being principally through the exertion of individual effort. It manifests itself in the exploitation of resources. The cessation of the interest on abandonment is an indication that the right lies in the enjoyment of the fruits of one's labour. The wealth created on the land is regarded by society as belonging to the creator and not the soil itself. Individual rights inhere as a consequence of community membership. But until such rights have been exercised by the exertion of individual effort in the creation of wealth on the land, the individual has no exclusive claim to any portion of the land although he may acquire such rights by inheritance. In the light of these conclusions about the nature of individual rights in land under the customary schemes of tenure, the question is whether the notion of individual ownership of land as such, as the term is understood under Anglo-American conceptions of tenure, is a feature of traditional systems of tenure in Ghana? The answer to this question involves the consideration of some terminological issues under the customary laws which should receive attention in the next discussion.

G. Some Terminological Issues in the Customary Law

(i) Land Ownership

In discussing the vexed question of ownership in relation to land, the intention is not to delve into the usual jurisprudential questions concerning ownership and its related concept of possession in the common law. The aim here is to bring into relief some of the problems associated with the use of the English term to describe customary interests in land.

At present, Ghana regards the introduction of a system of land titles registration as a priority in her programme of land reform. The examination of the term "ownership" in relation to interests in land under the customary law is thus of great importance. Consideration of the issue will highlight some of the preliminary problems of identifying the various interests in land that may be recorded in the title register.

Under English law, to say of a person that he is an owner of a thing is tantamount to saying that he has a right to enjoy the property, to exclude

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84 Kwamena Bentsi-Enchill, G.L.L., p. 280.

others from using it and to destroy it if the law does not forbid it. It imports in that person exclusive and unfettered right of alienation and recovery of possession from all other persons. Such rights, as John Saunders points out, are not conceived of as separately existing, but as merged in one general right of ownership.[85]

Although the term is generally applied to things, in so far as ownership of land is concerned, the common law draws a distinction between ownership of goods and of land. Firstly, it did not recognise the possibility of goods being split up into lesser successive interests or estates, nor did it contemplate remainders or reversions in chattels. Secondly, the common law did not treat land as a subject of absolute ownership by the King's subject, but only of tenure, the absolute ownership being theoretically in the Crown.[86]

However, in practical terms, the holder of the greatest interest that an individual can acquire under English system of tenure, the fee simple absolute, is an absolute title in the sense that its holder can dispose of it without reference to anyone. Under English system of tenure, it is the person holding the fee simple absolute or the frehold title holder that one would be looking for if the question arises as to who the owner of a particular piece of land is.

The word ownership is however, a "nomen generalissimum" the meaning of which may be gathered from the context in which it is used. Thus even in England where the concept of ownership in relation to land is assumed by some to be "simple and intelligible to any human being anywhere",[87] not infrequently Parliament finds it necessary to express the legal definition of ownership in statutory form. Thus in the Housing Act of 1957, for example, section 189(1) of the Act provides:

> "'Owner' in relation to any building or land means a person other than a mortgagee not in possession, who is for the time being entitled to dispose of the fee simple of the building or land, whether in possession or reversion, and includes also a person holding or entitled to rents and profits of the building or land under a lease or agreement, the unexpired term whereof exceeds three years."[88]

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[85] Words and Phrases Legally Defined, Vol. 4, London, 1969, p. 61.

[86] Ibid.

[87] See S. R. Simpson, "Towards a Definition of 'Absolute Ownership': II" / 1961/ J.A.L.145.

[88] Emphasis supplied. See also section 295 of the Highways Act, 1959; the Harbour Act, 1964, S.57; The Housing Act, 1964, S.44; The New Town Act, 1965, S.4 and the Town and Country Planning Act, 1962, S.221. These definitions of land ownership would have been unnecessary if its meaning were so simple and intelligible to every one as Simpson would make it appear. With respect, his view on the question is a narrow one which does not take into account its special meaning in relation to land.

The common features of all the statutory definitions of land ownership are the indications of a right in the 'owner' of the land to alienate the fee simple, appropriate the rent and to enjoy profits from the land owned by him. He can exercise these rights without reference to any one. These statutory definitions of ownership do not appear to be different from the common law view of a land owner. What all these mean is that although under both English and customary law, land consists of a bundle of rights which can be created by the proprietor in various degrees of lesser successive interests or estates, in the case of the former the root of title is ultimately traceable to the fee simple absolute title holder as the proprietor or the owner. Such lesser interests are only encumbrances on the fee simple owner's title. Any one holding such lesser interest is not the owner of the land.

But when we turn to the customary schemes of tenure in Ghana, where as we have seen, the paramount title in lands is generally vested, not in individuals but in stools, families, clans and village communities, difficulties arise as to where absolute ownership lies. Is it in the individual or the group as an entity or the management committee representing the group?

Such difficulties are clearly identified by Allott when he points out that in the preparation of any register of title in England or other countries whose law is based on English law, the most important register will be that of "proprietors" entitled to "freehold" or an "absolute title", and there will usually be no difficulty in determining who such person should be. But when we turn to African countries where title to land is governed in whole or in part by the rules of customary law, he stresses, the position is very different.[89]

Outlining the problems, he writes:

> "Here we are faced with such institutions as that of the paramount control of land by 'tribes', village-communities, or other territorial groupings, and that of 'family land' or 'clan land', where the individual's enjoyment of land may be fettered by the superiror rights of the social group to which he belongs. Often there is a hierarchy of such bodies or persons interested by different titles in the same tract of land, and the position is further complicated in many areas by the admission of individuals or groups of strangers not belonging to the land-controlling group into permanent or semi-permanent occupation."[90]

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89 A. N. Allott, "Towards a Definition of 'Absolute Ownership'", [1961] J.A.L.99.

90 Ibid.

In such cases, Allott asks, where is the absolute ownership to be said to lie? Which out of all the hierarchy of estates and interests in land which may be existing concurrently can be selected as being "truly" ownership?

These are the practical and theoretical questions raised by uncritical application of the English word "ownership" for the description of customary law interests in land. For instance, Sarbah says that:

> "The head of the family owns the whole of the property, and all acquisitions made by members of the family are made for him, and fall into the common stock." [91]

What does this mean? Statements like these can mislead the foreign observer who understands land ownership in terms of Anglo-American conceptions of tenure to think that the head of the family is a kind of land lord in whom the fee simple absolute or freehold title vests.

But as Sarbah himself points out, with the exception of the coastal towns, where there is much contact with European ideas, "private property in its strict sense does not exist."[92] Confirming these views of the lack of individual ownership within the customary schemes of tenure is Casely Hayford who in his commentary on the Akan property systems observes:

> "But in the customary law, we find no trace of individual ownership. What the head of the family acquires today in his own individual right will in the next generation be quite indistinguishable from the general ancestral property of which he was a trustee."[93]

Rattray made a similar finding in Ashanti and states categorically that:

> "There is in Ashanti no such thing as the individual ownership of land".[94]

One fact on which all are agreed is that the paramount title to land in the customary land tenure systems is vested in the stool, the village community or the family. When it is claimed that individual ownership of land does not exist under the customary law, it is the sense in which, as has already been explained, the term is understood in English law that the concept is said not to exist in the indigenous systems.

Surely, the owner of land under the common law has an exclusive and unfettered right of disposal without reference to anyone. He may dispose of the entire property in the land and can do anything with it subject

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91 J. M. Sarbah, op. cit., p. 61.

92 Ibid., pp. 60-61.

93 J. E. Casely Hayford, The Truth About the West African Land Question, 2nd ed., London, 1971, 56. Emphasis supplied.

94 R. S. Rattray, Ashanti, Oxford, 1933, p. 230.

only to the general laws of the country. The individual under the customary law has no such rights. His right is that of benefit from the wealth created through individual effort on the land. His interest at best may be regarded as an encumbrance on the paramount title of the village community, the family or the stool.

It is in such respects that individual interest in land under customary law stands in a different order of property relations from those of the individual owner under English law. It is submitted that in order to avoid confusion and the creation of erronous impressions the term should be avoided and sparingly employed in the discussion of the customary land law.

Bentsi-Enchill does not agree with the view urged above. Applying what appears to be English law ideas of rights which seek to define the relation between persons and things, argues that the holder of any interest less than the whole in property is apt to regard the limited interest held by him therein as "owned" by him. Thus a man, he argues, may own a farm or house or tree on land owned by another. The emphasis is on the relation between the interest, however large or small, and the person in whom it is vested rather than on the quantum of the interst owned by him. Ownership, he therefore argues, could be defined as the widest liberty that may be had in respect of the lawful uses of a thing.[95]

It is in this sense of owning or belonging in accordance with which a person may be described as the owner of a dependent or derivative interest such as licence or lease or mortgage that the learned author regards the notion of individual ownership as "not foreign to native ideas."[96]

What can be deduced from this argument is that individual interest in land under the customary schemes of tenure, though derivative or dependent as it is on the paramount title of the corporate group, is in itself an ownership. The principal difficulty about this argument, as indicated already, is that the term "ownership" does not sufficiently explain the nature and extent of such interests in terms of rights of benefit and the controls which the management committees exercise over the group-held property. As the kind of interest which the term imports under English Common law with all its plenary dispositive rights stands in a different order

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95 Kwamena Bentsi-Enchill, op. cit., p. 11.

96 Ibid.

of property relations from those of the customary interest, the use of the English term to describe the customary interest is bound to create erroneous impressions and lead to confusion.

Allott points out the defects in undue reliance on Hohfeld and his fundamental legal conceptions as a tool of analysis of African land tenure and stresses that such an approach is unrewarding and unilluminating because the Hohfeldian scheme does not sufficiently expose the hierarchical and concurrent aspect of African property systems or the radical distinction between control and benefit. He makes the point that in the analysis of property relations in African traditional law, we are concerned with permitted, prescribed or forbidden modes of action in regard to exploitation of resources.[97]

It is submitted that these distinctions between the nature of individual ownership under English law and individual interests in land under the customary law should continually be borne in mind in the analysis of customary tenure. It is the failure to recognise this dichotomy between African and Anglo-American land law that leads commentators, such as Simpson to adopt what would appear to be a very narrow view of ownership in relation to customary interests in land. He states that ownership is the foundation upon which all other rights in property stands "and comprises the entirety of the powers of use (including abuse) and disposal of what is owned." Applying the Hohfeldian concept of rights in relation to ownership, he reached the erroneous conclusion that individual interests in land under African law necessarily amounts to ownership.

He writes:

> "In seeking the owner, therefore, an adjudication officer must look for the person who has the residue of such power when every despatched 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." [98]

The fact which the learned author overlooks is that unlike in England where it will be easy to "look for the person who has the residue of such power", under the customary law the task is not so simple. No single individual has such residuary power when every despatched and limited portion of the land has been accounted for so as to be declared the owner. Such rights are usually vested not in individuals but groups or the collectivity.

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[97] A. N. Allott, "Language and Property: A Universal Vocabulary for the Analysis and Description of Proprietary Relationships", /1970/ African Language Studies, p. 12 at p. 16.

[98] S. R. Simpson, op. cit., 146.

This is where the adjudication officers' problems will begin, particularly where the term "ownership" is applied to the customary law interests uncritically. Simpson mentions the Registered Land Bill proposed for Lagos in which full provision for the registration of family land was made.[99] But it is the difficulties involved in determining the persons whose names shall be entered on the register as proprietors which are partly responsible for the proposed Bill not being brought into force or applied.

It is submitted that Simpson's arguments are based on certain misconceptions about the way in which the customary law works both in theory and in practice and a failure to take into account the disparities that exist between individual interests in land under traditional African land law and individual ownership of land under Anglo-American law. As a result of the difficulties and confusion which have already been pointed out, arise in connection with application of the term "ownership" to describe customary law interests in land, its use should be advisedly avoided. But if such a term is inadequate for application to individual interest in land under the customary law, what should be the appropriate terminology for describing it? This is the question which will be considered in due course.

(ii) The issue of an Appropriate Terminology

The individual interest in land under the traditional schemes of tenure we have been discussing has been variously described as "pre-emptive", "possessory" right or title, "usufructuary" title, "determinable estate", "customary" title, etc. None of these terms however, accurately describes the indigenous interest.

The obvious defect in all those terms is that it is hard to find any kind of interest under the customary law, an aspect of which may not be described by any of those terms. For instance, every kind of interest in land under the customary law can be described as a customary interest. It is therefore not meaningful to describe individual interest as customary interest. Similarly, every kind of acquisition of an interest in land involving occupation is a kind of possession. This possessory title is unhelpful either. In a similar way the term, determinable estate or title gives the wrong impression that the individual is a tenant of some Lord and whose right may therefore be determined at will.

Usufructuary title which is widely employed is also unsatisfactory. Etymologically, its civil law connotations do not fit into the customary

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99 Ibid., pp. 147-148.

schemes of interest in land. For usufruct is the right to enjoy a thing the property of which is vested in another. The usufructuary could draw from the thing without altering the substance of the thing or damaging it.

But the customary law interest holder has a right to benefit from the land as a member of a group or collectivity to which the property belongs and not to another in the sense in which a usufructuary enjoys the thing belonging to another. Similarly, the civil law interest may be for life only while the customary law interest is inheritable and lasts so long as successors can be found and is not abandoned. The use of that term is therefore misleading in that it does not sufficiently illuminate its community-based and potentially durable character.

Having considered the ineptness of the terms such as these for application to the customary law interest, Bentsi-Enchill suggests as an appropriate terminology, "Proprietary Occupancy".[100] The word "proprietary" to emphasise the nexus of this interest with the allodial title of the owning group, and its inheritability, and the word "occupancy" to suggest a broad confinement to surface user, and the assertive character of the original acquisition.[101]

With respect, this proffered terminology appears to suffer from the same sort of defects that can be associated with those already discussed above. One of the obvious flaws in the suggested nomenclature is that occupancy suggests that physical occupation or possession ought to be present at all times in order that the interest must exist. But as cases, such as Komey v Korkor[102] and the Shai Hills Acquisition case[103] already discussed have shown, beneficial interest in land may continue to subsist even where the citizen has never been in physical possession or having been in physical occupation, abandons it for a while but has the intention of physical control. Thus occupancy suggests too readily actual physical possession as the only essential attribute of the customary law interest.

To say that the word "proprietary" emphasises the nexus with the allodial title of the owning group and its inheritability seems to be a roundabout way of applying the term, ownership to the customary law interest within the framework of the Hohfeldian legal conceptions which seek to describe ownership in terms of relation between things and persons. We have already

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100 Kwamena Bentsi-Enchill, op. cit., p. 231. See also his "Do African Systems of Land Tenure Require a Special Terminology?", /1965/ J.A.L., Vol. 9, No. 2. p. 114, pp. 120-121.

101 G.L.L., p. 231

102 (1958) 3. W.L.R. 331

103 Reported in Ollennu, op. cit., p. 177

argued that this analytical scheme does not sufficiently throw into relief the community-based nature of the enjoyment of rights in land denoted by the exertion of individual effort in the creation of wealth, rights, the exercise of which is controlled by traditional authority administration.

These principal features of the customary law interest are not sufficiently exposed or illuminated by the suggested nomenclature. Finally, it would appear that the term, proprietary occupancy casts dark shadows over the extent and duration of the interest which has been argued, subsists so long as the occupied or appropriated land continued to be used. The interest becomes extinct in the event of abandonment and the land reverts to the common fold. For these reasons, the proposed terminology does not seem to be apt for the customary law interest under consideration.

It may be suggested, though tentatively, that it will be appropriate to employ the term, "Community-based Prescribed - user Right" to describe the indigenous interest. "Community-based" to indicate the community-based character of the enjoyment of rights in land, connoted by the exercise of inherent rights premised on that membership. "User right", to throw into relief the nexus between use or the exercise of inherent right through land exploitation without which the right or interest may not be brought into being. "Prescribed" to expose and illuminate how the control function of the management committee representing the group or community in which the paramount title is vested regulates how rights to benefit may be exercised.

This suggested nomenclature has the merit that unlike the terms currently in use, such as "usufruct", individual 'ownership", customary "freehold" or possessory title, it does not convey any preconceived English or Civil law ideas about the nature of the customary law interest or what it ought to be. Thus students of the customary law are put on enquiry as to what the suggested terminology implies.

Inquiry concerning "community-based" leads to questions relating to the exercise of concurrent and common rights in respect of unappropriated land and the establishment of individual and exclusive rights through the exploitation of unappropriated land, rights the exercise of which ultimately depends on membership of a land-holding community or group, such as the family, stool or the village community. It is in this sense that the individual right is community-based. Such rights are "prescribed" because the rules governing the enjoyment of the right say that the continued existence of the right or the duration of the interest depends on continued development and user. The interest is thus a "user right" - rights to benefit from individual wealth created on the soil.

Inquiry about the enforcement of the prescribed rules leads to questions relating to the control function of the management committees. The sort of investigations that the proffered teminology can provoke leads to the discovery and appreciation of not only the nature, extent and duration of individual interest in land but the determination of such interests which Allott describes as the rights of benefit and control.[104]

(iii) The Trust Analogy

Another important area in which the misapplication of Anglo-American terms tend to confuse issues under the customary land law, concerns the administrative controls which the chief or the head of the family exercises through the agency of the management committee over group-held property. Sarbah for instance states that:

> "At the most the King or head chief is but a trustee, who is much controlled in his enjoyment of the public lands by his subordinate chiefs and councillors as the head of a family by the senior members thereof." [105]

The inconsistency of the above statement with an earlier proposition in which Sarbah claims that the head of the family "owns the whole of the property, and all acquisitions made by members of the family are made for him, and fall into the common stock"[106] underlines the confusion and difficulties associated with uncritical application of English terms for the description of property relations under the customary law.

Danquah too falls into a similar difficulty in his attempts to describe the position of the chief in relation to stool lands when he writes:

> "The stool occupier is in common parlance, or by courtesy, referred to as owner of the land; but he is only so in so far as he represents the sovereignty of the people, giving due respect to the sacredness of the stool . . . In short Akan chiefs hold the lands and other stool property in trust for the Asamanfo and to the benefit of subjects

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[104] A. N. Allott, op. cit., p. 16.

[105] J. M. Sarbah, op. cit., pp. 65-66. Emphasis supplied.

[106] Ibid., p. 61.

of the stool." [107]

This tendency on the part of some jurists and students of the customary law to employ English equity terminology to delineate the adminsitrative control of the chief or family head over group-held property is widespread in the customary law literature.[108] But the trustee beneficiary relationship which the application of the term such as "trustee" implies, confuses rather than illuminates the relation sought to be described.

Under English equity jurisprudence, the term trustee has acquired a technical meaning with a readily recognisable legal signification. Under such law, if a man is said to be a trustee of land for the benefit of another, it means that he holds the legal title to the land, while the beneficial interest in it vests in the cestui que trust. A trustee-beneficiary relationship is established between the legal title-holder and those who are to benefit under the trust with certain legal consequences flowing from that relationship.

An examination of such legal consequences will reveal that the trust analogy with the position of the chief or family head is inappropriate. The trustee under English law, being the legal title-holder, has the legal capacity to dispose of that title. However, under the customary law, neither the head of the family nor the stool occupant has such capacity. It is the management committee of the stool or the family which has such capacity.

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107 J. B. Danquah, Akan laws and customs, London, 1928, p. 200. Emphasis supplied.

108 See Ollennu, op. cit., p. 46, where the author says: "the occupant of the stool or skin, or the head of the tribe or family, is a trustee." Gluckman also appears to see a relationship between property rights and status in African traditional law and seems to regard the King of Barotse land as the "ultimate owner of all lands", and referred to his position as that of a trustee. He says that the king may be called "owner of the land only as a trustee or steward for the nation". See M. Gluckman, op. cit., p. 257. See also S. K. B. Asante, Property Law and Social Goals in Ghana 1844-1966, Accra, 1975, Parts I and II; and his "Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana", (1965) 14 I.C.L.Q. pp. 1144-1188. The learned author, while recognising the inadequacies of the trustee-beneficiary relationship analogy with the customary law is of the view that the fiduciary principles inherent in trusts under English equity law nevertheless exists under the customary system thus employs the term in his analysis of the customary land law. With respect, this is not a sufficient reason for using the term if it does not correspond to the customary law position.

While the alienation of the legal estate in the property by a trustee to a bona fide purchaser for valuable consideration without notice of the defect in title could have the effect of extinguishing the beneficial interest of the cestui que trust, the head of the family or the occupant of the stool will be unable to do so unless with the consent and concurrence of the accredited Elders. Under the customary law, the question of the purchaser's bona fides is immaterial. If the rules prescribed by the customary law are violated, the transaction is illegal and of no effect.[109]

Under English law, the trustee is not expected to benefit directly or indirectly from the administration of the trust property. Flowing from this proposition is the strict accountability implied by the relationship. The trustee is fully accountable to the beneficiaries. Unless the trust expressly provides for remuneration in connection with the administration of the trust, the law of equity will compel the trustee to disgorge any benefit which he might have enjoyed under the trust.

As pointed out by Lord Upjohn, K.C., in In re Sykes, Sykes v Sykes:[110]

> "It is a rule of universal application that no one having fiduciary duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interest of those whom he is bound to protect."

Fletcher Moulton L. J., in a similar way was keen to point out in Bath v Standard Land Company Ltd.[111] that:

> "the strength of the position of cestui que trust hitherto has been that no profit could be made by those administering the trust out of such adminsitration so that no question of self-interest could divert the trustee from the duty to use his powers solely in the interest of the cestui que trust."

Under the indigeous law, however, there are no such restrictions on the traditional heads upon whom land administration responsibilities devolve. The performance of their duties as land administrators does not preclude them from beneficially enjoying rights in the property under their management and control. The beneficial enjoyment of rights under the customary law inheres as an incident of community membership. The head of the family

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109 As pointed out earlier, (See pp.28-40) the courts may take into account the purchaser's bona fides and the conduct of members of the group into account and decide on certain occasions that illegal alienation by the head of the family or head of the stool is not void but voidable. But such conclusions do not normally flow logically from the customary law on alienation of group-held property.

110 [1909] 2 Ch. 241, p. 245. Upjoh was counsel for the appellants.

111 [1911] 1 Ch. 618, p. 632.

and the Stool occupant being members of their own communities have inherent right to beneficially enjoy rights in the property administered by them. Unlike the trustee under English law, therefore, no rule of customary law prevents the chief or the family head from enjoying the property controlled by him by reason only that he is discharging his duty as a land administrator.

Finally, the land-control function of the traditional authorities under the customary law is devoid of the strict accountability which is a characteristic feature of the trustee's obligations under English law of equity. The Ghana courts have consistently held that neither the chief nor the head of the family can be sued for an account.[112] Although this law has been severely criticised and its validity challenged on several occasions, the law has not changed.[113] The chief and the head of the family are thus insulated from full accountability to the subjects on whose behalf they are supposed to be acting.

It can be concluded, in the light of the disparities that can be seen to exist between the duties and obligations of a trustee under English law and the land control functions of the stool occupant or the head of the family under the traditional law, that the trust analogy with the customary law is inadequate. It is submitted that, in order to avoid the wrong impressions and confusions which such analogy creates in respect of property relations under the customary law it should be avoided in the law altogether.

H. Synopsis

This preliminary part sets out the main objectives of the thesis, the most important of which is to defend the land policies contained in the abortive Crown and Public Lands Bills of 1894 and 1897 respectively of Sir William Brandford Griffith and Sir William Maxwell. It has been pointed out that the measures contained in the above mentioned Bills were

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112 See Sarbah, op. cit., p. 90; Pappoe v Kwaku (1924) F.C. 1923-25, 158; Abude v Onano (1946) 12 W.A.C.A. 102; Nelson v Nelson (1932 I.W.A.C.A. 215.

113 For some criticism of the principle of non-accountability of the family head and the stool occupant, see the following: W. V. Ekow Daniels, "Some Principles of the Law of Trust in West Africa", / 1962 / 6 J.A.L. 165; "The Extent of the Head of Family's Liability to Account". (1976) 8 R.G.L. 70; S.K.B. Asante, "Fiduciary Principles in Anglo-American law and customary law of Ghana", (1965) 14 I.C.L.Q. pp. 1164-1173; Bentsi-Enchill, op. cit. pp. 95-108; Kludze, op. cit., pp. 91-99; and A. N. Allott, "Family Property in West Africa: Its Juristic Basis, Control and Enjoyment", in Family Law in Asia and Africa, London, 1968. pp. 138-140, ed., J. N. D. Anderson.

designed to solve problems of insecurity of title and costly litigation which were central to land problems in the Gold Coast.

It has been pointed out that this work is not concerned with a detailed exposition and critique of Ghana land law. Hence, reference has only been made to the most central and common themes in the customary land law, the understanding of which will be necessary for the appreciation of colonial land policy in which the analysis of the Land Bills of 1894 and 1897 will feature prominently.

It has been indicated that the twin problems of title insecurity and costly litigation in the past and at present are due to:

(a) the recognition of tribal boundaries between the native polities that were absorbed into the Gold Coast Colony, although such boundaries remained undefined, undemarcated or unsurveyed;
(b) the difficulty faced by outsiders in identifying the persons with legal capacity within the groups or community to deal with property and;
(c) the uncertainties concerning the rules governing the dispostion of interest in land and certain exceptions to such rules.

The wrong application of Anglo-American and Roman-Dutch law concepts and terminology for the description and analysis of customary schemes of interest in land has also been shown as one major source of confusion and misunderstanding of the customary law. Attention has been focussed on the nature of individual interest in land with a view to demonstrating that such rights are those of benefit from the land which is a community resource and asset. Such rights to benefit, as we have seen are controlled by prescribed rules enforced through the agency of the management committee.

The facts summarised here as a synopsis of the preliminary part, will have to be borne in mind continually in order to appreciate from the right perspective, colonial land policy to be discussed in due course. When this is done, it will be realised that Sir William Maxwell in particular, understood the land problems of the Gold Coast well. The way in which he was quick to recognise the element of benefit and control as basic to the property systems, and how he saw that inappropriate application of Anglo-American tenural concepts and terminology to customary schemes of interest in land would obscure and confuse the nature of such interests, would be seen as clear demonstration of his wisdom and foresight.

PART II

COLONIAL LAND POLICY

CHAPTER I

THE PERIOD OF THE MERCHANTS' RULE

A. Introductory

The independent government of Ghana inherited from the colonial administrators of her country in the past, some inconsistent and incoherent land policies, formulated without regard to their long-term effects on the socio-economic development of the country. Responsibility for this should not, however, be laid entirely on the shoulders of the colonial government.

A proper investigation and appraisal of the historical evolution of land tenure and administration during the Colonial era, would disclose that much of the land tenure problems of the past and the present were due in part, to some of the obstructive policies of the local native and European merchant opposition to measures adopted by the colonial government to solve land problems. In their opposition to the land legislation programmes of the government, the few native merchant class, lawyers and the educated elite allied themselves with European merchants, concession speculators and their African intermediaries to resist the land policies of both Governors, Sir William Brandford Griffith and Sir William Maxwell in the last decade of the nineteenth century.

The successful campaign against these policies which led to the withdrawal of the Crown Lands Ordinance, 1894 and the Public Lands Bill, 1897 is often hailed and regarded as an exemplary victory of a colonised people over an alien authority. Yet a closer examination of the facts would show that pressure from British firms, financial institutions and commercial bodies in Liverpool, Manchester and London was the decisive factor in changing the course of events at the time. Such commercial bodies as the Liverpool Chamber of Commerce, the West African Traders Association and their lobbies in Parliament were able to bring pressure to bear on the Imperial Government and the colonial administration to withdraw its land legislation programmes.

Yet, if one takes a closer look at the factors and events which influenced the colonial administration to initiate such far-reaching programmes of land reform, one would discover and appreciate the political, economic and social justification of such measures. Some study and close scrutiny of their provisions reveal that the underlying principles of the land Bills were conformable to the indigenous notions of land tenure and resource

management. The basic principles and philosophy of Griffith's and Maxwell's policies could be seen as the recognition of land in the traditional system as an economic asset and resource of the community to which no one individual should be permitted to lay exclusive and absolute claim. To ensure the fair and equitable distribution of such resources for the advantage of the community at large, the land and its resources must be efficiently managed and administered.

The Land Bills of the eighteen nineties sought to achieve this result. Despite any criticism that might be levelled at the colonial administration that it might use the law to further the economic interests of British firms, the fact remains that the provisions of the proposed Ordinances were mere re-statements of the traditional law. A distinction must be drawn between the possible manipulation of a good law to further certain interests for which it was not originally intended and the quality of the law in itself.

If these legislative measures had been allowed to become a reality, most probably many of our present day land problems would be non-existent. The present efforts to introduce a costly system of title registration, for example, with its possible economic and social consequences for the country would have been avoided. Instead, such fundamental questions as the efficient land use and development including the introduction of modern techniques of agriculture and food production would have been our major preoccupation in land matters.

The twin problems of uncertainty of title and costly litigation which have bedevilled land transactions in the past and the present day would continue to live with us unless there is a rethinking on a new basis for land administration on the lines similar to those objected to in the past. However, more than two decades after independence, the errors of the past have not been realised as yet.

Today, the various traditional states and communities comprised in the state of Ghana are still treated, in terms of land administration, as if they were separate independent polities. No clearly defined national land policies have been formulated as constituting the framework within which the development, use, management and administration of lands and its resources should be organised.

All these are happening in the face of obvious relative success of land administration in the Northern parts of the country, where colonial

land policy was allowed to continue even after Independence.[114] While some African countries are beginning to realise the benefits of colonial land policy of the past and returning to it,[115] Ghana is making strenuous efforts to undo even what remains of colonial land policy in the North of the country.[116]

Our task in this part is to attempt an examination of the factors which influenced and shaped the Colonial administration's land policies. It is proposed to do this from a historical perspective. In the evaluation of its chequered evolutionary history, attempts would be made to highlight the fundamental problems of the land tenure and administration systems. Efforts would be concentrated on showing that there is the need for a reappraisal of the land policies of the Colonial administration in the past, the main principles of which we believe are in accord with the fundamental principles of the indigenous systems of resource management and distribution. It will be submitted that a reappraisal of this kind could help in the formulation of future land policies based on the principle that Ghanaian citizenship should entitle one to enjoy rights in land in any part of Ghana and to do away with the present individual community membership basis for the enjoyment of such rights.

B. The Nature of European Merchant Administration

It would seem anachronistic to talk of something in the nature of colonial land policy in the Gold Coast prior to the last three decades of the nineteenth century. However, a brief historical review of the nature of European merchant administration during the period before the mining boom could assist in explaining some of the difficulties concerning land tenure and administration in the closing years of the nineteenth century.

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114 The Administration (Northern Territories) Ordinance of 1902, for instance, empowered the Chief Commissioner to take lands in those regions for public services and vested all lands then occupied as government property absolutely in the Colonial administration. See Cap. III, 1951 Rev., S.5. In 1931, the Native Rights (Northern Territories Ordinance, Cap. 147, 1951 Rev., vested the administration of all lands in the North in the Governor for the common benefit of the natives. These laws were allowed to continue by L.I. 109 of 1963.

115 See the Nigerian Land Use Decree, No. 6 of 1978, which vests all lands in the State. Similar principles are discernible from the Land Tenure and State Land Ordinance of the United Republic of Cameroon. See Ordinance No. 74-1 of 6 July 1974.

116 See Paragraph 280 of the 1978 Constitutional proposals for Ghana.

Until about 1820, British trade to West Africa was controlled by the Company of Merchants trading to Africa. The most important function of the Company was the administration of the forts along the coasts of West Africa with governmental subsidies. The aim of the Imperial government in supporting the Company was the promotion of the export of goods from Britain to West Africa and imports from the latter region to the former country. This export-import trade, it was hoped, would stimulate industry at home and create a large market for British goods.

A Committee of nine men selected annually from the Ports of London, Liverpool and Bristol were entrusted with all the official and administrative responsibilities of the Company along the coasts of British West Africa. In the Gold Goast, the head of the Committee was the President. Since the principal objective of the Company was the promotion of trade, it sought to protect the interest of British firms. In matters relating to politics, the preservation of the peace which was the necessary condition for regular commercial activites was their primary concern. The Committee of Merchant Administration, therefore, co-operated with the local chiefs and elders of the community. Being the traditional keepers of the peace, the Company policy was the establishment of a harmonious relationship with them. For this reason, no attempts were made to interfere with their traditional institutions or sovereign rights.

This was a convenient policy to pursue, for to assume sovereign rights would have involved the Company in the sort of expenditure associated with governmental functions. This the Company wanted to avoid and thus conveniently limited the scope of its administration to the British Forts along the Coast with its headquarters at Cape Coast.

For reasons of insecurity, European merchants were reluctant to venture into the interior of the territory. The intermittent raids on the coast by the Ashanti constituted a sufficient deterrent to inland penetration by strangers. The export-import trade was thus confined to the coastal towns near the forts. The trade was naturally in the hands of European merchants and a few educated native merchants and mulatos, most of whom were intermediaries between the European merechants and the local population of the hinterland. Few literate Africans and mulatos ordered goods, sometimes on credit from European firms and disposed of them through their intermediaries to their customers in the hinterland.

This kind of relationship between the coastal natives and the Committee of Merchants administration was adequate enough to accommodate the economic interests of British firms. Trade flourished and remained the basis of

economic activity until the last quarter of the nineteenth century. The traditional methods of collecting gold dust from river beds and sinking shafts and digging gold were employed to secure the gem in sufficient quantities to support the trade. The volume of trade was augmented by forest produce such as rubber, cola nuts and spices.

What is worthy of note about the trade is that, there was no need for European firms to get themselves involved directly in the production of these goods. If the Africans could procure them in sufficient quantities to support the volume of trade, then the risk of direct involvement by Europeans was not worth the trouble. As such, Europeans did not come face to face with problems relating to land acquisition. Not having been confronted with land tenure and administration problems, the tenure system remained uninvestigated.

Similarly, the acquisition of land by Europeans being unnecessary for the procurement of articles of commerce, the need to assume sovereign rights over the territory so as to be in a position to control land use and administration did not arise. Hence, until the late nineteenth century when it became necessary for European firms to get involved directly in the mining industry, Britain did not take any direct or positive step to assume sovereign rights over the territory. Indeed, the British Government had, on many occasions, in official statements and Reports emphasised and reaffirmed the sovereign rights of the native traditional states. Their "immemorial" rights over lands within their jurisdiction were similarly proclaimed.[117]

After the abolition of the slave trade in 1807, the need for increasing agricultural output to meet the growing demand for raw materials was recognised. The supply of these goods had dwindled over the years partly, as a result of the lucrative slave trade. With its abolition and the growth of the industrial revolution, the need was felt for encouraging legitimate trade. However, given the available level of technology and the technique of production by native methods, the continued supply of goods in large quantities to satisfy demands could not be guaranteed.

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117 See for instance, Leiutenant-Governor Maloney's statement as late as 1882 saying: "So far as I know there has not been any general acquisition of the territory outside the forts on the Gold Coast either by conquest, cession, purchase or treaty, and if I am supported in my assertion Crown Lands do not exist, whatever may be the right of the government in the matter of sovereign rights over land around the Forts for defensive purposes." Dispatch No. 511, 2 November, 1882, C.O. 96/144.

One would have thought therefore, that at the height of the industrial revolution, attempts would have been made by British firms to get directly involved in the mining and agricultural industries. Yet, this was not done. The climatic conditions, health hazards, lack of transport and communication and insecurity mainly due to internal wars proved formidable obstacles to European involvement in land development.

One way out would have been for the imperial government to assume sovereign rights over the territories so as to afford protection to the merchants and land developers. Prior to the mining boom of the eighteen eighties, this course of action was regarded as both politically and economically inexpedient. As pointed out already, the assumption of sovereign rights carries with it the burden of administration. It would require the maintenance of law and order which meant the keeping of a security force with the responsibility of policing the frontiers of the territory and maintaining internal security. This was thought to be politically and economically unwise to do. As the Under-Secretary of State declared as late as 1882:

> "I do not think that the country is yet sufficiently civilized to require a universal detailed administration by European Commissioners nor sufficiently rich to pay for it."[118]

Similar economic considerations influenced the Select Committee of House of Commons' Report in 1842. In its recommendation on what the relationship between the colonial administration at the coastal settlements and the Cape Coast chiefs ought to be, it recommended in one of its resolutions that these relations ought not to be:

> ". . . the allegiance of subjects to which we have no right to pretend, and which it would entail an inconvenient responsibility to possess, but the deference of weaker powers to a stronger and more enlightened neighbour, whose protection and counsel they seek and to whom they are bound by certain definite obligations." [119]

As pointed out by Lord Hailey, it was largely as a result of this recommendation and in order to define the nature of such 'definite' obligations that Governor Maclean's successor negotiated the Treaties with a number of Fante chiefs; Treaties which became known as the Bond of 1844.[120] It might be helpful to clarify certain points about these Treaties at this early stage in the discussion. It is important to note that the Treaties

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[118] Secret Dispatch of 31 August, 1882, C.O. 96/147.

[119] The Select Committee Report, 1842, quoted by Lord Hailey, Native Administration in the British African Territories Part III, London, 1951, 196.

[120] Ibid.

were signed by certain Fante chiefs before the head of the quasi-colonial administration along the coast. They were not treaties between the Gold Coast as a colony on the one hand and the Colonial administration on the other. The Bond was not regarded by the chiefs as having taken away their sovereign rights. It merely acknowledged the power and jurisdiction of the crown. Its chief objective was to reaffirm their acquiescence in the trial of criminal offences by the Crown's judicial officers along with the chiefs concerned. The customs of the native states be moulded according to the general principles of English law and justice.

The treaty was silent on questions relating to land rights. In fact, there was no pressing need for touching upon such sensitive questions when the basis of the relationshp was purely commercial, an export-import trade in which British subjects did not require land for actual production of goods. The provisions of the Bond did not alter the traditional basis of the relationship. It remained purely commercial.

By the middle of the nineteenth century, trade was considered to be so bad that it was no longer commercially wise to retain control over the Colony.[121] For this reason a Select Committee of Parliament went so far as to recommend withdrawal from the Colony altogether. The Report said:

> "On the Gold Coast there is no possibility of raising a sufficient revenue while the Dutch remain, and thwart our policy . . . The protectorate should only be retained while the chiefs may be as speedily as possible made to do without it. Nothing should be done to encourage them to lean on British help, or trust to British administration of their affairs whether militarily or judicial."[122]

As Lord Hailey has pointed out, one of the factors which influenced the Fante Confederation to draw a constitution providing for an ambitious programme of education, agriculture and improvement in communications to be financed by taxation, was the recommendation of the Committee.[123]

Under circumstances like these where there was feet dragging and vascillation on matters relating to severeign rights and jurisdiction over the territory comprised in the colony, it would be fair to conclude that until after the Ashanti war of 1873-1874, one cannot meaningfully

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121 In 1860, the total revenue accounted for was £3,947 in addition to a parliamentary grant of £4,000. See, Lord Hailey, op. cit., p. 196.

122 Select Committee Report, 1865, vol. 5; reproduced by W. C. Ekow Daniels. See his book, The Common Law in West Africa, London, 1964, 26.

123 Lord Hailey, op.cit., 197 .

talk of a Colonial government, let alone a Colonial land policy. After 1874, however, the economic and political circumstances of the country had so changed that British policy changed accordingly. Prominent among these were the abolition of the slave trade and the development of the industrial revolution in England which are our next subject of discussion.

C. The Industrial Revolution and the Introduction of Permanent Agriculture

The industrial revolution which occurred in Britain in the eighteenth century and the abolition of the slave trade in the second half of the nineteenth century constituted two important events that influenced the pattern of land development in the Gold Coast. The abolition of the slave trade in 1807 served as a disincentive for local wars and this led to relative peace and stability. The growth of the industrial revolution was accompanied by increased demand for raw materials in the shape of agricultural goods and forest produce to feed factories in Europe. These factors had considerable influence on the ways in which the land tenure system evolved in the Gold Coast.

The abolition of the slave trade marked an important epoch in the social and economic life of the Gold Coast. The Trans-Atlantic Slave trade commenced at a time when the supply of gold and other commodities began to dwindle over the years. It thus became one of the mainstays of the triangular trade. Writing about the lucrative nature of the trade, Lord Hailey wrote:

> "If the Slave trade was sordid, it was nevertheless lucrative. It is estimated that between 1680 and 1700 over 300,000 slaves were exported from West Africa, and that by the middle of the eighteenth century, the annual export amounted to 74,000 of whom possibly about half came from the Gold Coast." [124]

It cannot be over-emphasised the fact that so long as the natives were able to supply commodities in commercial quantities to support the Trans-Atlantic trade, the need for either the Imperial Government to assume sovereign rights over the territory or for the European firms to engage in the direct production of goods in the Gold Coast was not felt. As Kimble has rightly observed:

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[124] Ibid, 195.

> "Trade remained the main object of Anglo-African relationships, so that when the Gold Coast settlements were taken over by the crown for a brief period, 1821-8 and more permanently in 1843, it was a case of the flag following trade and not vice-versa.[125]

In line with this policy of non-interference in the political institutions of the colony, direct investment in land development by European firms was not seriously considered. Large scale development of land with modern equipment was thus out of the question and the slave trade remained until its abolition one major source of profit. In the words of Lord Hailey, "the chiefs of the time were the purveyors of slaves and the British concern with them was limited to the establishment of relations which would secure the maximum supply of slaves for the trade."[126]

With the abolition of the slave trade however, one of the major sources of profit was lost to the traders. It became necessary to supplement this loss by increasing the supply of precious metals, agricultural goods and forest produce. The demand for these commodities grew with the expansion of industry in the wake of the industrial revolution. The desirability of encouraging legitimate trade in place of the slave trade became obvious. These events had a direct bearing on land use and development in the traditional systems of tenure.

The industrial revolution in England was accompanied by great increases in its population. The increase in population gave rise to increased demand for toilet soap and skin cream. By the end of the eighteenth century, palm oil became one of the principal raw materials used in the manufacture of stearic candles.[127]

What the industrial revolution actually meant was the substitution of metal for wooden machinery. Machinery was extensively used in the process of manufacturing goods. For the machines to run smoothly, the aid of lubricants such as fats and oils were required. By 1865, railways alone required for truck grease in England over 13,000 tons of lubricant annually.[128] British traditional sources of supply could not satisfy all the requirements. The palm oil trade in West Africa of which the Gold Coast was a part became an important source of supply during the period.[128a]

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[125] David Kimble, A Political History of Ghana 1850-928, Oxford, 1963, 2.

[126] Lord Hailey, op.cit., 195

[127] See A. McPhee. The Economic Revolution in British West Africa, London, 1926, 31.

[128] Ibid.

[128a] The following are the figures for palm oil export from the Gold Coast to the U.K. during the period between 1857 and 1864.

1857	1,870 tons	1861	1,352 tons
1858	763 "	1862	1,974 "
1859	810 "	1863	2,213 "
1860	843 "	1864	4,144 "

See David Kimble, op.cit., p.6

These developments afford a partial explanation ~~of~~ for the abolition of the slave trade. Humanitarian considerations inspired such men as William Wilberforce, Granville Sharpe and Bowell Buxton at the close of the eighteenth century to begin the movement aimed at the abolition of the obnoxious trade. But of equal importance was the change in the direction of commerce and industry. The need was felt at this time to check the further glutting of the British sugar market. It was believed this could be done by regulating the importation of sugar from the West Indies. An indirect way of achieving this result was the prevention of export of slave labour to the West Indian sugar plantation.

British sugar planters therefore, began an active campaign for the abolition of the slave trade.[129] By this time the British economy which had hitherto depended heavily on the West Indies was changing with the rise of the industrial revolution. What British industry needed was no longer slaves but raw materials to feed her growing industries. The acquisition of such raw materials as palm oil, kernel oil, ground nuts, cotton, rubber and later cocoa and coffee became vital.

The effect of the abolition of the slave trade and the response to growing demand for fats and oil from West Africa at the close of the eighteenth century is reflected in increased export of the commodity. Soon after the formal abolition of the slave trade exports of palm oil leapt high.[130] The effects of these developments on the physical development of land and the exploitation of its resources should, however, not be overplayed. Even at this period of increased demand for raw materials, such demands were not necessarily followed by any extensive cultivation of the land on such a permanent basis as to affect the tenure system significantly.

The reason was that most of the agricultural products and forest produce could be procured without necessarily having to grow them. The oil palm, the nuts and kernels of which provided the fats and oil could grow wild. Many of the cola and rubber trees, and many of the

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129 See F. Agbodeka, African Politics and British Policy in the Gold Coast 1868-1900, Evanston, 1971, 10.

130 Three years after the legal abolition of the slave trade in 1807, exports of palm oil from West Africa to England increased by 1,000 tons in 1810, by 2,000 tons in 1815, 5,000 tons in 1821, 10,000 tons in 1830, and by 30,000 tons in 1842. See McPhee, op.cit., p. 32

spices which the natives supplied, grew wild. Hence, these commodities could be supplied merely by searching through the forest involving no large scale cultivation of the land. In the relatively primitive communities under consideration, there was little incentive for any large scale or extensive cultivation of the land. Production was largely limited to subsistence levels. Hence, there was very little demand for land, the supply of which was far in excess of everyday requirements.[131]

Although there was no official policy to encourage the natives to go into commercial agriculture, some private firms tried to create what Kimble has called "a race of native capitalists" in West Africa.[134] The scheme devised to assist such natives however, involved the buying and selling of goods which had no direct bearing on any land development scheme.[133]

The acquisition of wealth by some natives meant the availability of capital for investment in the exploitation of land and its resources if they were minded to do so. For example, between 1837-40, James Swanzy was managing a coffee plantation on the basis of "pawned" labour. The estate was later purchased by Reverend J. B. Bannerman, a Wesleyan general superintendent. The latter developed the area into a self-supporting Christian community and an agricultural training centre with some degree of success.[134]

Similarly a group of Cape Coast traders brought in an American expert to advise them on the planting of 25,000 "cotton bushes" and in 1864, the Basel mission arranged the shipment of cotton grown in the Transvolta area.[135] Although these projects suffered from labour shortage and lack of transport and communication facilities, the introduction of commercial agriculture based on permanent cultivation of the soil

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131 The total area of the Gold Coast Colony was estimated in 1887 to be 29,401 square miles with an average population ratio of 41.4 sq.mls. See Papers relating to H.M. Colonial Possessions, No. 110 of 1890, ZHC1/5239.

132 Kimble, op.cit., 2

133 Ibid. Instrumental in the formation of an agency which was to assist the merchant native class under this scheme, was Fitzgerald, the London editor of the African Times. The task of the agency was to buy and sell goods on behalf of such natives via London and Liverpool on non-profit making basis. Although the scheme fell through, it helped a handful of Africans to acquire wealth. Robert Hutchinson, for instance, claimed to be worth £60,000 in 1855.

134 Ibid, 8

135 A. McPhee, op.cit., 7.

had begun in earnest.

However, these developments were not widespread on a scale that could affect the land tenure systems significantly. One would have expected official reaction to these developments to be the encouragement of the natives to step up development in this direction. But as McPhee has rightly observed, when relations were purely commercial, little responsibility was felt for the native as to the way in which they should develop. Things were thus left to be organised by the Africans themselves.

Despite the lack of guidance from official sources, something happened at the last quarter of the nineteenth century which changed the attitude of the natives to agriculture. This was the development of the cocoa industry. It had a far-reaching effect on the evolution of land tenure in the traditional system. Land use patterns in many parts of the country were transformed from mere shifting cultivation to the acquisition and development of land on a permanent basis.

The cocoa industry succeeded in the traditional system of tenure mainly because it did not require a large capital outlay for its development. The only capital the farmer needed was the cutlass and the land. Both could be obtained without difficulty. Apart from this factor, it should be noted that the cocoa industry is not generally difficult to manage by peasant farmers without expert advice. The cocoa tree provides its own manure. During the dry season, it sheds its leaves. When the undergrowth is weeded, it is left to dry on the farm. During the wet season, the leaves and weeds rot on the farm and serve as manure for the cocoa trees. This process continues for thirty years or more with increases in yields.

What is more, it is not difficult to preserve the cocoa seed. It is a simple job of drying the seed in the sun after its fermentation. To treat the seed in this way does not require any complciated scientific method. Storage facilities are provided by the buyers who normally supply the seller with cocoa sacks. There is often an added incentive that there is always a guaranteed price for the commodity so that the farmer can estimate his earnings. This means that it is not difficult for the money lender to give the farmer loans to devlop his farms. It must be observed and borne in mind the fact that the success of the cocoa industry depends on these factors and not on any particular system of tenure.

As the superior technology of European mining firms ousted and killed the indigenous mining industry in the late nineteenth century,

the economic opportunity provided by the cocoa industry was quickly recognised and seized and utilised. Reasonable expectation of pecuniary rewards from the cocoa industry thus encouraged the ordinary man to battle with the virgin forest with his proverbial tools of the hoe and the cutlass.

The rapid growth of this industry attracted a large number of farmers and farm labourers from the Western part of the territory to the Eastern Provinces of Akim Abuakwa in search of farming land.[136] Few years after its introduction, an experimental shipment of cocoa began in 1891 when 80 pounds weight of the commodity was shipped to England.[137] Initially, some European firms also planted cocoa on their concessions. Palm oil corporation for instance, acquired two concessions in 1893. Over 200 acres of land was cleared and planted with cocoa and rubber.[138]

This development gave rise to an increased demand for land by the natives in areas beyond their traditional states and communities. While this was happening, the increased demand for concessions which accompanied the mining boom during this period led to the high appreciation of land values. In addition to its sentimental and religious significance, land began to acquire monetary value. This trend increased with the expansion of mining and cocoa growing activities. As land values appreciated while boundaries remained unsurveyed, undefined or undemarcated, the twin problems of uncertainty of title and costly litigation reared their ugly heads.

These problems would have been left for the natives themselves to solve, but the direct involvement of British firms in the mining industry compelled the flag to follow the trade at last. It is the development of the mining industry by British firms and the problems which attended the concession grants by native chiefs that we shall presently discuss. It will be seen from this discussion how the mining and the cocoa industries' development combined to affect the land tenure system and the problems associated with its administration.

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136 In the last two decades of the nineteenth century a large number of farmers migrated from Akwapim, Krobo and some Ga communities in the South to Eastern Akim Abuakwa, where they obtained large tracts of land for the cultivation of cocoa. See generally, Polly Hill, The Migrant Cocoa Farmers of Southern Ghana, Cambridge, 1963.

137 Hailey, op.cit., 199.

138 In 1916, the company shipped 61,772 lbs of its cocoa. In the following year, it shipped 131,330 lbs of it in addition to 68 tons of palm kernel. In 1918 the company made a shipment of 33¾ tons of cocoa beans.

D. The Development of the Mining Industry

Gold, cola and slaves had been sent across the Sahara to the Middle and Far East from very early times. Some of these commodities, particularly gold and cola nuts, were obtained from the Northern hinterland of the Gold Coast.[139] This trans-Saharan trade was interrupted by the collapse of the ancient empires of Ghana, Mali and Songhai in the thirteenth, fourteenth and sixteenth centuries respectively. However, the arrival of the Portuguese in the Gold Coast in 1471 marked the beginning and the revival of the export of gold and forest products from the Gold Coast, this time, not across the Sahara to the far and middle East, but across the Atlantic to Europe and the Americas. Yet, as has been pointed out earlier, it was not until the late nineteenth century that European firms began the development of the mining industry on modern lines.

As early as 1554, the first Englishman to visit the Gold Coast, Captain Thomas Windham, and his crew returned to England with 150 lbs of gold dust procured from the natives of the Gold Coast.[140] This could be seen as the beginning of more than four centuries of trade in gold and other products between the Gold Coast and the United Kingdom.

As noted earlier, the supply of goods to support the trade was controlled by native intermediaries and some Europeans who settled near the Forts along the coast. To ensure the continued supply of commodities to support such a large volume of trade for so long a period, the introduction of modern techniques of mining and agriculture was necessary. This implied the supply of machinery and the necessary inputs. But for reasons of insecurity, inland penetration was kept to the barest minimum. The frequent internal wars, sometimes encouraged by the slave trade, the unfavourable climatic conditions and tropical diseases kept Europeans away, thus preventing them from taking the risk of investing in this area.

The Portuguese were known to have worked two mines at Abrobi and

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139 See E. W. Bovill, The Golden Trade of the Moors, Oxford, 1958, Chapter 22.

140 Clifford's Memorandum on the land question, 26 December, 1917, C.O. 96/583

Aboasi. But the former collapsed in 1662 owing to badly structured tunnels. The latter met a similar fate in 1836 during an earthquake.[141] These misfortunes were regarded as supernatural vengeance and were some of the reasons why the supply of gold remained in the hands of the natives until the late nineteenth century. Thomas Hughes of Cape Coast regarded as the pioneer of modern mining in the Gold Coast imported heavy machinery and began mining at Wassaw. After striking a rich vein in 1861, he was forbidden by the chief to continue its exploitation and his equipment was destroyed.[142]

However, after the defeat of the Ashanti in 1874, the military power of Ashanti no longer constituted an effective barrier between the coastal areas and the interior of the territory. Direct trade between European firms and people of the interior became easier. The abolition of the slave trade also had improved the internal security situation. Although the Colonial Office was opposed to the extension of political authority, it had no objection to the extension of trading frontiers northwards.

For these reasons, some adventurous and enterprising Europeans began to push their trading activities inwards.

A Frenchman, Mr. J. M. Bonat was for instance a captive of the Ashanti, and while in captivity he tried to find out what he could about the gold bearing regions of the Kingdom. After his release, he undertook a prospective journey to Salaga in the North of the country. He went back to Europe where the results of his findings were given wide publicity. He returned to the Gold Coast in 1877 and acquired a concession for mining at Tarkwa on a modern scale.[143] In 1881, a rich reef was struck at Abosso. The news spread fast and a greater interest in the mining industry was rekindled.

Interest in the mining industry and the wealth of the country was given added impetus by newpspaper reports and stories told by soldiers returning home from the Ashanti war, concerning the wealth and riches of the Kingdom of Ashanti. The Daily Telegraph, for instance, reported

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141 W. W. Claridge, A History of the Gold Coast and Ashanti, London, 1915, vol. 1, 86-91

142 Kimble, op.cit., 15

143 See the 1879 Report of the African Gold Coast Company Ltd., C.O. 96/129

that the British Gold Field of West Africa Ltd., had acquired about 7,000 square miles of territory containing "rich deposits of gold, both alluvial and reefs, copper, silver, cinnarbar and other metals". It reported the presence in the Gold Coast of "ebony, cedar, boxwood, greenheart, camwood, petroleum, rubber, oil palms, gums and fibre of valuable kinds in immense quantities." [144]

The editor of the African Times when promoting shares for some companies, drew the attention of readers of his paper to the fact that although the mines of the Gold Coast had not been thoroughly investigated until lately, they had been the source of supply of gold for many years and were among the most productive in the world. His assessment of their richness was based on the fact that gold of the value of several millions of pounds sterling exported from the ports of the Gold Coast, derived solely from the surface washing of the metal or the rude crushing of gold-bearing quartz which was carried on by the hands of the natives.[145] Lacking scientific skills and mechanical appliances, he pointed out, the natives had been unable to work below 70 or 80 feet from the surface, but the richest ore was to be found at and below that depth.

Apart from newspaper reports, travellers to the interior gave tantalizing accounts of what they saw as the immense wealth of the country. George Ferguson, in his travel to Attabubu in 1890, took special note of traditional mining and gave interesting accounts of nuggets worth £100.[146] Eva Meyerowitz claimed to have seen in Wassaw stretches of earth bordering the streets where gold dust sparkled, even without the benefit of rain.

Some of these accounts were at times exaggerated deliberately by certain concession speculators so as to increase the market value of their concessions. Prince Owusu Ansah's accounts were for example, intended to achieve such a result. He gave tantalizing accounts of the Asantehene's wealth.[147] It was believed that the richest deposits

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144 25 July, 1895, Report of the African Gold Coast Company Ltd., C.O. 96/129

145 The African Times, 13 April, 1880

146 Kimble, op.cit., 23

147 Owusu Ansah was one of the prominent native speculators who acquired large tracts of land from native chiefs and sold them to business men in England. See, Enclosures in R. J. Sheehy to Colonial Office, 26 October, 1895. C.O. 96/269.

lay in what were called the fabulous Kong mountains which lay to the north west of Ashanti and Techiman. It was thought these mountains stretched right across the hinterland of the Guinea coast from Sierra Leone.[148]

These interesting reports about the wealth of the country were given credibility by official statements and reports. In 1895, Sir John Kirk, Chief Commissioner who had arrived in England in the steamer "Accra", in the course of an interview said the Western coast was far superior to the Eastern, both in richness of its produce and in its mineral wealth. The traders, so far, had only touched the fringe of its capacities. He said the Gold Coast was a great country with a most promising future and would "handsomely pay development."[149]

In the 1899 Colonial Annual Reports, for example, it was stated that the mining industry was on the increase and that several companies had been formed during the year with a view to commencing mining operation. It disclosed that experts who had gained experience in the Transvaal gold fields said that the banquette reefs in the Gold Coast were both similar and higher in grade than those in the Transvaal. It was estimated, the Report said, that there were about 20 miles of banquette reef formation in the Western Province. If estimated on the basis of those of Johannesburg, the Report continued, it would contain 13 million tons of banquette reef from which about 40 million pounds sterling worth of gold could be extracted during a period of ten years operation. It concluded that with an initial capital or investment of one million pounds sterling, the area of land described could return one and a quarter million pounds sterling annually.[150]

These official reports were intended to furnish information to British firms and capitalists whose appetite for the exploration and the exploitation of the mineral wealth of the country might be whetted. In response to these accounts, many firms followed Bonat's example and formed companies either for mining or for buying and selling concessions on speculative basis. Tarkwa became a mining centre where by 1897,

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148 Kimble, loc.cit., 23.

149 The Daily Telegraph, 25 July, 1895.

150 Colonial Annual Report, 1899. C.O. 96/341

the labour force had grown to about 554 including 17 Europeans.[151] In the Wassaw District there was a labour force of 628 including three Europeans, while in the Prestea area there was a labour force of 238 men including three Europeans.

It was not only the mining industry and speculation in mineral concessions in which European firms and individuals became involved. In the 1887 Report of the Commission appointed to investigate the agricultural potential of the Gold Coast, it was noted that the forests of the country formed an "untouched mine of wealth" which only required the introduction of a cheap method of transport to be developed.[152] The Commission expressed dissatisfaction at the way in whcih the colony was importing timber from the United States while there was plenty of it in the colony. The report noted that the forests on the banks of the Ankobra, Prah, Amissah, Ayinsu and Volta rivers contained "millions of cubic feet of valuable timber which might be cut within a short distance of the stream and floated down the mouth at the smallest possible cost for transport."

Three years after the publication of this Report, the situation complained about changed dramatically. The felling of timber and lumbering became an important feature of the forest resource exploitation at the close of the century, its export increasing with the years. In 1889 for instance, the total export of mahogany from the Colony amounted to 250 tons. This increased to 750 tons in the following year and between 1893 and 1894 about 11,000 tons were exported to Liverpool alone, apart from sundry shipment to Hamburg and London where the demand was on the increase.[153]

Unlike gold mining, lumbering did not require at the outset, a large capital outlay. The way in which timber was gathered during the period involved only the cost of labour, transport and supervision. Apart from the latter, these were cheaply obtained. These were added incentives for European and the few native concessionaires to clamour for concessions from native chiefs. These factors, the development of commercial agriculture based on the permanent cultivation of the soil, increase in the exploitation of forest resources in which lumbering was the predominant activity, and above all, the euphoria with which mining concessionaires and speculators scrambled for concessions from native chiefs, brought into focus, certain fundamental problems concerning the land tenure system and which could no longer escape official scrutiny. It is the problems arising from these phenomena that we shall presently consider.

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151 It was reported by the District Commissioner for Tarkwa that 1,414 oz of gold was produced within three months in Tarkwa. See District Commissioner for Tarkwa to Governor, 17 April, 1897, C.O. 96/297. It was reported that in 1885, a total of £10,570,109 worth of gold was exported from the Gold Coast. See Maxwell to Chamberlain, 24 July, 1897, C.O.86/297.

152 Accounts and Pepers relating to H.M. Possessions, 1890, No. 110, XHC1/5239

152 C.O. 96/297.

CHAPTER II

THE NEW ECONOMIC ORDER

A. Problems arising from the new economic order

Perhaps, at the root of the land problem was what McPhee has described as the clash of an advanced civilisation on comparatively unsophisticated peoples who, as in India, were in danger of losing their lands on the introduction of a commercial and monetary economy by the manoeuvres of concessionaires and money lenders, and accordingly needed protection as much against their own simplicity as against the cunning of others.[154]

The four centuries of European commerce in the Gold Coast had an important impact on the socio-economic lives of the people. It introduced a market economy based on the exchange of goods for money. There also emerged a wage economy founded on employer-employee relationship. This new economic system existed side by side with the subsistence economy in which the production of goods was limited to the amounts necessary for the sustainance of the family. These changes made serious inroads in traditional conceptions of tenure, social and economic values.

Religion played a significant role in matters relating to land tenure and administration in the past. In most communities, it has been pointed out, the land was regarded as a community asset and resource, an ancestral heritage to which no one individual should lay absolute claim. For this reason, it was believed that the ancestors would not tolerate any absolute alienations of the property which would have the effect of depriving the future generations yet unborn of the use thereof, unless it was absolutely necessary and was in the interest of the community to do so. Compliance with the equitable principles underlying the distribution of the community resources were enforced by the fear of the ancestors' wrath which might be visited

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154 McPhee, op.cit., 140.

on "offenders".[155]

But continued compliance depended on the continued fear of the ancestors and the prevalence of superstition in the society. However, the impact of European economic, social and religious ideas produced certain attitudes in the most influential members of the community. These ideas were in conflict with traditional norms. In illiterate communities where the ability to read, write and speak English assured one a privileged position in the community, the tendency was to imitate the life styles of the educated natives. Such literate natives had their formal education and training in mission schools. In such schools, the Christian religion preached the omnipotence of God and his power over the devil. It abhorred idolatory and ancestral worship.

To the educated, therefore, ancestral worship and superstition were marks of backwardness. The fear of the ancestors or the conception of land as belonging to them no longer constituted an effective barrier to the free alienation of property. Reinforcing these views was the reception of certain Anglo-American notions of tenure. The members of the African middle class who wielded considerable influence and commanded respect in the society were the lawyers. They were not only the intermediaries between the concessionaires and those responsible for land administration in the traditional system, they had a formative influence on the customary law.

Trained in the English law of property and conveyancing, their attitude was to employ Anglo-American terminology in the drawing up and the preparation of deeds of conveyance. Instead of investigating their own systems of tenure in order to deduce the appropriate terms to describe the interests which were transferable or the respects in which they differed from disposable interests under English law, the tendency was to use the English forms as the standard and to bend the customary ideas to conform with English feudal theories of tenure and terminology.

One of the reasons why it occurred neither to the native lawyers nor the colonial administration to carry out any investigation of the traditional system of tenure was the belief that English law would necessarily be suitable for the territory. As McPhee has pointed

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155 For the discussion of religious aspect of land, see A. N. Allott, The Ashanti Law of Property, Stuttgart, 1966, pp. 139-143; K. A. Busia, The Position of the Chief in the Modern Political System of Ashanti, London, 1951, pp. 40-42 and Kludze, op.cit., pp. 105-107.

the nineteenth century was a period when the comparative analysis of institutions of varying circumstances and place was considered unimportant. English law was regarded to be the best law for any country at any state of development.[156] English law and feudal ideas introduced the conception of individual ownership as a necessary step leading to the alienation and commercialisation of land.

Hence, before the problems associated with these developments came into the fore the colonial administration encouraged this trend which was seen as a civilising influence on the traditional law. Sir William Brandford Griffith (Junior) son of Governor Brandford Griffith for instance, suggested in 1894 that land in the Gold Coast as in all other places under civilised government should bear the burden of taxation, as such it was better that "the wretched" system of traditional tenure be got rid of as soon as possible before the mixed application of English law and native custom got things into an inextricable tangle.[157]

It was soon to be realised that the failure to investigate the tenure systems and to dichotomise between traditional schemes of interest in land and English notions of tenure was a serious error.[158] The use of English terms to describe interests affecting land in the traditional law began to cause confusion and led to serious disputes. As we have seen already, under the traditional law, absolute title in property is vested in corporate juristic entities such as the stool, the family, the clang or the company.

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156 Ibid., p. 158. Sarbah, the first legal writer on the customary law whose work was published in 1894, employed such feudal terms as "freehold" and "trustee", terms which do not represent the traditional law. See his F.C.L. 3rd ed., London, 1968, pp. 65-66

157 Brandford Griffith Junior to Sir William B. Griffith, 29 August, 1894. In Enclosure No. 2 C.O. 879/46, 21.

158 Maxwell summing up the debate on the Land Bill of 1897 in the Legislative Council said what it was necessary to do was to direct efforts towards the discovery of what principles lay at the root of African notions about land tenure, and the first thing to do was to get rid of English real property terminology and associations which were inseparable from the use of such terms as "freehold" and "leasehold". See C.O. 96/295, 484.

Absolute titles not being generally vested in the individual, the customary law requires that only accredited persons with the legal capacity to dispose of such property could validly alienate it by following certain laid down procedures.

Yet, in many of the documents disposing of concessions, language was employed implying outright alienation of the group-held property, although the procedural requirements of the customary law were not complied with. The problem here was that the signatories to the documents disposed of interests far in excess of what they though they were actually alienating.[159] The problem was succinctly described by H. J. Bell in 1893 as follows:

> "The would-be concessionaire, who is usually a native with a certain amount of education goes to the chief of the locality where mahogany or gold is to be found and, in exchange for a few pounds induces him to affix his mark to a formidable-looking document which conveys to the concessionaire complete rights over a stretch of country, varying in extent from a few hundred yards square . . . to 30-40 miles in dimensions. The deed is usually a lease for 99 years and sets forth all various conditions and also the rent payable."[160]

The question which must be asked is whether, under circumstances of the kind described above, the illiterate chief understood the nature and quality of his acts relating to the transaction in question? Did he know what he was doing? Take the case of Prince Albert Owusu Ansah's concession of 22 June,1894 for example, where chief Quacoe Attah purported to have granted him 200 square miles of land for a term of 99 years for £100.[161] The lease described the grantor chief as "bona fide owner" and conceded to the grantee the following rights:

> " . . . all rights, easements, privileges and appurtenances thereto . . . , with all mines, minerals and precious stones, trees and substances and things found upon and under any part or parts of the said lands, estates, hereditaments and properties, with full and absolute power and liberty for the said lessee, his heir, executors, administrators and assigns. For whom it shall be lawful . . . to plant and transplant, to cut and convey away all trees, shrubs, vines and plants of any kind whatsoever found upon the said lands . . . estates . . . (and) to construct and make buildings, ways, roads, watercourses . . . and do all matters

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159 See the case of the Ashanti Goldfields Corporation above, p.89.

160 Quoted by Charles Udenze Ilegbune, British Concession Policy and Legislation in Southern Ghana, Unpublished Ph.D. Thesis, London, 1974, 31

161 Enclosures in R. J. Sheehy to colonial office, 26 October, 1895, C.O. 96/269

> and things as effectually as if his heirs and assigns were the absolute owners of the fee-simple or freehold of the said lands, estates . . . "[162]

The obvious problem about the transaction described above is the misuse of terms which could, in principle, render the transaction invalid and ineffective. It was not only misleading to call the chief, who was only an administrator of the lands, the "owner" of the 200 square miles which was the subject matter of the transaction, but the use of that term to describe the grantor chief mistakenly assumed that absolute title in the property vested in him. The issues were further complicated by the provision in the transaction that the grantee had the right to "do all matters and things as effectually as if his heirs and assigns were the absolute owners of the fee-simple or freehold of the said lands . . ."

The description of the interests which the chief purported to alienate in those terms was based on the mistaken premises that any such terms as freehold and fee simple existed under the traditional law and which the transferor had the legal capacity to deal with in the manner described. As argued in part I, by the application of the ordinary principle of English law and the customary law, the operation of the nemo dat quod non habet rule could render the transaction invalid. In addition, the question arises as to whether the necessary consents and concurrences were obtained. Even granted that the procedural requirements were met, was the transaction made in the interest of the community on behalf of whom the grantors administered the property?

The problems arising from the unquestioning reception of Anglo-American notions of tenure and the increasing use of their forms and techniques of conveyancing in land transactions in the traditional systems was amply demonstrated by a Tarkwa case of 1888.[163] In that case, the chief, Kofi Chay, having granted a large tract of his stool land to Essaman Mining Company in 1888, allowed his subjects to continue digging on the land, apparently in genuine belief that his subjects still had the right to do so. However, the Company would probably have succeeded at the ordinary courts in the ensuing action of trespass

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[162] Quoted by **Ilegbune**, loc.cit., 33. Emphasis is supplied.

[163] See pp. 459-469 for a further discussion of the problems of conveyancing.

and damages for £3,000. This was only prevented by the timely intervention by the Governor, on the grounds that the terms on which the company had the grant was so one-sided and unreasonable that the legal action was entirely unjustifiable.

The injustices of this system, caused mainly by the ignorance of the chiefs and their weak bargaining position, is justifiably described by Ilegbune in the following words:

> "The disadvantage of this kind of language in contracts with the generally illiterate chiefs seems obvious. It was beyond their comprehension and in most cases they signed without legal advice. The chief's misfortune of illiteracy thus became a contractual fortune for the concessionaire. A chief who granted a concession over a stretch of land subsequently discovered that he ran the risk of action for breach of contract if he attempted to exercise customary rights supposed by him to have been reserved for him."[164]

Although the considerations for which the chiefs disposed of the community resources would appear to us as trivial and inadequate, as they did not generally apply them to the development of their communities, the little amounts they obtained were regarded by them as sufficient. Thus as the prospects of pecuniary gains ushered in by the new economic order, the reception of Anglo-American ideas of tenure and Christian religious ideas made serious inroads into the traditional beliefs concerning land, it was increasingly becoming a free marketable commodity.

One of the most serious problems which emerged at an early stage in these developments was the twin problem of uncertainty of title and costly litigation. As land values appreciated as a consequence of increased demand for mining and timber concessions, and for the cultivation of permanent crops, such as cocoa and coffee, rights over or title to land were keenly contested. At the root of this problem was uncertainty of boundaries.

Before the introduction of permanent agriculture and the advent of the mining boom, the demand for land was negligible and for which reason it had not acquired such a commercial value as was the case in the last quarter of the nineteenth century. As the cultivation and effective occupation of the land were the means by which individual user rights were established over it in closely knit communities of the kind under consideration, everybody knew the developed areas of

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164 Ilegbune, op.cit., p. 34

each cultivator. Disputes over land rights among individual stool subjects or community members were thus not expected to arise frequently. Even where it did arise, it was contained within the family.

Before Colonial rule and the extensive acquisition of land, there were large tracts of land between the various polities within the area known as the Gold Coast. Because land was so abundant, the need for boundary settlements was not felt. Unless conquest was contemplated for political reasons, the need to settle boundaries or to dispute them was uncommon. However, the colonial government, having brought these polities under the protection of the crown, did nothing to encourage members of the various polities to regard themselves as members of one nation state of the Gold Coast. Instead, each traditional state was being treated as if it were an independent sovereign within the Gold Coast.

The result of this policy in terms of land rights was that members of one traditional state regarded subjects of the other as strangers. Similarly, this policy implied the recognition of tribal territorial boundaries between the various polities comprised in the new state of the Gold Coast. While matters were left in this state, the supposed boundaries which existed between these petty states remained undefined, not surveyed and undemarcated. Thus prospects of pecuniary gains by means of the disposition of stool or family lands led the chiefs of communities or polities bordering one another to make rival claims of rights over hitherto large tracts of unoccupied land lying and situate between them. The resolution of such disputes took many years to complete and the costs involved were high, rendering many families impoverished.[165]

While the uncertainty of boundaries constituted a fertile ground for litigation, the problem was exacerbated by the traditional rules concerning the disposition of group-held property. We have shown

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165 See the 1887 Report on the Agricultural Potential of the Gold Coast, op.cit.; the Belfield Report of 1912, Cmd. 6278; Professor Shephard's Sessional Paper No. 1 of 1936 on the economics of peasant agriculture in the Gold Coast; C. R. Havers' Report of a Commission of Inquiry into Expenses incurred by Litigants of the Gold Coast and the Indebtedness caused thereby, 1944; and the Report of the Committee on Agricultural Indebtedness 1957. The results of all these enquiries indicate the serious effect of litigation on the development of land and living standards of the people.

that in the traditional law, absolute title in property is vested in corporate juristic entities which are separate and independent of its constituent members. Accredited persons, usually the chief and his councillors or the head of the family and his principal members, depending on the type of land in question, having the legal capacity to deal with such lands if certain procedures laid down by the customary law are complied with.

The difficulty for members of one polity seeking land for development in another in which they were regarded as strangers was the identification of such accredited members with the legal capacity to deal with the property. The issues are complicated by the fact that even where such persons have been identified, the customary law is uncertain as to whether it is the unanimous or majority decision of the group that makes dealings with the property valid. The majority of the cases disputed in the courts concern these problems of uncertainty of boundaries and questions relating to the capacity of transferors.

While the colonial administration found no easy answer to the solution of these problems, another social and economic evil, perhaps more serious than the latter, reared its ugly head. The appreciation of land values that accompanied the increased demand for concessions led to land speculation on a large scale. This particular problem was not only contrary to traditional property value systems which placed a premium on the exertion of effort and industry as the means by which individual user rights could ordinarily be established over communal lands, but it meant the introduction into the tenure system of the acquisition of unearned profit based on speculation.

This implied that large tracts of land could be acquired with no intention of immediate or future development. The only purpose was to hold such land until it appreciated in value so that the original acquirer could resell it to the next highest bidder in the open market. This had serious implications for the land tenure system. It meant that those individuals having the necessary capital for development might have to acquire the land through intermediaries. It followed that the tendency for land rights to pass through many hands before getting to a potential developer increased. This in turn would have the effect of increasing costs on development.

In the perpetration of this economic wrong, the native middle men were as guilty as the European capitalist entrepreneurs, if not more guilty. Take the case of a prominent Ashanti literate native,

Prince Owusu Ansah for example. He devoted himself to the busines of buying and selling concessions on speculative basis. In one transaction for instance, he managed to obtain a lease of 200 square miles from a chief of Axim, Kwaku Atta at £100 for a term of 99 years.[166] This was in June 1894. In October 1896, two years after its acquisition, he disposed of his interest to a firm, William Frederick Regan of London for £800.[167]

Earlier Dr. J. B. Africanus Horton, who may be regarded as the pioneer of the busines of land speculation by people of African descent in the Gold Coast, obtained 23 different concessions between 1878 and 1880 totalling over 200 square miles. In May 1882, he floated a company, the Wassaw and Ahanta Gold Mines Syndicate Ltd., to which he sold his assets.[168] It would appear that initially, apart from Dr. Africanus, the educated natives did not participate directly in the concession business. Instead they simply acted as intermediaries between the concessionaires and the land authorities.

However, the degree of land acquisition and speculation began to cause concern among the educated native class. It was not, however, the evil consequences of these events which they were concerned with. They were unhappy about the lack of interest in African participation in the business. This anxiety was expressed in an indigenous newspaper which appealed to the native middle class to get themselves involved in the bussiness. The appeal was contained in the following words:

> "This colony, we believe, has reached a most important epoch in her history. Societies and Companies hitherto unknown are springing up in our midst . . . Unmistakeably, the arrival of fresh companies will be the prelude for increased activity in their operations on the part of those mining bodies which first settled here . . . We should not every day be passive onlookers at the operations of our foreign friends at Tarkwa. They only come to benefit themselves alone. if we are going to permit them to do on our soil what was done in New Zealand (sic) by its white population some years ago, we will be guilty of an act which bears upon its very face the impress of absurdity. The land is ours."[169]

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166 R. J. Sheehy to Colonial Office, 26 October, 1896, C.O. 96/269.

167 Ibid.

168 Africanus had an initial capital of £10,000 divided into 200 shares of £50 each. See, Sir W. B. Griffith to Knutsford, received 24 July, 1889, C.O. 879/46.

169 The Gold Coast Times, 22 November, 1881. Quoted by Ilegbune, op.cit., p. 28.

The idea of the natives participating in the development of the economic resources of the country was a laudable one. Yet the African middle class, perhaps partly because they lacked the skills and the capital, never actually engaged themselves in the mining business significantly. Instead of opposing the speculation business, they joined the race for the acquisition of concessions. As influential members of the community, they could easily persuade the chiefs to dispose of large tracts of land to them on the most favourable terms.

Thus, as if the newspaper publication was intended to prepare the mind of the people for what was already a fait accompli, five months after its publication, eight prominent members of the educated native class, lawyers and merchants, including John Mensah Sarbah, the proprietor of the newspaper, F. C.Grant and Prince Brew of Denquah, one of the most ardent critics of the Land Bills of the nineties, formed the Gold Coast Native concession purchasing company. Ltd.[170]

Apart from the above mentioned firms in which the latter had an interest, he had other private concessions in several districts of the colony. For instance, between 1890 and 1892, he succeeded in the acquisition of timber and mining concessions from the districts of Discove, Axim and Wassaw amounting to over 200 square miles of territory. He established his base in London where he was engaged in the buying and selling of concessions. In 1896, during the time when the land question was coming to a head, he tried without success to dispose of his assets to Ahanta Company.[171]

As David Kimble has noted, enterprising groups of natives and individuals continued in the field of speculation and of the concession acquisition to such an extent that their speculative activities became "a source of annoyance to the tidy mind of officialdom during the 1890s".[172] A detailed treatment of the part played by the native

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170 Naturally the 1882 edition of the paper hailed this development as "wholesome to the core". F. C. Grant, Proprietor of the newspaper was the chairman of the new company, J. M. Sarbah was a member of the Legislative Council and later became president of the A.R.P.S. Other executives of the company included, G. E. Emingsang, J. E. Sey, all prominent and influential members of the community.

171 See letters from Messrs. Vranks & Timbrell to Colonial Office, 21 and 27 January 1896, included in enclosures 52 and 53, 879/46.

172 David Kimble, op.cit., p. 22

middle class in concession speculation is not intended to underplay the role of Europeans in this respect. The role of the former is highlighted here as background to the assessment of their opposition to the Land Bills of 1894 and 1897. For the moment, it is enough to bear in mind that the economic interests of the native middle class were, in a large measure, identical with those of the European merchants and its financial institutions, a factor which placed both parties on the same side in opposition to the land reform programmes of the last two decades of the nineteenth century.

It is unnecessary to delve at length into the speculative activities of European entrepreneurs and the agents of firms and their financial institutions. It will be enough for our purposes to point out that because of their superior skills, technology and availability of capital to them, they played a greater part in the speculation. What happened was that even where a European firm was interested in real mining, it normally acquired more land than it could really develop. The intention was either to sell the undeveloped portion at higher prices in the future or return to it in the distant future if it became possible to expand their activities.

It was therefore normal to find companies acquiring large expanses of territory with no possibility of developing all of it. Take the case of the British Gold Fields of West Africa Limited, for example. In 1895 it acquired about 7,000 square miles in extent, reported to contain "rich deposits of gold, both alluvial and reefs, copper, silver, cinnabar, and other metals, enormous mahogany forests, ebony, cedar, boxwood, greenheart, camwood, petroleum rubber, oil palms, gums and fibre of valuable kinds in immense quantities."[173]

There were such large concessions as those of the Bolton Syndicate of Johannesburg in which the syndicate's acquisitions comprised almost the whole district of Tchuful the chief town of which was Mampong,[174] and the Ensor agreement by which over 100 square miles of territory was acquired from certain chiefs in the Kwahu traditional area.[175]

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173 The Daily Telegraph, 25 July, 1895. The Company had £235,000 capital divided into 235,000 shares of £1 each. Firms usually exaggerate the richness of their acquisitions in order to boost their share prices. This is evident from how the concession was described here.

174 Sir Frederick Hodgson to Chamberlain, 11 August, 1899, C.O. 96/342.

175 This was the agreement by which what became the lucrative Obuasi mines was acquired in 1896.

On occasions chiefs entered into agreements with individual English speculators not to allow others to prospect or mine gold in their districts for a period of time until the latter were ready to do so themselves. Such was the case of Castle Gold Exploration Syndicate Limited. In 1897, Amoako Atta and his Councillors in the Akim district entered into an agreement of a similar nature with Mr. Macdonald who was acting on behalf of the company. The Chief and his Councillors agreed not to assign mineral or concession rights to any person until he had returned a year later. If at the end of the year he did not come back, the agreement was to come to an end.[176]

The disturbing features of concession agreements by which speculators and mining concessionaires alike acquired rights to land, were to be found in the extensive nature of the rights, territory and privileges acquired. What gave rise to considerable concern was the vagueness of the descriptions which could enable the acquirer of the right to lay claim to unspecified areas of his choice. The extensive nature of the rights acquired by such concession agreements of which Captain J. A. Duncan's was representative, amply illustrate the point here. In an agreement in which land was leased to him for one hundred years, he acquired exclusive rights to:

> "all the lands of the lessors . . . and all the adjacent and intermediate villages and the rivers [177] . . . and all the adjacent streams and the mountains together with the rights of the lessors in all rivers and water courses in the said lands with all metal ores and mineral precious stones rocks or other mineral substances or materials with an over and under the said lands with full power licence and authority to sink make and use any shafts adits levels and other mining works now existing or hereinafter to be constructed and to dig work mine search for win and carry away and make mercantile all such metals ores and metallic minerals precious stones rocks and other mineral substances or materials of any kind and convert the same to the use of the said lessees and for the purpose aforesaid to . . . build houses or any other buildings upon the said lands." [178]

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176 Mr. Macdonald was in fact the Director of Education in the Gold Coast and acted on behalf of the company while travelling on duty in the District. For this agreement, the head chief Amaoko Atta obtained £10. His subordinate chiefs of Awhimasi, Dodo, Pano and Tette had £5 each. See Maxwell to Chamberlain, 24 July, 1897, C.O. 96/297.

177 Emphasis supplied.

178 Hodgson to Chamberlain, enclosures, 16 May, 1896, C.O. 96/273. Quoted by Ilegbune, op.cit., 34.

It is obvious that agreements such as these between illiterate chiefs and concessionaires sowed the seeds of dispute. The transactions were not only misunderstood by the chiefs, but they deprived the ordinary citizen of the right to collect and gather natural fruits of the lands in respect of which they were entitled to exercise common and concurrent rights. To describe the rights of the lessee as extending to "all the adjacent and intermediate villages and the rivers" was to lay claim to lands belonging to others who were not parties to the agreement. These were some of the common features of such transactions the consequences of which became a source of worry to the colonial administration.

From what we have discussed so far, it can be seen that economic activity in the Gold Coast in the last quarter of the nineteenth century carried with it certain major land tenure and administration problems. Firstly, the introduction of commercial agriculture based on permanent cultivation of the soil and the development of the mining industry led to increasing demand for interests affecting land. This was attended with the appreciation of land values, rights to which became keenly contested. Secondly, as land became a marketable commodity, the tendency to acquire rights in it for speculation purposes increased with possible disastrous social and economic consequences for the country. Thirdly, the reception of Anglo-American ideas of tenure by the native middle class and elite, the hard core of which was the lawyers, led to the confusion of traditional schemes of interest in land with those of English feudal theories and tenurial concepts.

The combined effect of these events was to highlight the major inherent problems of the land tenure system exemplified by uncertainty of title and costly litigation.

At the root of these problems, as indicated earlier, lay:

i. the continued recognition of tribal territorial borders between the various polities comprised in the Gold Coast even after their absorption into the Protectorate under the colonial administration;[179]

ii. failure to survey, define and demarcate such boundaries;

iii. the difficulties faced by outsiders in identifying the accredited persons in the traditional law with the legal capacity to deal with group-held property, and

iv. the failure to investigate and define the traditional schemes of interest in land which were confused with English tenurial concepts.

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179 For how and when these native states were absorbed into the protectorate and the Colony under British administration, see pp.92-95 below.

Related to these problems was the general mismanagement of the proceeds of concessions by those entrusted with resource management responsibilities in the traditional shceme. These were the problems of land tenure and administration which confronted the colonial administration in the last two decades of the nineteenth century in the Gold Coast. In tackling them, it had to face formidable obstacles which will be our immediate subject of discussion.

B Problems relating to sovereign rights

The land tenure and administration problems outlined above, required for their solution, the exercise of some political and legislative powers. Constitutionally, such powers are normally exercisable as incidents of sovereignty. Therefore, in order for the quasi-colonial administration to be able to exercise them, it should have been in a position to justify its action by reference to a claim of sovereign rights over the territories in which such powers were to be exercised.

However, at the time when the land tenure and administration problems outlined above emerged, there were still great doubts concerning the Crown's rights over the territories. As will later become clear, the existence of such doubts provided the foundation for the future opposition to the legislative measures which were proposed to solve these problems. Hence, it is deemed wise, as a background to the understanding of the problems of the Colonial government, to outline the basis of the Crown's jurisdiction and political authority in the Gold Coast at the time.

We have already seen that until 1921, the British forts along the coastal belt had been administered by the Company of Merchants Trading to Africa. The coastal settlements were made subject to the laws of Sierra Leone after the Crown took over from the Company. During the Presidency of Governor George Maclean, he established in the eighteen-thirties along the coasts a system of administration of justice on British lines; and many cases were brought to him in Cape Coast for trial. Although the exercise of such jurisdiction was criticised as being irregular, it was generally accepted by the inhabitants as fair.[180]

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180 Dr. R. R. Madden, the Commissioner who was required to investigate the system established by Maclean strongly criticised the system as being 'a species of irregular authority", but admitted that it was acknowledged by all parties. See Kimble, op.cit., 194.

As we have noted earlier, the Select Committee of the House of Commons had in 1842, acknowledged the fact that Britain had no sovereign rights over the territories within which such peculiar jurisdiction was being exercised. This was reflected in one of its recommendations that their relations with the Cape Coast chiefs should not be at the basis of the allegiance of subjects to which Britain had no right to pretend, and which it would entail an inconvenient responsibility to possess, but the deference of weaker powers to a stronger and more enlightened neighbour whose protection and counsel they sought and to whom they were bound by certain definite obligations.[181]

In order to regularise the jurisdiction thus established, the Foreign Jurisdiction Act of August, 1843, [182] was enacted in order to remove any doubts as to the exercise of power and jurisdiction by Her Majesty within diverse countries and places out of Her Majesty's Dominions and to render the same more effectual. [183]

On 6 March, 1844 a Bond was executed by certain Frante chiefs in the presence of Governor George Maclean. In it, they voluntarily agreed, inter alia, to mould the customs of their communities to the general principles of English law. The treaties were neither concerned with the cession of sovereign rights nor matters relating to land tenure and administration. It can therefore be concluded that as at 1844, there was no basis for the exercise of any powers in the nature of sovereign rights by the quasi-Colonial administration thus far established in the Gold Coast. The Report of the 1965 Select Committee which recommended gradual withdrawal from the Colony lends support to this view. [184]

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181 See page 66 and note 119 above.

182 6 and 7, Vict.C. 94

183 A British Order in September, 1844, constituted the Settlement of Cape Coast Castle and the Colony of Sierra Leone as British colonies in which Her Majesty's jurisdiction may be exercised over its subjects.

184 Resolution No. 3 of its recommendations declared that all future extension of territory or assumption of government or new treaties offering any protection to native tribes would be inexpedient; and that the object of British policy should be to encourage the exercise of those qualities which might render it possible more and more to transfer to the native authorities the administration of all the government with a view to the ultimate withdrawal by the Crown from all, except possibly Sierra Leone.

However, the increasing penetration of the interior by Europeans after the Ashanti war of 1874 opened new avenues for trade and mineral exploitation. This partly influenced the Imperial government to change its policy towards the territory. In response to this new prospect of economic activity, certain positive steps were taken to strengthen the administration's grip on the territories comprised in the protectorates and the colony. Whether these steps amounted to Sovereign rights is still a matter for debate, but it was evident from henceforth that the flag was permitted to follow the trade and the country was practically ruled as if it were a Crown colony.

In line with this change of policy, the Treaties of Friendship and Trade entered into with certain traditional states were maintained, and certain proclamations and ordinances were introduced so as to lay the foundation for the exercise of political, judicial and legislative powers. In 1874, an Order in Council, for the first time authorised the Legislative Council of the Gold Coast to legislate for the Protected Territories.[185] Such exercise of legislative powers was, however, to be limited in scope, to such powers and jurisdiction as Her Majesty may, at any time before or after the passing of the Order in Council have acquired in the territories adjacent to the Colony. It will be observed that this later qualification on the exercise of such powers rendered the Order to fall short of a general power of enabling legislation which the Sovereign characteristically exercises.

When it became necessary to define the nature and extent of the "peculiar jurisdiction" exercised by the British in the territories under British protection, it was acknowledged the fact that certain rights and powers had been acquired by usage and long sufferance and tacit assent of the inhabitants which exceeded those granted by the Bond of 1844.[186] In order to delimit the scope of this authority and to lay the constitutional foundations for the administration of such territories, the Secretary of State, Lord Carnarvon proceeded by the proclamation of Authority.[187] This was drafted as a guide to the Legislature and the traditional authorities under British Protection.

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185 Order-in-Council, 6 August, 1874.. See also, Letters Patent dated 24 July, 1874, which revoked so much of the provisions of the Royal Commission of 1855 as affected the Gold Coast and Lagos. It erected both Lagos and the Gold Coast into a Colony under one administration.

186 Kimble, op.cit., p. 302

187 See the draft published in J. M. Sarbah, Fanti Customary Laws, London, 1904, Second edition, 293-5; also, Kimble loc.cit.

The Proclamation provided for the exercise of several powers, the exercise of many of which could only be justified on the basis of a claim to sovereign rights. They included:

i. the preservation of the peace;

ii. the administration of both civil and criminal justice;

iii. the establishment and regulation of courts of justice, including native courts;

iv. the enactment of laws framed with due regard to native law and customs where they were not repugnant to natural justice, equity and good conscience;

v. the hearing of appeals from native tribunals;

vi. the apprehension and trial of criminals in any part of the protectorate;

vii. the abolition of human sacrifice, judicial torture and slave trading;

viii. measures concerning domestic slavery and pawning;

ix. the protection and encouragement of trade, by means of roads, bridges, telegraphs and other public works.

x. the settlement of chiefs' disputes;

xi. the promotion of public health and education; and

xii. the raising of revenue.

From this time onwards, the crown was held to be fully and legally entitled to exercise all the rights and jurisdiction it had hitherto assumed in the Gold Coast, as if the proclamation had in fact been published locally. Having laid down this basis and guide lines for legislation, the Supreme Court Ordinance was passed in 1876.[188] It was to apply in both the colony and the protected territories. It provided that:

> "The Common Law, the doctrines of Equity, and the Statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the Court."[189]

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188 No. 4 of 1876

189 S.14

This was followed by the enactment of a Criminal Law and Procedure Ordinance which were made generally applicable in the Colony and the protected territories. [190] In 1877, an Order-in-Council revoking that of 1867, made provision for appeals to issue from the Supreme Court to the Privy Council in London as the final appellate court, instead of Sierra Leone. [191]

The question is whether the 1874 proclamation of Authority and the subsequent legislation outlined above, did or did not amount to the assumption of sovereign rights over the Colony and the protected territories? An affirmative answer to this question is made difficult by the fact that even after all these laws had been passed with the exercise of powers, the underlying assumptions of which were claims to soveriegn rights, high ranking officials of Her Majesty's government continued to deny or express doubts about the existence of any such powers.

Even as late as 1882, the under-Secretary of State could still be heard to be saying that the country was not yet sufficiently civilized to require a universal detailed administration by European Commissioners, nor sufficiently rich to pay for it. [192] In the same year as the Proclamation was made, Sir W. Lawson confirmed in the House of Commons Lord Derby's doubts about British authority in the colony, expressing great doubts whether any man in or out of the colonial office exactly knew or could define the limits of Britains's responsibility with regard to the tribes included within the protected territories. [193]

The principal reason for the existence of such doubts concerning the sovereign rights of the administering authority was that which was regarded as the lack of any theoretical and doctrinal basis for such claims. The theory was that for sovereign rights to be acquired in a territory, it should be brought about either by conquest, cession, purchase or treaty. in the Gold Coast, none of these conditions had been satisfied. Therefore the administering authority had no such

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190 The Criminal Law and Procedure Ordinance No. 5, 1876

191 Order in Council, 23 October, 1877.

192 Dispatch of 31 August, 1882, C.O. 96/147

193 House of Commons, 4 May, 1874.

rights. Having regard to the fact that the colonial administration was acting practically as though it had such powers, the emphasis which was placed on the lack of any formal acquisition of sovereign rights could be seen as a distinction as to form and not of substance.

Yet, it was this formal distinction on which the opposition to the land reform programmes of the period was based. These were also problems concerning questions relating to sovereignty which the Colonial administration was to face in dealing with the land tenure and administration problems of the time. This particular aspect of the problem we should remark, was the creation of the Imperial government itself by insisting that it had no sovereign rights so as to avoid the responsibilities of expenditure incidental to the claims of such rights.

However, the change in the economic circumstances of the territory led to a change in policy where such rights were claimed so as to justify certain policies concerning land administration in the Colony and the protected territories. It is the events which culminated in the introduction of the Land Bills that we shall examine next.

CHAPTER III

THE CROWN LANDS BILL, 1894

A. The Genesis of the Land Bills

Our previous discussion of the problems arising from the development of the mining industry and the introduction of commercial agriculture based on permanent cultivation of the land, gives an indication of the background to the measures to be adopted for their solution. While the doubts about the relationship of the Crown to the native polities persisted, the concession fever that gripped European capitalist speculators and some members of the native middle class alike, caused large tracts of territory to be concentrated in private hands for mining and speculative purposes. The need to do something about some of the anomalies in the system became apparent as the colonial administration was swamped by Reports from District Commissioners from the Mining Districts of Tarkwa, Wassaw and Axim areas.

There were two options open to the government. The first was to allow the laissez faire atmosphere in which business had been conducted since the Company of Merchants rule to be continued. The other alternative would be for the government either to assume full control over land administration by vesting it in the Crown or at least controlling the way in which lands might be acquired or developed by means of statutory regulation. The Government decided to adopt the second alternative course of action.

One of the earliest suggestions that the lands be vested in the crown was made by the African Times which demanded that Governor Strahan should proceed to lay down a sound foundation of a civilised state by declaring the whole of the lands of the territory to be vested in and held from the Crown.[194] As the events of the concession boom were being unfolded, it became clear that this suggestion was not a bad proposition.

For instance, in 1882 the Civil Commissioner, F. J. Higgins responsible for the Tarkwa area sounded a note of warning to the administration, stating that if steps were not taken early enough to control the mining industry by means of legislation "confusion and probably disturbances would be the result."[195] In his report, he complained that various mining companies had published inadequate maps of their concessions which merely indicated general ideas of areas. In addition to suggesting that the Tarkwa area should be surveyed soon to avoid confusion, he proposed that "eventually in the near future, the question of seeking or making proper arrangement for the supervision of the gold mining districts would have to be undertaken."[196]

The Secretary of State's response two months later showed that he was

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194 The African Times, 1 April, 1874.
195 Higgins to Governor, 6 June, 1882, C.O. 96/140
196 Ibid.

not favourably disposed towards any form of control which might entail the making of any serious inroads into the traditional rights of the chiefs. As noted earlier, it was his personal wish that the territory should be administered through the chiefs as a means of saving on costs.

However, in a move which was directly opposed to the views of the Under Secretary of State, the Governor of the Gold Coast sent a secret despatch to the Chief Administrator of Lagos, Lieutenant Governor Maloney, suggesting the acquisition of certain parts of the territory as crown lands, noting that the causes of "our exclusiveness as regards land in the past have almost if not altogether disappeared . . ."[197] He expressed the opinion that the provision of social services "may perhaps render it the more advisable to acquire without delay, certain tracts of seaboard land to meet at least the needs of the future before the further influx of capital and enterprise would make future acquisition too expensive."

He argued that in view of the rush for concessions and gold mining activities which brought in high returns on purchase money, it would be necessary to take steps to acquire the areas adjacent to such forts. Such land was needed for building warehouses at landing sites where customs duty might be imposed on goods shipped from the colony. For this to be done easily, he called for the amendment of the Public Lands Ordinance [198] under which a cumbersome and long procedure was to be gone through before such acquisition could be made. He thought that these cumbersome procedures were no longer adequate to meet the new demands of the colony.

Turning to the land problems that accompanied the rush for concessions, he said:

> "Boundaries of concessions are often, generally I may say, of the vaguest description and advantage is no doubt taken of the indifference of the government and of the ignorance of the people." [199]

However, in proposing these measures within the framework of a new policy, he envisaged opposition from those whose commercial and economic interests might be affected. He thus recognised the need for legal and political justification for action in this respect. Referring to the doubts which persisted about the sovereign rights of the crown, he observed:

> "So far as I know there has not been any general acquisition of the territory outside the forts or on the Gold Coast, either by conquest, cession purchase or treaty, and if I am supported in my assertion, crown land does not exist, whatsoever may be the right of the Government in the matter of sovereignty over land around the forts for defensive purposes." [200]

It may be said therefore, he argued, that lands beyond the forts were

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197 Dispatch No. 511, 2 November, 1882, C.O. 96/144

198 No. 8 of 1876

199 Loc.cit.

200 Ibid., See note 197.

the exclusive property of the people through their "Kings and chiefs". The Governor observed however, that to a large extent, the term "waste land" might be appropriately applied to a great and considerable portion of the land, of which, as to its extent, value and in many instances ownership indeed, complete ignorance prevailed. If this observation was meant to suggest that the "waste lands" were ownerless and therefore their taking was justifiable, such an argument was never pressed forward at any stage of the arguments concerning the crown's rights over lands.[201]

Concluding his case for taking steps to improve the land tenure and administration problems brought about by the new economic order, he suggested the introduction of a system of title registration as the ultimate solution. Although his suggestions fell short of a positive demand for vesting the lands in the crown, they set into motion a policy change towards the direct control and management of lands and the mining industry.

This change in direction of policy gathered momentum as the colonial administration was swamped by reports prepared by civil commissioners in the mining districts on concession anomalies and disputes arising therefrom. The move towards greater involvement in land matters was also dictated by the need to impose tax not only on goods exported from the colony but also on produce so as to enable the administration to obtain sufficient revenue for the provision of social services such as the construction of roads, telecommunications and other services that might assist the development of the mining industry. It was the increasing tempo of this policy change that culminated in the introduction of the ill-fated Crown Lands Bill of 1894.

B. Events and the Debates preceding the Bill

Following the reports on anomalies in the mining industry, Sir William Brandford Griffith, Governor of the Gold Coast, undertook a tour of some of the mining districts of the Western Province. His objective was to acquaint himself with the nature and extent of the problems. At the end of his tour, he became convinced from what he had seen that the best way to solve the problems was the vesting of all vacant lands in the crown from whom all titles to land may be held.

It may be recalled the discussion of the dispute in which he had

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201 The doctrine that there is no land without an owner in the Gold Coast was generally accepted without question. Chief Justice Hutchinson in his memorandum on the Lands Bill in 1891 made this clear. See his memorandum, op.cit. Sarbah wrote that Mr. Justice Smith explained the doctrine in his "Report on Land Tenure in the Gold Coast." F.C.L., London, 1904, 271-81. See also Wiapa v Solomon (1905) Renner, 405. Dr. A. P. K. Kludze is the only one known to have doubted the validity of this rule. See his "Ownerless Lands of Ghana", (1974) 11 U.G.L. 123.

had to intervene while on his tour between the Essaman Mining Company and a local chief, Kofi Chay. [202] When he returned from his tour, he despatched a letter to the Secretary of State in which he outlined the problems. [203] Commenting on the dispute referred to above, he informed the latter that he did not think the sort of claims being made by the company was justifiable, having regard to the fact that the chief involved in the dispute was anxious to be on good terms with the "white man". He noted that the rents being paid by the mining firms were "trifling amounts".

Yet, he felt it was inexpedient at that time to interfere directly. The policy of interference should be limited to the levels necessary with a view not to check the development of the mines which if they succeeded "would open up the country and lead to a great revolution and prosperity of that part of the Colony". The policy of non-interference he thought could be justified, bearing in mind the fact that the natives could only work the ore in small quantities while the great majority of the European companies worked the mines below the surface far beyond the power of any native could carry on successfully. [204]

He expressed the need for some measure of control over the mines. He required the Secretary of State to furnish him with copies of the mining legislation of British Guiana or South Africa which might help him enact a similar law for the Gold Coast. It will be observed here that, although the Governor found on his tour of the mining areas that the agreements by which speculators and mining firms obtained concessions were vague and "somewhat one-sided"in favour of the companies with which they were executed, and that the rents being paid were of "trifling amounts", his suggested solutions fell far short of any direct control of land use acquisition or its management.

Outlining the immediate policy, he said:

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202 See page 83. This section is based on Colonial Office Records. Some of the manuscripts are difficult to decipher and some of their authors sign their names without their initials. Thus some of the names may be supplied without the initials.

203 Secret dispatch from W. B. Griffith to Knutsford, 25 June, 1889, C.O. 96/202.

204 Ibid.

> "Looking to the extreme primitiveness of the whole country at present, the insufficiency of staff of the government to exercise really much control over so large a space of territory, and the infancy of the industry, no steps should be taken which are not rendered immediately desirable for its regulation."
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> Envisaging a policy for the future, he continued:
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> "As regards the future, or the protection of the legitimate rights of the owners of the soil, the question arises whether the simplest course to take in the event of the mines beginning to pay, would not be to assume the whole country as Crown lands, preserving existing individual rights for the life time of the holders, and devote the revenue arising from the sale or lease of these lands for the exclusive benefit of the people of the district." [205]

It can be seen from this projection of future policy on land tenure and administration that, in terms of applying the natural resources of the land, the Governor thought they must be used to the benefit of the people in the districts where such resources were to be found. It follows that at this moment in time, the colonial government still regarded the natural resources, such as minerals, as not belonging to the Gold Coast as a nation, but to the communities in which they were to be found. Perhaps, because the question of British sovereignty was still unresolved, it would be asking for too much to expect the formulation of a national land policy for the Gold Coast at this time.

Five months after this dispatch to London, the Secretary of State responded favourably. In forwarding the mining legislations of British Guiana, Zululand and British Bechuanaland to the Governor as he had requested, the latter was reminded that these acts applied to Crown lands while in the Gold Coast, "except to a very limited extent, is not British territory in the full sense of the term and the land is therefore not the property of the Crown." [206] He was thus required to ascertain if any of the provisions could be introduced in the Gold Coast.

Lord Knutsford wanted further clarification on the Governor's proposals. He would like to know if the scheme was to be applied to mining areas alone or to the whole of the protectorate. Lord Knutsford was prepared to admit that there were many reasons in favour of making the whole

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205 Ibid.

206 Knutsford to Griffith, 4 December, 1889, C.O. 879/46, No. 513, African West.

of the colony and protectorate British territory, and therefore Crown lands, and many advantages to be gained for it. [207] He thought such a measure "would no doubt get rid of many troublesome questions of jurisdiction", particularly as the country was practically ruled "as if it were British territory, though nominally it is not."

Lord Knutsford believed that the conversion of the whole country into a Crown land would lead to a social revolution; therefore, before making such a decision, he would like to receive fuller reports on further development and a statement on how the scheme, if adopted, would be implemented without causing any serious trouble or disturbance. He further warned that although the change might be of advantage to and in the best interests of, the natives in the end, it did not necessarily follow that they would be prepared to accept it quietly in the first instance.

As the Secretary of State welcomed the idea of the Crown's assumption of lands, the Governor became committed to its implementation. But before carrying this intention into effect, he sought the advice of the chief Justice, Sir Joseph Hutchinson as to the desirability of such a measure. Hutchinson having seen Lord Knutsford's Dispatch, disagreed with him on several issues. In his memorandum to the Governor, he criticised the Secretary of State's suggestion that the making of the country into a British colony involved the making of the lands Crown lands. "Perhaps", he argued, "all that the Secretary of State meant to suggest was that the result of making the country British territory would be to make the Sovereign the ultimate lord of all the land, all private rights being left untouched." [208] If this was the meaning of the proposal, then he saw no objection to it. But if the proposals implied the appropriation of all the land by the Crown with or without compensation, becoming the immediate and not merely the ultimate landlord, the case would be very different.

"I believe", he argued, "that all the land in the colony and the protectorate, whether occupied or not, . . . has according to native law an owner." [209] He drew attention to the

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207 Ibid.

208 Hutchinson to Griffith, 7 April, 1891, C.O. 879/46, No. 513, African West.

209 Ibid.

fact that natives appeared to have a strong feeling of attachment to their stool or family lands. A large part of the litigation in the courts, he pointed out, was about land, and he was often amazed at the pertinacity with which the right to the possession of a small piece of land, sometimes land which had hardly any value except the sentimental value arising from connection with the stool or a family member having been buried in it or from its association with some tribal or family fetish.

Like the Secretary of State, he conceded the fact that there were many advantages to be gained if the scheme were to be implemented. Some of these would be the possible increase in revenue from sales and leases of the land and possible benefit to the community from the creation of indisputable title to the land to be held from the crown. But he did not think these advantages constituted a sufficient reason for the introduction of a measure of such far-reaching consequences.

What he considered to be the strongest objections to the measure was that which he described in the following words:

> "Perhaps the most important effect of expropriation by the Crown of the present owners of waste lands would be that it would permanently lower the dignity of and importance, and therefore the power of the chiefs and heads of families." 210

He stated that the chief was the life owner of all the land, unoccupied or waste, belonging to his stool or family. It was he who had power to make grants of it upon the customary native terms and tenure and received the customary presents and tribute due from grantees. In Hutchinson's opinion, if this power and these emoluments were taken away from the native chief and the head of the family, it was impossible that their estimation in the eyes of their people should not be lowered. This consideration alone, would, in his view, be enough to make him reject the proposed legislation unless the reasons in favour of it were "overwhelmingly strong".

He suggested that instead of a wholesale appropriation of lands by the crown, steps should be taken to control the mining industry by regulation. He conceded the fact that there were many reasons why the crown should control minerals and unused and unoccupied forests. He observed that minerals in the country had not been a source of revenue to the country, except to a very few owners. Concessions of timber

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210 Ibid.

and mining rights were being made on a large scale to European companies for speculation purposes. He expressed the opinion that it would be a public misfortune if those rights over such large tracts of land should fall into the hands of persons, especially absentees who for reasons of speculation would not work them. He therefore concluded that all minerals should be vested in the crown.[211]

The issues discussed by Hutchinson deserve some comments. In the first place, he seemed to have fallen into the common error of confusing the control functions or the jurisdictional rights of the traditional authorities with proprietary rights over land. It is misleading to say that the Chief and the head of the family are the life owners respectively of stool and family land. Failure to draw this distinction was one of the principal misunderstandings concerning the land tenure system that misled many opponents of the Land Bills and caused them to reach erroneous conclusions about the measure.

Similarly, the Chief Justice erred in suggesting that the head of the family or the Chief had the legal capacity to deal with stool or family lands in their own right. The factor which the Chief Justice ignored in his argument was that the scheme was being designed partly to protect the citizen against the illegal alienation of the large tracts of land to which he referred in his memorandum. His confusion of the title situation misled him to overlook the interest of the communities of which the Chief and heads of families were representatives. He did not advert to the fact whether or not the revenue derived from the grant of concessions by the land authorities were applied to the benefit of their communities. Instead, he was concerned with the preservation of their "power" and "dignity". The overriding interest of the community, represented by the rank and file of its members ought not to have been thus relegated to a secondary position in this regard.

Happily, the Governor, Sir William Brandford Griffith, sought a second opinion on the matter. He sought the advice of his son Sir William Brandford Griffith, who had spent some years in the Gold Coast but was recently transferred to Jamaica, where he became a resident Magistrate. In his letter to his father, he agreed with Hutchinson that the lands

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211 Ibid.

belonged to the natives of the Gold Coast, but the difficulty, he thought was how individual claims were to be ascertained. [212]

He disagreed with Hutchinson who seemed to be suggesting that if the lands were vested in the crown, it would amount to confiscation. He argued that such a policy would not mean confiscation or spoilation. He believed, it would simply aim at holding the land for them as a "trustee". He argued that the land, once acquired by the crown would practically be the "property of the Gold Coast". He wrote:

> "The land so acquired would then be used for the benefit of the Gold Coast. Any revenue derived from such crown lands would go to the credit of the natives and the few scores or possibly hundreds of Europeans temporarily residing on the Gold Coast." [213]

He thought it was unnecessary to take account of any gain to the handful of Europeans who would then become joint owners of the land along with the natives. What could be done in their case was the imposition of a poll tax on them in order to compensate for the advantage they might gain from the scheme.

It will be observed that the scheme envisaged by Sir William Brandford Griffith (Junior), if accepted, could be of far-reaching consequence. Unlike his father, Sir William Brandford Griffith, and Sir Joseph Hutchinson who both suggested the revenue derived from the minerals exploited should be applied to the exclusive benefit of the communities from where such resources were to be found, Brandford Griffith (Junior) saw the problem within the context of a wider Gold Coast national land policy. It was his opinion that such revenues as were derived from concession grants should go to the credit of the people of the Gold Coast as a whole. As the assumption of control by the Crown would have the effect of vesting the lands in it as a "trustee" for the benefit of the country as a whole, it could not amount to confiscation or spoilation as Hutchinson seemed to suggest.

Referring to the question of insecurity of title, he made the following observations:

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212 Brandford Griffith Junior, to Sir W. B. Griffith, Enclosure No. 2, C.O. 879/46, African West, No. 513.

213 Loc.cit.

> "No doubt the land will belong to some native, but what individual claims are, it will be hard to ascertain. probably numerous persons would each of them possess some indefinite claim to the land. Some of the claims would probably conflict, and if any person desired to purchase this land, he would experience great difficulty in getting a secure title owing to this indefinite and conflicting claim."[214]

One of the sources of such conflicting claims and uncertainty was what Hutchinson described in his memorandum as "great difficulty in discovering owners or persons entitled to sell or mortgage".

No doubt the scheme of land administration envisaged by young Brandford Griffith (Junior) could have successfully dealt with the land problems of the time and could have laid a firm foundation for the future management and administration of the land and its resources of the country on the basis of a sound national land policy. The far-reaching consequences of the implementation of such an elaborate programme of land reform would have been:

i. the abolition of the tribal territorial basis of beneficial enjoyment of rights in land;

ii. the establishment of the principle that membership of the Gold Coast Colony and the Protectorate formed the basis for the exercise of inherent traditional rights in respect of land;

iii. the elimination of tribal territorial and family boundaries with their associated disputes; and

iv. the identification of social and economic problems with the Gold Coast as a Colony under British administration instead of identifying them with ethnic and tribal affiliations.

It is evident that if the servants of the Crown assumed control over the administration of all lands, prospective acquirers of interests in it would have had no difficulty in identifying the bodies which might be created to perform the functions relating to the allocation and disposition of interests in land. Similarly, if boundaries had ceased to matter so would disputes associated with them. Perhaps Brandford Griffith (Junior) himslef did not realise that his scheme would have all these effects, but his objectives were clear.

His main goal was the security of title and the creation of freehold titles. In this regard, he proposed the following measures to be the principal objectives of land policy:

i. the creation of freehold titles:

ii. that the system by which land is held may be simplified;

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214 Ibid.

iii. that unoccupied lands should become Crown lands; and that the present inconvenient distinction between the Protected Territories and the Colony be done away with.

He suggested a skilful scheme by which this programme might be implemented. He recognised that it would be politically unwise to rush the programme through. He therefore suggested a land tax system whereby land for which such taxes remained unpaid for seven or ten years might become liable to forfeiture. "Land in the Gold Coast", he said, "as in almost all other places under civilised governments must bear the burden of taxation, and it is better that the present wretched system of land tenure should be got rid of as soon as practicable before the mixed application of English law and native custom gets things into an inextricable tangle."[215]

Provision must therefore be made in the proposed Bill imposing tax on lands generally. Such a law, it was envisaged, would operate a gigantic partition suit, gradually working itself out with comparatively little friction. Families and tribes would agree to split up the lands jointly held by them or in common in order to pay tax on their individual holdings. In this way, individual titles would be created and freehold titles would become vested in such individuals. Large tracts of waste land would in many cases remain unpaid for and could then fall into the hands of the Crown.

It should be remarked here that the young Griffith being ignorant of the nature of the traditional schemes of interest in land, assumed erroneously, that the indigenous system was a wretched one and therefore ought to be done away with. Hence the evolution of tenure should be guided on the lines of English principles. Yet, greater insight into the systems would have made him realise that the policy advocated by him was not incompatible with the traditional notions of tenure.

For, the assumption of land administration responsibilities by the crown would amount to taking over the control functions which the traditional authorities had from time immemorial exercised over lands as the political leaders of the community. The role which the crown would be playing under the new scheme could therefore be seen as the natural consequence of the crown becoming the new head of the communities now absorbed into the Gold Coast nation without necessarily changing or infringing individual rights. Under such a scheme, the creation of freehold titles would not be a necessary condtition for the beneficial

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215 Ibid. Young Griffith evidently had in mind the Indian land tax system in which the major source of government revenue was derived from taxation on land.

enjoyment of rights in land.

In view of this, although the crown may allocate land to the subject having an indisputable interest therein, the interest would subsist so long as the subject continued in occupation and use. When he abandoned it, it would revert to the crown for reallocation in the same manner as it was the practice under the traditional system. The equitable and economic principles underlying the traditional system has more to commend it than the creation of freehold titles in the manner suggested by young Griffith. His general approach to the problem however meant that it opened the way for the discussion and consideration of land problems in the Gold Coast in the context of a national land policy.

While the canvassing of opinion and the debates on the proposed measures went on, Sir William Brandford Griffith asked A. Redwar, the Queen's advocate to draft a Bill to vest the "waste lands" in the Crown. The matter was however kept in abeyance as a result of Redwar having been on holiday in England throughout the whole of 1891. Meanwhile, the anomalies concerning the mining industry and concession grants were being brought to the attention of the Imperial government in England. Things came to a head when early in 1894, certain anomalies in concession grants came to light in the Colonial Office in London. One Mr. Prosser obtained some documents from the Gold Coast purporting to be concessions granted to him there. By that document he was granted certain rights, among others, the construction of railways from Elmina to Cape Coast and hence to Prah.[216]

The Secretary of State, the Marquess of Ripon, refused to entertain the application because he discovered serious irregularities concerning it. He sent a Dispatch to Griffith stating:

> "The concessions alleged to have been obtained by Mr. Prosser appear to be identical with the first three of the four so called concessions to which you referred in your Dispatch No. 140 of the 8th May 1891 . . . I have to request you to inform me whether it is probable that other concessions of similar kind will be brought forward, and, if so, whether it may be desirable to issue a public notice to the effect that no concession purporting to be granted by Native

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216 Ripon to Griffith, 1 May, 1894, C.O. 876/46. No. 513, African West. By this time the Marquess of Ripon succeeded Lord Knutsford as the Secretary of State. It would appear however that Ripon's views were not dissimilar to those of his predecessor.

> Chiefs will be recognised by the government in any way, unless approved by the Governor within one year of their being granted."[217]

He also expressed concern about the reports calling his attention to the serious damage being caused to the Colony by reckless felling of timber in the Axim district. He warned the Governor that the time had come when the colonial government should seriously consider what were the best means to adopt for the regulation of the mining and timber industries. He therefore enquired to know what progress had been made on the proposed Crown Lands Bill.

The Governor replied that he had delayed action on the matter in order to write a full report regarding the problems and how he proposed to tackle them. Meanwhile, Chief Justice Hutchinson, who had three years earlier expressed some reservations about the feasibility of the crown's control over lands, was forced to change his views. Having had six years experience on the Bench in the colony, he became aware of the serious consequences of uncertainty of title and its incidental costly litigation.

In his memorandum accompanying the Bill he had drafted, he notified the Governor that he had changed his earlier views on the issue.[218] He regarded the failure of the traditional elders, particularly the Chiefs, to apply the proceeds of concession grants to the benefit of their subjects and the serious irregularities arising from such grants as being "overwhelmingly strong" reasons why the Chiefs should now be relieved of their traditional land control functions. He wrote:

> "The right, if it exists, of making grants to strangers, particularly Europeans, of waste land, and of minerals, and of concessions of forest land, will be taken away. The practice of making such grants and concessions is quite modern and is probably illegal according to Native law and custom".[219]

If the Chief Justice had certain doubts about the legality of such transaction, there was one thing of which he had no doubts in his mind. This was the desirability of some measure of control over the timber and mining industry. Referring to the Bill which he had drafted he stated:

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218 Letter of 25 July, 1974. Enclosed in no. 513, African West, C.O. 879/46.

219 Ibid.

> "I think that an Ordinance on the lines of this Bill would secure for the government the main object which, I believe, your Excellency has in view - the control of the forests and the mines without any hardship or injustice to the natives or to anyone else."[220]

Armed with such words of support from his earlier critic and his son who had suggested the ways in which the reforms might be carried out, Sir Brandford Griffith was now ready to give a full report on the problems and the measures he proposed to adopt for their solution. He assured the Secretary of State in his report that the kind of anomalies in the Prosser concession would no longer occur in the future.[221] He believed the new Crown Lands Bill, the draft of which he enclosed in his Dispatch, would take care of similar problems. He was therefore of the opinion that it was unnecessary to issue the notification referred to in Ripon's Dispatch.

C The Draft Crown Lands Bill of 1894.

i. Definitions

The Bill drafted by Hutchinson was a short and simple piece of legislation. Section 1 vest in the Crown all waste lands in the country. Clause 2 dealt with matters relating to definition. It defined "waste land" as land which for a period of 30 years next before the day on which the Ordinance was passed no beneficial use had been made for cultivation or inhabitation or for collecting or storing water or for any industrial purpose.[222] It also defined forest land as land which was for the most part covered with trees which have not been planted or sown by man. Clause 3 of the draft Bill vested the lands so defined in the Crown for the use of the government of the colony.

Lands to be affected by the Bill were so defined so as to avoid the infringement of prior existing rights. A remarkable feature of

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220 Ibid.

221 Griffith to Ripon, 29 August, 1894, C.O. 879/46.

222 This definition of "waste land" is a replica of Section 7(b) of the Public Lands Ordinance, No. 8 of 1876 which defines unoccupied land in a similar manner and which the government could acquire for the service of the Colony without having to pay compensation therefor.

of these definitions was that they were consistent with the indigenous law under which rights to land were established by means of effective occupation and inheritance of such acquired rights. Abandonment of occupied land for a period of thirty years was considered as a sufficient time within which such rights might cease to exist. This was a restatement of the traditional law.[223]

ii. Native Rights

Under Clause 4, the Bill sought to guarantee certain rights to Natives. It provided that:

> "Nothing in this Ordinance shall affect the rights according to native law of any head of a family or any Chief with the concurrence of those persons (if any) where concurrence is required by Native law, either himself to occupy, or to give permission to Natives on the customary native term and tenure to occupy waste land belonging to such family, or to the stool of such chief (such waste land not being forest land), and the persons so occupying or permitted to occupy shall have the same rights of user of the land for cultivation or inhabitation, or otherwise, as if the Ordinance had not passed, and so long as their occupation continues the land shall be vested in the Queen as aforesaid subject to their rights."

This provision was obviously formulated to allow the traditional authorities to continue their traditional roles with respect to land allocation to members of their land holding groups. This was an important provision because it would allow the traditional leaders to assist in land administration until such time as government officials might be found to assume such duties. Serious anomalies in land alienation were not common among the members of the same land holding groups. The problem lay with the grant of concessions to strangers. It was therefore deemed unnecessary to prevent chiefs and heads of families from performing their land administration functions within their families or polities.

Just as before the Ordinance came into force, members of land holding communities or families could acquire rights to land by the exercise of their inherent rights of family or community membership by means

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223 Although it is uncertain for how long abandonment becomes effective under the customary law, Sarbah suggests a ten year period might be sufficient. See his F.C.L., op.cit. p. 61.

of effective occupation of "waste land". If the land was abandoned, the right was to be extinguished and to revert to the crown. The significance of this provision lay in the fact that although it would appear as a mere reproduction of the customary law, abandonment under the new law would have the effect of reverting the interest to the Crown, that is to say, the right would revert to the state of the Gold Coast and not to the particular community or family to which the original acquirer of the interest belonged. This provision could have far reaching consequences. It meant that all the waste lands, having been vested in the crown, would have the effect of abolishing tribal territorial basis of beneficial enjoyment of rights in land. In place of this would be established Gold Coast citizenship by virtue of which the citizen would be entitled to beneficially enjoy and acquire interests in land.

Although the Bill sought to vest all minerals in the Crown,[224] Clause 8 preserved the right of the native to work and get minerals by himself or by any members of his family or household, who were entitled by customary law to do so before the coming into force of the Ordinance. The only restriction in this respect was that this right did not extend to any mineral, the right to work or get which, the government had before the attempted exercise of these rights had already granted to any other person.

This early take-over of minerals by the government was the result of a recognition of the fact that the mineral wealth of a nation requires a greater protection against indiscriminate exploitation and must be prevented from falling into the hands of a small number of private individuals who might not manage or apply it to the interest of the community at large. The policy considerations underlying such a measure were set out 50 years later when the mining policy of the Imperial government was authoritatively stated to be as follows:

> "There is a fundamental difference between mining and other forms of productive activity such as agriculture, animal husbandry or forestry. Whereas policy in the latter cases should aim at the preservation and improvement of the productive powers of the basic natural resources of a territory, mining essentially consists of the removal of valuable natural resources which once removed, cannot in the nature of things be replaced. The process is therefore in the nature of the realisation of a capital asset and the general aim of mining policy must therefore be to make the best possible

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224 Clause 6.

arrangement for realising such an asset." [225]

In what was regarded as five powerful arguments to be adduced for the vesting of all mineral rights in the Crown, the 1946 Circular noted that in the first place, the development of minerals in colonial conditions frequently required considerable government expenditure, e.g. on survey, transport or other facilities and it was undesirable that the result of such expenditure should accrue to private mineral owners. Secondly, a multiplicity of owners was frequently an obstacle to the organisation of economic units of operation. Thirdly, the payments made under contracts betwen owners and mining companies did not necessarily accrue to the benefit of the members of the community which had the most substantial interest in the lands affected. Fourthly, minerals were important economic assets to a territory and being the gift of nature, their benefits should be shared by the community to which they generally belonged, and not enjoyed solely by limited groups of private individuals who were often not members of the community concerned. Finally, government, by possession of the rights, was in a position to control the size of the concessions and the rate and terms of exploitation. [226]

The 1946 Circular noted that in pursuit of these objectives most colonial legislation had already provided for the reservation of mineral rights in any future sale or alienation of crown or public lands. It urged that in places where such provisions were not made, the government of those territories might well consider its adoption. Although policy considerations of this kind were not fully articulated in the memorandum to the 1894 Bill, the principles outlined above could be discerned from its provisions. Unhappily, as will be seen later, the opponents of the Bill could not see the merit in the scheme as their vision was blurred, in many respects, by emotion and their own selfish interest.

iii. General Provisions on Existing Rights

Under the draft Bill, all prior existing rights in respect of minerals

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225 Circular dispatched from the Secretary of State for the Colonies, Mr. A. Creech Jones, 17 October, 1946, See note 226 below.

226 Ibid. This policy statement was influenced by the post-war Labour Party ideas concerning the important role governments should play in development programmes so as to rehabilitate shattered economies of the inter and post war periods.

and timber were required to be registered in the land registry within six months from the date of commencement of the Ordinance. Failure to do so within the prescribed period would render such grants absolutely void.[227] This provision was aimed at compelling concessionaires to survey and record their possessions. In this way, the government could determine the extent of individual acquisitions.

Clause 10 (i) provided that every grant of land in respect of timber and minerals which shall have been made within ten years next before the commencement of the Ordinance where the land to which the grant applied exceeded 500 acres, should be submitted by such person claiming any rights under it to the Governor in Council for approval. For approval of such grants to be given, certain prescribed conditions were to be satisfied. Firstly, the Governor in Council shall take into account the fairness of the transaction. In determining the fairness of the contract under which the rights were acquired, the Governor was enjoined to take into consideration:

a. the area to which the interest related;

b. the consideration given for it;

c. the purpose for which it was acquired, and in other respects.

Secondly, where these conditions were satisfied, the Governor might approve it subject to such exceptions, conditions or reservations if any, as may be agreed upon with the grantee. In any event, its approval was made subject to the absolute discretion of the Governor in Council. Even where such grant had been finally approved such approval would not confer on the grantee any validity which it would not otherwise have had.[228]

If the Governor-in-Council did not approve a grant within one year after the commencement of the grant, it would become absolutely void. In that event, if the Governor considered it just, he might direct payment to the grantee out of public treasury, the value of the consideration given for the grant. These provisions were apparently aimed at speculators and grantees of interest in land on unreasonable and unfair terms. Conditions such as adequacy of consideration, limitation as to size etc., which were required to be satisfied before the approval of such grants, implied that such transactions could be reopened. The effect of this provision would be to bring to an end the laissez-faire atmosphere

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227. Clause 9 .

228. Clause 10 (2) .

in which parties were accustomed to conduct land transactions on the basis of ordinary principles of contract law.

Although this might be open to objection on the grounds that the exercise of these discretionary powers by the Governor would amount to interference or restriction on the private rights of individuals to bargain freely, the policy might be justified on the grounds that the natives needed protection against the sharp practices of the literate native middlemen and the European capitalist speculators who stood in a stronger bargaining position than the illiterate and ignorant native chiefs. The former more often than not took advantage of the weaknesses of the latter and acquired concession rights on unreasonable terms. These provisions sought to redress this imbalance.

In order to strengthen the hands of the government against speculators, a provision was introduced under Clause 11 to declare unutilised concessions void. It thus provided that every grant in respect of forests, minerals and other rights in respect of lands which was made before the commencement of the Ordinance and which had not been utilised in good faith by cutting timber, or the making of roads or the opening or working of mines, or erection or purchse of machinery or otherwise, should on the commencement of the Ordinance become absolutely void. In any such case, if the Governor in Council deemed it just, he might direct payment out of public treasury, the consideration or part thereof to the grantee.

These provisions on prior existing rights were those that provoked the strongest attack from Europeans and the African middle class alike on the proposed legislation. They could not easily accept a measure which could strike at the very foundation of their profitable gamble in concession speculation.

iv. Crown Grants

In order to lay down clear procedures for land grants and allocation under the scheme, the Ordinance empowered the Governor to make rules prescribing the mode of application for grants and such deposits as applicants might be required to pay. Such regulations were also to define the terms on which grants were to be made.[228] Clause 14 prescribed the procedures by which grants by the crown might be made. The Colonial Secretary or anyone appointed by him was required to cause notice of every application for a grant to be published in the Gazette. Such a

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228 Clause 12.

notice should also be conspicuously posted up for two weeks on the door of the principal courthouse of the Commissioner of the district in which the land to be affected by the grant was situate.

Similarly, a copy of the notice was to be served on the head chief or head chiefs if there were more than one such head chief residing near to the land in question. After the publication of the notice in the manner discused above, anyone making an adverse claim in respect of the land concerned was required to make his claim at the Divisional Court of the province in which the land was situate. If a claim of this kind was made, the court was to set up a date for the adjudication of the claim in not more than three weeks from the date on which the notice had been posted. Similarly, the claim must be made within the prescribed period of three weeks.[229] After the adjudication of the claim or if no adverse claims were made, the Governor might proceed to make the grant. Any such grant made would have the effect of conferring on the grantee an absolute title to the interest granted.[230]

It may be questioned whether the procedures laid down for publishing the notice of applications were adequate enough to furnish information on prospective grants. In the first place, the vast majority of the people were illiterate and would not be able to read the notices. It would appear however, that these provisions were more relevant to transactions in which European mining firms, speculators and the native middle class were the main parties. For, it was this class of persons who were involved in the large concession grants for mining and speculation. This category of persons would have no difficulty in reading the Gazette and other notices.

It would thus appear that the method by which the Colonial government under Sir William Brandford Griffith sought to solve the land problems of uncertainty of title, costly litigation, speculation, illegal dealings in land and the control of the mines and the forests was the assumption by the Crown of some of the administrative controls which the traditional authorities had from time immemorial exercised over such lands.

When the Secretary of State, the Marquess of Ripon, received the draft Bill and the memorandum thereon, he approved of it, but recommended minor additions and alterations.[231] He suggested that instead of imposing

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229 Clause 14 (2).

230 Clause 15.

231 Ripon to Griffith, 10 October, 1894, C.O. 879/46, No. 513, African West.

an obligation on the grantee to register his grant in the land registry within six months of his grant, it might be better if the government undertook that responsibility. A moderate fee could then be charged to cover expenses of the registry and surveys. He believed this procedure would simplify the system and pave the way for the establishment of a system of title registration on the ~~liens~~ lines of the Torrence system in Australia. He suggested the publication of the Bill in the Gazette for three weeks before it should be brought before the Legislative Council. The obvious reason for this suggestion was to assess public opinion and reaction to the measures.

As might be expected, reaction was immediate and unfavourable. The problem for the Gold Coast government was that, for the first time in the history of British administration of the Gold Coast, an attempt was being made to assert rights which were sovereign in nature. Yet it should be borne in mind that even as at this time, the Imperial Government's position in relation to sovereign rights remained ambiguous. This element in the situation was to prove quite damaging to the defence of the programmes being proposed.

There was also an additional factor which was to prove disadvantageous to the implementation of the programme. For a programme of land reform with such far-reaching consequences, the need for consistency and continuity in policy was essential. But the scheme suffered the misfortune that those who lived with the problems, understood them and initiated this programme of reform did not continue in office long enough to see the scheme through. This proved unhelpful to the pursuit of a coherent and consistent policy on these matters.

For instance, the brain behind the scheme was Sir William Brandford Griffith, but the Bill had only been read once in the Legislative Council before he left the Gold Coast on retirement. Both Redwar, the legal officer of the Colony, and Hutchinson were involved in drafting the Bill. The former left the Gold Coast at the end of 1891, while the latter was apppointed Chief Justice of the Windward Islands at the end of 1894. Lord Knutsford, who originally supported the idea, was succeeded by the Marquess of Ripon as the Secretary of State early in 1895. Although the latter had no objection to the plan, hardly had he had time to grasp and digest the problems before he was succeeded by Lord Chamberlain. Maxwell who succeeded Griffith could have been firm and seen the scheme through. But before he could do so, he was taken ill and died at sea in the autumn of 1897. All these made the appreciation of the problems

by government officials difficult and helped the opposition considerably. Therefore it was not surprising that when Maxwell was succeeded by Hodgson, one of the original opponents of the Bill, the scheme was doomed to failure.

It will be considered next, the nature of the opposition to the Bill, the assessment of the arguments for and against it, and the way in which the British government's ambivalence concerning its sovereign rights over the territory in the past years was employed by the opposition as a basis for challenging the administration's right to exercise the sovereign powers implied by the scheme.

CHAPTER IV

Opposition to the Bill

A. Introductory

It is often assumed erroneously that native opposition to the Land Bills of 1894 and 1897, spearheaded by the Aborigins Rights Protection Society, was the main cause of their withdrawal. An examination of the facts would, however, disclose that the importance of the part played by native protest and agitation in this respect was often exaggerated. At the end of the day, the most important factor in the issue was pressure from European merchants, financial and commercial organisations in Liverpool, Manchester and London. These trade associations had their lobbies in the House of Commons, and the pressure exerted by them was further helped by the opposition of certain government officials, both in the colony and the Colonial Office in London. Instrumental in the withdrawal of the Bill was pressure from these groups. Had these financial and commercial institutions not found their interests threatened by these legislative measures, the Bill might well have been pushed through, protest from the natives notwithstanding.

One of the arguments advanced against the Bill by the natives was that if the lands were vested in the crown with power in the Governor to allocate land, the latter would dispose of all the lands to Europeans and deprive the natives of their lands. What this argument amounted to was in effect that the scheme was being designed in the interest of British firms. However, curiously enough, the latter in whose interest the scheme was alleged to have been designed, found themselves on the same side as the natives in opposition to the measure. This factor must continually be borne in mind in the assessment of the arguments advanced against the Bill. The fact was that those elements of the native middle class which were most unrelenting in their opposition to the Bill all had identical financial interests with Europeans which the measures threatened.

B. Opposition from Government Officials

Prominent among those government officials who raised objections to the proposed legislative measures were the Attorney General of the Colony, Bruce Hindle, and the Colonial Secretary, Sir F. M. Hodgson. Both men were away in London when Hutchinson made the first draft of the proposed Bill. Soon after their return, they wrote their comments in criticism of the Bill.

The Attorney General, Bruce Hindle, conceded the fact that when he was a District Commissioner in Axim in 1888 and became acquainted with land problems in the districts of Ankobra, Wassaw and Appolonia, he formed and expressed the opinion that the solution lay in the assumption of all lands under Crown con-

trol to be administered for the general advantage. But he was now of the view that the present measure went too far. His main reasons for his new stand were stated as follows:

> "All these years the Government has, without hindrance or warning, allowed speculators to spend health, time and money, in the acquisition of concessions, many persons having come out to this colony at the risk of life, and at great expense, only now to find that, by ex post facto legislation, practically all the grants that have been made are liable to be forfeited and most of them are void absolutely, with a provision, however, which is not going to amount to much. Their interests have already been registered and published from time to time in the Gazette. Most of the properties had been subject to costly litigation. All these are to go overboard if the concession has not been worked or the terms are unreasonable.[232]

It is interesting to note that Hindle's argument was not based on the fact that the anomalies in concession grants such as insecurity of title and costly litigation were on the decrease since he had ceased to be a District Commissioner in 1888. Indeed, the evidence was overwhelming that such problems actually increased steadily with the years. In fact, there was implied in his own argument the suggestion that the majority of the concessions were obtained on unreasonable terms and were not being developed. If this were not the case he would not have entertained any fears that all those concessions were "to go overboard" if they were unworked or the terms were unreasonable.

Certainly, Hindle saw speculation in concessions as one of the legitimate business activities which ought to be encouraged in the colony. He expressed this objective in the following words:

> "One chief hope of this Colony is that the speculative capitalist will become interested, but I fear that this Ordinance, if passed, will frighten him off for half a century, especially as he won't know what is coming next."[233]

He conceded the fact that many of the terms on which the concessions were obtained were apparently unfair "especially looking at the first consideration". Yet he believed this could be compensated for when the mines began production at which time high rents would be paid.

This argument presupposed the incorporation into the concession agreements terms which provided for the payment of higher rents when the mines began production. However, as the examination of the concession agreements disclosed, no such clauses existed which would justify such a presupposition. The factor which the learned Attorney General seemed to have overlooked was that even if clauses of the kind were included in the agreements, they could easily be evaded by selling off such grants to the highest bidder in the market before the grantee had even had time to work the mine and develop it. It might not be easy for the grantor to enforce the clause against the subsequent purchaser.

Similarly, the Attorney General's objections based on the fact that the concessions having been registered at the land registry and published in the

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232 Attorney General to Colonial Office, 18 July, 1895, C.O. 879/46, No. 513, African West.

233 Ibid., emphasis supplied.

Gazette could not be invalidated for their unreasonableness, could have no legal validity. For Section 20 of the Registration Ordinance under which these instruments were registered neither guaranteed title nor cured defects in it.[234] It provided that registration shall not cure defect in any instrument registered, or confer upon it any effect or validity it would not otherwise have had. It follows that the validity of instruments so registered could be attacked without necessarily violating the law.

Although his arguments appear to be in defence of "speculative capitalists", he also commented on the way in which the proposed Ordinance would affect the interest of the natives of the Gold Coast. He believed the measure would in its effect treat them unfairly. If the Crown made grants of lands, then the chiefs "who were the owners of the waste lands" would be deprived of the revenue. It appeared to him unfair that no part of the consideration should be given to the chiefs whose stools the land belonged to. He regarded this legislation as the most important in the history of the country and was therefore unhappy about the way in which it was being dealt with.

As the Scheme stood, he did not see it as adequate to protect the natives. However, he was doubtful if the whole scheme was a good policy to press forward at a time when Her Majesty's Government was considering the question of bringing the Ashantis into the protectorate. They might be reluctant to come into terms.

Turning to the feasibility of the scheme, he expressed doubts about its success. It was "curious" and "injudicious" that a grant not approved by the Governor in Council within one year should render such a grant void. He could not see how the Governor could examine the "innumerable" grants within the last ten years within such a short period. In order to perform this task efficiently, it would require land commissioners and land officers who would be responsible for the survey, definition and demarcation of boundaries between Crown and other lands.

Having regard to these administrative problems, he thought the measures went too far. He suggested the question of paying some of the proceeds of land grants to the chief might be considered. He thought the period within which a concessionaire should be required bona fide to begin working his concession should be extended to ten years and that the size of concessions acquired ten years hence which should receive automatic recognition should be extended to 2,000 fathoms instead of 500 acres.

In support of these views, was the Colonial Secretary, F. M. Hodgson. In a letter to the Governor, Sir William Brandford Griffith, he criticised the Bill on several grounds.[235] Like the Attorney General, he expressed doubts about the availability of any machinery to bring to bear on the vast area of land to be affected. He repeated most of what the latter had said and was

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234 Ordinance No. 1 of 1895

235 F. M. Hodgson to Maxwell, 13 September, 1895, No. 51 African West, C.O. 879/46

almost in entire agreement with him. Like Hindle, he thought the Ordinance went too far in terms of principles and in the direction of "confiscation and spoilation".

Turning to the financial implications of the scheme, he drew the attention of the Legislative Council to the economic and financial constraints which might make the legislation a futile exercise. He argued that it would cost the government something in the range of £8,000 per annum at least if the programme was to be implemented. In his opinion, unless the Bill was to be a piece of meaningless legislation "encumbering the Statute Book and irritating the natives", then the government would have to accept the responsibility of making available all the staff necessary for such an elaborate scheme.

He saw, as the raison d'être of the scheme, a belief on the part of the government that it could make better use of the land and better conserve the interest of the natives with respect to it than "the present owners, who are in the main the native kings and chiefs."[236] Where he disagreed with Hindle was his suggestion that only European capitalists should be encouraged. In this regard, he wrote:

> "The Attorney General makes a strong point against the Bill when he says that some of the provisions are calculated to frighten away capitalists, who are the people the Government has to encourage - (not the natives) to come here, but I will not travel the same ground with him."

In conclusion he suggested:

> "What is wanted, in my opinion, is not a wholesale annulment of all existing ownership over vast tracts of land and forest, a step which will cause, has in fact already caused, extreme dissatisfaction and disgust, but a measure which gives the government the right to watch the land operations of the natives, and to insist upon the observance of certain regulations with respect to them as may appear to be called for in the interest of the natives on the one hand and capitalists on the other.[237]

For this reason, he suggested that the principles of the Bill should be abandoned. Instead, government inspectors of mines be appointed. Officers responsible for the inspection of timber grants and more complete arrangement for the registration and survey of grants be appointed. Regulations for the conservation of forests and the working of grants both in the case of minerals and wood could be an answer to the problems. These objectives could be accomplished without the necessity of confiscating the land. He believed that if his suggested course of action was adopted, it would prevent the universal irritation, which although had not as

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236 Ibid.

237 Ibid. It is not surprising that the policy which was later adopted and pursued after the withdrawal of the Bills embodied the principles inherent in this suggestion, for Maxwell was succeeded by Hodgson as Governor and was therefore in a position to put his ideas into practice.

yet found its full vent, the Bill had already caused.

Certain aspects of Hodgson's argument call for comment. It would be observed that underlying his arguments was a basic misunderstanding of the traditional schemes of interest in land. He was mistaken in supposing that the "owners" of the land were "in the main, the native kings and chiefs". Had the land belonged to the "kings" and "chiefs" in their own rights, perhaps one would not have been too much concerned by the maner in which they were improvidently disposing of them for paltry sums. Perhaps, the fact which Hodgson did not appreciate was that the "kings" and "chiefs" were administrators of the lands belonging to communities of which they were representatives.

The raison d'être of the Bill was therefore not the protection of the interests of the "kings" and chiefs" as "owners" of the lands as such, but the safeguarding of the interests of the ordinary members of the communities whose resources were being mismanaged and indiscriminately alienated by their ignorant and generally selfish leaders. The majority of the opponents and critics of the Bill based their arguments on similar mistaken premises, believing erroneously that the control function of the traditional authorities carried with it proprietary rights over the lands administered by them.

There were those who like Hindle sought to promote the interests of "speculative capitalists" without regard to the social and economic consequences for the ordinary members of the society or for the country as a whole. Too, there were those who like Hodgson believed erroneously that vesting the lands in the Crown necessarily amounted to "a wholesale annulment of all existing ownership over vast tracts of land and forests."

As indicated earlier, vesting the lands in the Crown meant no more than the assumption by the Crown of the administrative controls which the traditional authorities, as the political heads of their respective communities, were accustomed to exercise over lands within the territorial confines of their polities. If these traditional states had lost their sovereign rights by reason of their amalgamation into the territory of the Gold Coast, then the right of such administrative controls over lands could be seen to have passed to the new sovereign authority, i.e. the Crown.

Maxwell made this point, and rightly so when in defence of the Ordinance, he argued thus:

> "Now what is the position of the Government of this Colony in respect of public lands over which communities of this sort have a species of territorial rights? I claim that the right of the paramount power established here is to exercise any and every right which may be exercised by any chief. I claim as Governor of this Colony, and as representative of Her Majesty to have in this Colony any and every power which may be lawfully exercised by native custom by any chief, and further I consider that there is an obligation upon this Government - an obligation upon me, as the representative of Her Majesty to see that native chiefs do not abuse their position, and exceed their powers, by encroaching upon the rights of those for whom they are really trustees, and by dealing illegally and improvidently with stool lands which are in other words, the public lands of the Tribe." [238]

Despite the apparent flaws in the arguments against the proposed measures initiated by Griffith and the forceful defence of them by himself and his successor, Maxwell, the Ordinance which could provide the basis for their implementation could not come into force. The scheme fell through not so much because there were sound and cogent arguments against it. Its failure was due to the pressure and efforts of some powerful minority of economic and financial interest groups such as the Liverpool Chamber of Commerce, the West African Traders Association, businessmen and their lobbies in the House of Commons and native middle class of lawyers, elite and merchants whose economic interest were seriously threatened by the Ordinance.

Had Griffith or Maxwell remained longer in officer either of them could have been resolute and pushed the scheme through. Their untimely departure, one after the other, helped the opponents of the measure considerably. The scheme was thus doomed to failure when Maxwell was succeeded by Hodgson in 1897. As it will be recalled, Hodgson had earlier criticised the measures when he was serving under Griffith as Colonial Secretary. It is therefore not surprising that the views outlined by him as the lines on which land policy ought to be formulated became the guiding principle for future legislation on lands during the colonial

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238 C.O. 96/295. Emphasis supplied. On the public character of lands under African customary law, Casely Hayford wrote in 1912: "There are the general lands of the state over which the king exercises paramountcy. It is a sort of sovereign oversight which does not carry with it the ownership of any particular land." See The Truth about the West African Question, London, 1912, 54-55. See also Sarbah, op.cit., 65-66, where he writes: "At the most the king or head chief is but a trustee, who is as much controlled in his enjoyment of the public lands by his subordinate chiefs and councillors as the head of a family by the senior members thereof." Emphasis supplied.

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C. Native Opposition

The criticism of the Crown Lands Bill of 1894 by Bruce Hindle and F. M. Hodgson was influenced in part by public reaction in the Gold Coast to the measures. When information leaked out on the proposed legislation, public reaction was that of fear and indignation. The protests of the native middle class and elite might well have been motivated by nationalist feelings and genuine fears that private rights would be violated by the introduction of the law. But it was equally true that their economic interests were gravely threatened.

The Chiefs and traditional Elders having conceded much of their political and jurisdictional rights to the government, either by treaty or acquiescence, could not accept without opposition a measure the consequences of which might well be the destruction of one major source of their economic and political power. As far as the ordinary man was concerned, his reaction depended on the way in which the measure was interpreted to him by those who could read and write. For the local press, the land question provided a useful opportunity for a rallying point to nationalism.

Much of the fear of the people could be justified by the attitude of the government itself. The Imperial government had all along insisted that it had no sovereign rights over the territories with the intention of avoiding the financial obligations that went with claims of such rights. Throughout the period of merchant administration, British policy hinged on the protection and the preservation of British commercial interests. The quasi-governmental administration established at the end of the merchants' rule pursued the same policy. The result of this policy was the keeping of the colonial administration at a distance from the people of the territories. The government not being identified with the aspirations and interests of the people, it was only a matter of course that when they heard that an Act was to vest the lands in the Crown, the ordinary man should genuinely believe that he was to be robbed of his ancestral heritage - the land.

Long before the present crisis began, King Tackie of Accra had questioned the right of the government to acquire lands for public buildings. In what he rightly regarded as trespass on his stool lands, he complained:

> "Since the English Government took possession sir they have not asked us for land. But we only see them building." [239]

When the Public Lands Ordinance was passed in 1876, the natives did not anticipate any large-scale acquisition of lands "for the service of the colony", as the administration was doing very little by way of infrastructural development. As Maxwell noted in his Secret Dispatch to the Colonial Secretary as late as 1896:

> ". . . of a machinery of a civilised government the people see little or nothing. No British officers are stationed in the interior except at Tarkwa and Akuse. The remoter districts like Sefiwi, Kwahu and Upper Wassaw and even near ones such as Denkyira and Akim, are seldom visited, unless some dispute or complaint compels the Government to despatch travelling commissioners to investigate it. I have been astonished when travelling through the protectorate to find how little there is of anything approaching to any system of district administration practice in any of Her Majesty's Eastern Possessions. No revenue is collected in the interior, no police are maintained or required there and there are no Government establishments except at the two places I have mentioned. The people are left to manage their own affaris in their own way . . ." [240]

The Governor's observations give clear indications as to how distant the Administration was from the people. Their social, economic and political interests were not identical with those of the Colonial Administration. It was therefore not surprising that except the lawyers and the few educated elite, the people of the Colony and Protectorates knew little about the Public Lands Ordinance and its probable effects on land rights. Hence no significant opposition was raised.

However, when the establishment of the mining industry began on a large scale in the eighteen eighties, some educated African lawyers, merchants and individuals joined the business of buying and selling concessions, mainly on a speculative basis. [241] This could be expected,

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239 Report of a meeting between the British Administration, King Tackie and others in May 1887, C.O. 96/181, quoted by Kimble, op.cit., p. 331. Following this discussion, it was suggested that a retrospective statute should be enacted to legalise the lands acquired prior to the enactment of the Public Lands Ordinance. This idea was only discarded because the Secretary of State did not believe that the Crown's title was likely to be challenged.

240 Maxwell to Chamberlain, 28 January, 1896, C.O. 879/43, No. 490.

241 See pp. 87-88.

since unlike their European counterparts, they had very limited opportunities for the acquisition of modern equipment, liquid capital and the skills necessary for actual mining.[242] These developments created and established certain economic and financial interests relating to land rights which the proposed measures threatened to destory.

As David Kimble has pointed out, enterprising groups of natives and individuals continued in the field of speculation and of the concession acquisition and mining activities to such an extent that their speculative activities became "a source of annoyance to the tidy mind of officialdom during the 1890s".[243] These new opportunities for easy acquisition of wealth by the native middle class during the mining boom was threatened by the Ordinance. Kimble sums up what was at stake in the following words:

> "It was not only the traditional authorities who profited from this new source of wealth. The services of African lawyers were in constant demand, acting on behalf of the chiefs and sometimes for the concessionaires. Others were encouraged by the prospect of tempting profits to enter the field directly, buying up concessions from the chiefs and then renegotiating them to European companies."[244]

These developments provide a background to the natives' opposition to the Ordinance. The economic and personal interests at stake were so great that the arguments against the proposed measures became clouded with emotion. Instead of analysing the Bill on its own merit, it was condemned outright both on legal and political grounds. Admittedly, it would be unfair to suggest that their opposition was based entirely on selfish considerations. There were genuine fears as well. As the Gold Coast Times had warned its readers in 1882, if the people of the Gold Coast were to permit the Europeans to do on their soil what was done in New Zealand by its white population some years ago, they would be "guilty of an act which bears upon its very face the impress of absurdity." The land was theirs.[245]

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242 J. P. Brown for exmample was connected with the Ashanti Exploration Company 1891, but lacked the capital and technique to develop the mines.

243 op.cit., 22.

244 Ibid., 21-22. A classic example of this was the negotiation of the Adansi and Bekwai concessions of the Ashanti Goldfields Corporation in which J. E. Ellis, J. B. Brown and J. E. Biney were the original acquirers of the concession which they later sold to Mr. Cade.

245 See note 169.

Genuine fears of the kind expressed in the paper and the protection of personal, financial and economic interests provided the conditions under which the people became invited to mount a relentless opposition to the Bill on political and legal grounds.

As soon as rumours concerning the proposed Bill began to circulate around, the colonial administration was swamped with petitions from mining areas of the country and some parts of the coastal areas. Before some of these petitions could be despatched to the Secretary of State for the Colonies, Prince Bˆew of Dunkwa from his base in London, where he was engaged in the selling of concessions acquired in the Gold Coast, sent a letter of protest to the Colonial Office.[246] These were only the beginnings. Numerous other petitions were sent from "kings", chief and natives of the Gold Coast. People in the big towns along the coast were already resentful of the Town Councils Ordinance[247] which they regarded as an institution designed to mulct the people in taxes. Opposition to both the Crown Lands Bill and the Town Council's Ordinance was organised in Accra. It was led by Mr. Burtt, Swanzy's main European agent. A meeting held in early May, 1895, ended with a petition from the "Kings of Accra, Christianburg and others" against both Bills.

The substance of their protest consisted of the assertion that the people were not ripe for municipal government. Even if such government was desirable, it was unnecessary for its establishment that tax should be imposed on the people. For, it was argued, there was "sufficient funds in reserve from customs duties and other sources." As to the Crown Lands Bill, it was argued that there were no lands in their districts coming under the definition of "waste lands or forests" which were not "owned by the kings, chiefs, village communities or families by right of purchase, inheritance, gift, concession or other means as time honoured property belonging to particular towns.[248] The petition called for the repeal of the Town Council's Ordinance and the withdrawal of the Crown Lands Bill.

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246 Included in Dispatch No. 187 of 18 May, 1895, from Maxwell to Ripon, C.O. 96/257.

247 No. 17 of 1894.

248 Petition from King, chiefs etc. of Accra to Secretary of State, 11 May, 1895, C.O. 96/257

In what amounted to the repetition of similar points, the petition from the "king, chiefs, natives and other inhabitants of Cape Coast" noted that the greater part of the country was covered with forests and was "incapable of cultivation". Yet the colonial government it argued, did not find it necessary to give any assistance or encouragement to the natives in its cultivation and utilization in the Gold Coast. "It is only now that private enterprise has proved their value", claimed the petitioners, "that an Ordinance is to be passed to deprive the natives of their property in them and vest them in the Queen." [249]

The petitioners from Cape Coast continued their case by pointing out that the Gold Coast was famous for its mineral wealth and derived its name from it and that the exploitation of such wealth was not neglected by the natives. This fact was provable by the constant supply of gold from many parts of the country. The owners of the lands derived revenue and profit from it by leasing and working such lands. If the Bill was passed, it would have the effect of forbidding such landowners to "treat with any European any land defined as waste or forest" however great the sum offered by the latter. It would also prevent the native from going into partnerhship with any European with the purpose of working such lands.

A remarkable feature of all the petitions was the identical nature of the points raised, the language employed and the manner of their presentation. The scholarly manner in which they were presented was an indication that the opposition was organised around the hard core of the African middle class and elite. So identical were the arguments, language and the manner of their presentation that one might be tempted to conclude that they were presented on behalf of the petitioners by the same person or group of persons.

For instance, in almost all the petitions of protest I have seen, there was the usual repetition of the following statement:

> "From time immemorial the land in the country was owned and possessed by some king, chief, private individual, family or community."

It is not being suggested that the native middle class was trying to foment trouble by misrepresentation of the people's feeling through

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[294] Petition of 25 May, 1897, to Governor and Legislative Council.

these petitions. What could happen, however, was that as literate members of the community, the duty of interpreting the Bill to the people devolved on them. Reaction to the Ordinance would, therefore, depend on the way in which this duty was performed. Not unnaturally, as they opposed the measures, they gave prominence to the possible dark side of the measures and played down the brighter side.

It would appear that Maxwell was misled by the identity of form and language of the petitions to conclude that they were all the work of the educated African and that resentment against the Bill was exaggerated. Thus in a letter to the Colonial Secretary on the Axim petition for instance, he observed:

> "The framers of the petition from Axim addressed to you have inserted into (paragraphs 5 and 6) implied threats of disturbance if the proposed Ordinance is passed and enforced. This is to be regretted, but I do not consider the native chiefs, who are illiterate, to be responsible for the contents of the document drawn up for them. The Colonial Government will be prepared to deal with any case of rioting that may occur, but I do not apprehend anything of the kind." [250]

The Governor might be right in his belief that the chiefs were not responsible for all the contents of the petition. But he was mistaken as to the extent of feeling and resentment against the Bill. Before the Elmina petition to which the Governor referred above was sent to the Secretary of State, an emotionally charged meeting had taken place in February 1895 at Elmina market place where messengers were despatched to Accra with petitions of protest against the proposed Bill. [251] The King of the Abura division journeyed to Cape Coast to enquire from the District Commissioner if there was any truth in the "rumour" he had heard and then summoned his chiefs, headmen and councillors. [252]

The way in which the proposed Bill was understood in the country, at least the manner in which it was presented to them was what the chiefs and headmen of Himan complained about in their petition. Their fear

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250 Maxwell to Secretary of State, 15 July, 1895, C.O. 96/275

251 Report of District Commissioner for Elmina, 31 March, 1895, Enclosure No. 265 from Maxwell to Ripon in June 1895, C.O. 96/288.

252 See Kimble, op.cit., 336.

was that the Bill was designed to oust them with their families and their people from the land of their ancestors. They prayed that the proposed Ordinance be "dropped and thrown overboard".[253] Similar fears were expressed in the lengthy petition addressed to the Secretary of State by the chiefs, merchants and residents of Accra. The people under British Protection, they said, had been told on many occasions that the Queen did not claim any rights over the land outsdie the walls of the forts. "Now, however, with a stroke of his pen, this Governor is depriving us of our lands, our gold mines, our gum trees, our rubber trees, our cola trees and everything of ours that is worth having and which descended to us from our ancestors."[254] David Kimble has rightly observed that the heart of the controversial matter was contained in the widely quoted clause vesting all waste and forest land in the Queen for the use of the government of the Colony.[255]

Were the various small traditional states being treated as united under one government within the protectorate, it might have been easier to explain that the law meant no more than the administration of the lands by the government for the benefit of the country at large. But this position would have been difficult to maintain, having regard to the fact that the government by itself had done nothing to foster national unity among the different polities with varying ethnic and tribal affiliations. The government's attitude in this respect was exemplified in Governor Griffith's earlier suggestion that the revenue accruing from minerals exploited should be applied to the benefit of the particular communities from which such revenues were derived.

Under these circumstances, any suggestion at that time that the land was to be vested in the Queen for the use of the colony would be met with arguments from the peoples of the communities from which such wealth was derived that there was no basis or justification for applying resources found in their areas for the development of communities with which they had nothing in common.[256] As far as ordinary people were concerned, vesting the land in the Queen meant taking them for the latter as her personal property; hence, the fears that they were to be ousted

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253 Petition of 29 March,1895 to Governor and Legislative Council, included in Dispatch No. 196, of 11 May, 1895, from Maxwell to Ripon, C.0.96/257.

254 Petition of 30 March,1895, to Secretary of State. Enclosure No. 140 of 6 April,1895, from Griffith to Ripon, C.O. 96/256.

255 Op.cit., p. 336.

256 See Governor Griffith's views on this issue at page 102.

from their lands and to deprive them of "anything that was worth having".

Maxwell made the defence of his policy and its explanation even more difficult by declaring that the question involved in the matter was whether or not "the waste should belong to the Queen or the petty chiefs of the African tribes inhabiting the Colony."[257] He even suggested that the scheme was necessary to give the government a free hand when the need arose to import Indian coolies to work in the mines or to establish West Indian settlements in the Colony.[258]

In a country where the government was apparently not felt to be identified with the people, statements such as those referred to above could only tend to confirm the fears of the inhabitants that the measures were actually designed to vest the lands in the Queen in her own right. The fact was that even if the opponents of the Bill, the educated class, did not understand the measure in this way, they could not be expected to explain the true meaning of the Bill to the chiefs and their subjects.

The government therefore had the serious handicap that its traditional channel of communication was through the Chiefs. Language constituted a strong barrier between the government and the ordinary man. Now that the chiefs through whom the measures could be explained to the people were on the other side of the dispute, the government was placed in a difficult position in this respect. As Maxwell lamented when summing up the debate in the Legislative Council in 1897:

> "I am sorry there has been no means of explaining fully throughout the country the purport and intent of the Bill. It is sad that the chiefs should employ counsel at their expense to represent them." [259]

The Governor regretted that although meetings with the chiefs and people could be convened as was the normal procedure, there was no trustworthy native to do such explanation.

The best medium of communication would have been the press. But the general illiteracy of the people made this impossible. In fact, the local press regarded the matter of organised opposition to the Bill as its duty. The Gold Coast Chronicle for instance, was one of the several critics of the Town Council's Ordinance.[260] It once again

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257 Dispatch No. 187 of 9 May, 1895, from Maxwell to Ripon, C.O. 96/257

258 Ibid.

259 Legislative Council Debates, enclosed in Dispatch from Maxwell to Chamberlain, 19 August, 1897, C.O. 96/295

260 See the 19 November, 1894, issue of the paper.

took up the issue of the Crown Lands Bill. In the 11th January 1895 issue of the paper it wrote:

> "Our authorities are never tired of making laws, and the latest news is that a new Ordinance has been passed to legalise the seizure by the Government of all lands in the Colony that are unoccupied. This is to say the least a direct blow at private rights. A greater mistake could not have been made by any Government. it does not follow that because land is not occupied, there is no owner for it." 261

A correspondence of the paper under the pen-name of Bones in the same issue of the paper appealed to the emotions of the chiefs by recalling the way in which their slaves were set free without any compensation being paid to their owners. "We are poor people in this part of the world", it said, "our houses are now to be taxed, and we are to forego our lands". The intention of the government, the correspondent stated, was no doubt to "lower us to the very verge of poverty". He asked: "Because we want to be civilised, we must be stripped naked? Why . . . in the name of humanity is all this?" It concluded that the measure was not far from robbery. In its commentary on the Bill no arguments were adduced to prove why it was undesirable, all that the paper did was to whip up emotions.

The Gold Coast Independent, like the Chronicle did nothing to illuminate the issues involved in the measure. It questioned the moral basis of the Ordinance. It wrote:

> "The Bill is only the thin end of the wedge and its provisions do not speak much for the public morality of its authors. Questionable proceedings of this character can only tend to sully the honour and good name of the British nation both for their love for justice and the protection of the weak; and it is earnestly to be hoped that the Secretary of State will see that if this Bill be allowed to become law, it will be a fragrant violation of the most elementary principles of justice, a despotic use of power, a cruel wrong, and unjustifiable oppression of the poor of this country." 262

In support of similar views was Reverend S. R.Solomon, the Editor of the Methodist Times from Cape Coast who declared that he could no longer restrict himself to religious matters because there had arisen in all quarters a "fiery indignation likely to devour the Colony on account of the Bill entitled Crown Land Ordinance."[263]

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261 Quoted by C. Ilegbune, op.cit., 185.

262 9 February, 1895, enclosed in C.O. 96/267

263 Gold Coast Methodist Times, Vol. 1, No. 12, 1895.

The Chronicle returned to the issue in March. It accused the authorities of trying to conceal their real intentions by making the Bill difficult to understand. It commented:

> "If a person owns property, why should he be compelled to part with it? Fancy going to some wealthy squire in England who owns scores of land, and telling him that all the land that was not under cultivation would be taken from him and declared the property of the Crown. In no time there would be such an outcry. . . that the whole Kingdom would shake . . . But out on the Gold Coast, things are of course different. We are in curious latitutdes." [264]

D. Maxwell's Defence of the Bill.

Despite these attacks on the Ordinance, Maxwell was dauntless. He was determined to push the measures through. Although it was Griffith who introduced the measures, their defence fell on Maxwell. The former did not stay in office long enough to face the problems himself. As all the petitions looked almost identical, he chose that of Prince Brew of Dunkwa, the first to be received in the Colonial Office in London as representative of all of them. Indeed, that petition contained all the political and legal objections raised against the Bills in the country. The Governor therefore dealt with it in some detail, while making passing references to some other relevant points in others. He believed this would serve as a complete answer to the petitions. Prince Brew's petition echoed and repeated much of what was contained in other petitions which swamped the offices of the Colonial administration. In a summary, he outlined his case against the Bill on eight grounds, namely:

i. long before the advent of European contact with the Gold Coast, the lands of the country were owned and possessed by some kings, chiefs, private individual, family or community;

ii. there was not an inch of land which was not so owned or acquired;

iii. the Gold Coast Protectorate had not been acquired, either by conquest, cession or treaty;

iv. the kings, chiefs, communities, families and individuals had retained their rights tacitly recognised from time to time when the colonial government had paid money for lands purchased from native kings and chiefs;

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[264] Quoted by Ilegbune, op.cit., p. 187.

v. these rights of the natives had been recognised by the Public lands Ordinance of 1876 which regulated land acquisitions for the service of the public and for which compensation had been regularly paid;

vi. a circular about the acquisition of concessions in 1891 had declared that the colonial government had no intention "to interfere in the country";

vii. the people of the Gold Coast had inherent legal rights to deal with the lands of their own soil, and

viii. the courts and judges had questioned the right of the government to deal with the lands of the Colony. [265]

Before dealing with the issues raised by the points outlined above, Maxwell clarified matters relating to the misuse of terms. Referring to the petitioners' claims that lands in the Gold Coast were "owned" and "possessed" by some kings, chiefs, family, or individuals, Maxwell pointed out rightly in our opinion, that in talking about traditional schemes of interest in land it was necessary to be careful in accepting without qualification, the appropriateness of the use of such terms as ownership and possession in their full English legal signification. [266]

History was inaccurate, he argued, when the petitioner alleged that the British Government purchased land from kings and chiefs to erect forts in the Gold Coast. Such purchases were made, if any, not by the British government, but by trading companies. [267] Maxwell argued that reference to the Public Lands Ordinance as giving recognition to native ownership rights was unfounded. He observed that section 7 (b) of that Ordinance specifically provided that where land was taken for

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265 Dispatch No. 187 of 18 May, 1895, from Maxwell to Ripon, C.O. 879/46.

266 There is a great deal to be said for clarifying issues relating to the misuse of terminology. James Brew, the petitioner, was a British-trained lawyer and apparently fell into the common error of viewing the customary land tenure in terms of English law and its conceptions of tenure. This had been one of the key obstacles to the understanding of the Bills introduced by Maxwell.

267 Ibid. This aspect of Maxwell's argument does not dispose of the petitioner's argument on the question of ownership. Mr. Brew was using the fact of purchase from kings and chiefs to support his argument that before the arrival of Europeans the lands had owners from whom such lands had been purchased. It is therefore immaterial whether or not such purchases were made by the British government or trading firms. This factor would therefore make no difference to the validity of Brew's argument.

a public purpose, compensation shall not be awarded to any party in respect of unoccupied land. The Governor believed this would seem to be a precedent for the modification by the local legislature of what Mr. Brew was disposed to claim as native rights.

The substance of His Excellency's arguments seems to be that if land was unoccupied in the sense that no individual rights had been established on it through the exertion of effort and industry, then such land was public land. Therefore where such land was taken for the service of the Colony or for public service, compensation need not be paid for such taking. Section 8(b) of the Public Lands Ordinance was based on the recognition of this principle in the traditional systems of tenure, for which reason it provided that compensation should not be paid for lands taken for the use of the public to which the land rightfully belonged.

The underlying assumption of this argument was that the colonial government had abolished the tribal territorial basis of enjoyment of rights in land by bringing all the various polities in the Protectorates under British administration in the Gold Coast. It is however, obvious that until this time, there was no clearly defined law or policy statement defining the position of the government vis-à-vis the native polities. But as far as Maxwell was concerned, the proclamation of Protectorate over the traditional states implied a sovereign right in the Protector to deal with the lands within the areas affected by the proclamation.

In this view however, he was far ahead of his time in the Gold Coast. In the face of opposition from the natives, European merchants and financial institutions, some of his own senior officials, and the disclaimer of rights over the territory by official statements, the Governor proceeded to assert the right of the protecting power to exercise sovereign rights. He said.

> "The very theory of Protectorate seems to imply something in the nature of sovereign rights in the protecting power." [268]

He cited the examples of other British colonies in support of his theory. For example, he argued that as soon as protectorates were declared and established in the Malay Peninsula, the native rulers were taught that the advice of the protecting authority must in future be obtained

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268 Ibid. It should be remarked that Maxwell's proposition may be open to doubt on legal or constitution grounds. But it would be unrealistic not to concede his point when the Colony and Protectorates were practically ruled as a British Possession. The validity of native laws was subject to British law, the jurisdiction of the Supreme Court overshadowed the chiefs' jurisdiction, taxes were being levied and a police force was maintained. These were all acts of sovereignty.

before any act of sovereignty could be performed by them. Therefore, no grant of concession made by a native ruler after the establishment of the protectorate was recognised unless it was countersigned by the Chief Resident's authority.

He argued that this was what should have been done as soon as concessions in the Axim District commenced to cause embarrassment. A law should have been passed making the consent of the Governor a necessary condition for the validity of grants by native chiefs and regretted that this was not done at that early stage. He drew attention to the fact that:

> "Much of the territory comprised within the protectorate is described by travellers as 'dense brush'. Even where the country is open the greater part of it is waste. Sir J. Hutchinson in a letter dated 2nd August 1894 gave it as his opinion that perhaps more than nine-tenths of the lands in this Colony are unoccupied and uncultivated." [269]

He pointed out the fact that when Mr Brew referred to there being not an inch of land unowned, he must not be understood to be referring to land beneficially occupied. He saw the issue as involving one of two alternative questions.

It was whether the waste lands should belong to the Queen or to the petty chiefs of the African tribes inhabiting the Colony. "The African view of the position", he lamented, "is apparently that, within the protectorate, the Colonial Government may collect revenue on imports (paid in the first instance by merchants on the coast, and therefore not understood by the African consumer to really fall upon him), provide the machinery of administration, make roads and maintain order. But anything like direct taxation is resented and sovereign rights are claimed over land, the rights of Her Majesty being denied in respect of any land not purchased from a king, chief, community or individual. [270]

This situation, he believed, could not be accepted. It was intolerable that the protected African chief and tribe should receive everything

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269 Ibid.

270 Ibid. It should be remarked that this was the view of British entrepreneurs as well.

and yield nothing. He could not see why notwithstanding the sacrifices of the British government in freeing the protectorate from the Ashanti invasion of 1873-4, claims of sovereign rights over the forests, waste lands and minerals on the part of the petty chief were to be recognised. He continued:

> "I entertain no doubts whatever that it is right and politic to restrict the power assumed by certain native kings and chiefs to deal with waste lands, forests and minerals." [271]

British interests and the interests of the Gold Coast at large, he emphasised, demanded that the relative positions of the Colonial government and the native population in respect of real property should be clearly laid down by law. In the absence of any such definite orders or laws on the subject, supposed rights had been acquired from native chiefs in some districts by speculators. In some cases, the development of lands known to contain metalliferous deposits had been retarded by the cupidity of the local native authority while the government was in the ridiculous position of being unable to erect a building or lay out roads on waste lands without having to do so through the tedious legal process usually concluding with the payment of compensation to some individual or community who the prospect of gain had prompted to lay claims to the land. He believed that this situation should not be allowed to continue for too long.

An additional reason why these circumstances must not be allowed to remain unaltered, he thought, was that it would be difficult, if it became necessary to import Chinese or Indian coolies for public works, and as settlers, it would be impossible to act quickly in this respect.[272]

However, it is difficult to go along with the Governor as to his views concerning the importation of Chinese and Indian coolies. To say that this was an additonal reason for restricting the power of the chiefs would rather tend to confirm some of the fears of the people. Questions relating to the settlement of foreign nationals in another country could have such far reaching political and economic consequences for the country that it would not be "right and politic" to embark on such a programme without wide consultations and consent of the people of the home country. Such programme would involve the transposition of people of different cultures to another which could not be treated lightly.

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271 Ibid.

272 Ibid.

Maxwell, by introducing such questions into the arguments in defence of government land policy could open the policy to objections on the grounds that the real intentions of the government were to deprive the people of their lands which were their ancestral property. This view could be considerably reinforced by the fact that the government was not identified with the people. Surprisingly however, the opponents of the Bill did not seize upon this aspect of the matter.

Similarly, the way in which Maxwell dealt with the question of Crown rights would tend to obscure the principles inherent in the proposed measures. For example, to pose the question whether the land should belong to the Queen or the petty chiefs of the African tribe would suggest that the lands if vested in the Crown would become the personal property of the Queen. The correct view, though would appear to be that vesting the lands in the Crown implies conferring a right of administering all such lands in the Colonial government of the Gold Coast. The lands would then be administered by government bodies and servants on behalf of the Colony and Protectorate at large.

This would seem to be the view of Maxwell also. For in reference to Brew's assertion in his petition that the people of the Gold Coast had inherent and legal rights as to the possession of their soil, the Governor pointed out that no interference of any kind was contemplated with the free use of land by Africans for all the purposes for which they used it before the establishment of the Protectorate. They would be deprived of nothing which was the result of industry. What the scheme contemplated was "the right of the paramount authority to deal with the natural products and with the land being declared and asserted."[273] He disposed of Mr. Brew's arguments suggesting that the registration of instruments affecting land under the Registration Ordinances[274] amounted to a tacit acquiescence of the government in the present state of affairs. Maxwell referred to Section 20 of the 1895 Ordinance, which distinctly provided that registration did not cure defects in title. In conclusion, he called for a firm and resolute action so that Hutchinson's Bill, which was much required could be passed.

He made certain suggestions, however, as to some modifications of the Bill in its original form. He disapproved of the way in which "waste lands" was defined. The definition, adoped from Section 7(b) of the Public Lands Ordinance of 1876, limited the sort of lands which might be vested in the Crown to those which 30 years next before the

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273 Ibid. Emphasis supplied.

274 No. 8 of 1883 and no. 1 of 1895.

commencement of the Ordinance, "no beneficial use has been made for cultivation, or inhabitation or for collecting or storing water or for any industrial purpose." Maxwell believed this definition would give rise to endless litigation and the giving of false testimony.

He argued that as the land was not kept under continuous cultivation, any attempt by government to take any land under the proposed Ordinance just outside the town of Accra as Crown land under Section 3 might be defeated on production of witnesses to swear that they took a crop of yams or cassava off it within the last 30 years. "There can be little doubt that the witnesses would always be forthcoming." He believed that nothing but a complete survey of the colony would make it possible, with reasonable accuracy, to see what land was beneficially occupied.

There is much to be said for the views expressed by Maxwell here. Even under the traditional law, where no crops or wealth of any individual's creation can be found on the land, it is regarded as unoccupied and therefore as land "belonging" to the community or corporate group having title to it. No limited period is specifically prescribed within which land could become "waste" or abandoned.[275] The vesting of any land in the Crown under the Ordinance as "waste" might therefore prove difficult, since land might have been cultivated 30 years next before the commencement of the Ordinance without necessarily leaving any signs of previous occupation. Proof of past occupation would thus depend largely on sworn statements of the claimant and his witnesses which Maxwell rightly believed would always be forthcoming.

Maxwell also took exception to the recognition in the draft Ordinance "of something quite unknown in the shape of native law". If there were certain native laws and customs he would like them to be ascertained and enacted as part of the measure. "But I should be sorry to imnperil the working of a system", he said, "by making it liable to be modified at any time by any proposition or doctrine accepted by a judge as native law."

The firm and resolute defence of the government's land policy by Maxwell had wholehearted support from his retired predecessor, Sir William Brandford Griffith. At his home in England, the Colonial Office required him to report on all the petitions of protest which he had received in the Gold Coast before his departure for England. Lending support

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275 Sarbah suggests that a 10-year period might be enough, see the discussion of abandonment at pp. 43-47.

to the uncompromising stand taken by Maxwell, he wrote:

> "If I may venture to say so, I think a very decided stand must be taken with regard to the objects stated in the Crown Lands Bill. Africans are rather peculiar to deal with . . . If they detect anything like hesitation or indifference in transacting with them, they will give a great deal of trouble. if on the contrary, they consider that the Government is determined upon any particular matter, knowing, the strength of the Government, they will acquiesce in its decision almost without a murmur." [276]

For these reasons, Griffith urged the Colonial Secretary to let the natives understand that Her Majesty's Government "wills that the Crown Lands Bill, possibly with some amendments, shall become law". If this was done, "no further opposition of any consequence will be made to it". He concluded by saying that it was merely "a quibbling contention" against the Bill to suggest that it amounted to confiscation or spoilation. He contended that the interpretation placed on the Ordinance was a result of misunderstanding. He maintained that the Bill treated the positive rights of the people carefully and provided safeguards. Ifcertain aspects of it were evil, he argued, it was a necessary one.

Griffith was probably right in thinking that, if a resolute stand was taken on the matter it would be accepted without a murmur by the natives. The fact which he seemed to have overlooked, however, was the strong opposition from financial institutions and big business interests in London, Liverpool and Manchester. in addition he failed to take into account the opposition of some of his government officials, some of whom might have their personal or financial interest to protect.[277] Yet, it was the pressures from the latter groups more than anything else which prevented the passage of both the 1894 and 1897 Bills. No doubt, African protest was taken into account, but it was not the decisive factor.

What misled both Maxwell and Griffith not to take account of European

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276 Griffith to Colonial Office, 8 July 1895, C.O. 879/46, African West, No. 513.

277 For example, in 1897, Mr. G. Macdonald, Director of Education in the Colony while on official duty at public expense in the Akim district, acted on behalf of a local Solicitor, Mr. Osborne, in matters relating to concession grants from native chiefs. He managed to obtain an agreement from King Amoako Atta and his Council not to allow any person to prospect for gold on the lands belonging to them until his clients, Castle Gold Coast Exploration Syndicate Limited came from England within a years time. For this agreement he paid a consideration of £35 to the chiefs. See C.O. 96/297.

protest was that, at the time, opposition from Europeans was rather mild. Under the 1894 Bill, the Liverpool Chamber of Commerce merely complained that they were not consulted before the draft was published. They thought the Bill concerned the natives much more than it did Europeans.[278] In this view, the Chamber was mistaken. When the details of the expanded Bill under Maxwell was published, the latter realised it could even affect them more than the natives. It was then that their opposition became strong and decisive. Before dealing with the nature of European merchant opposition to these land reform programmes, it will be necessary to set out the main provisions of the expanded version of the Bill under Maxwell's Government.

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278 Deputation of Accra branch of Liverpool Chamber of Commerce to Maxwell, 24 June,1895, C.O. 96/257

CHAPTER V

The Public Lands Ordinance of 1897

A. Introductory

When Maxwell succeeded Griffith as Governor of the Gold Cast in 1895, opposition against the latter's Crown Lands Bill was just beginning. The new Governor, as we have seen, from his defence of his policy was not to be deterred by these protests. His confidence was built on experience in such matters. Before assuming office in the Gold Coast he had been sent on deputation to Australia in 1881 for the purpose of studying the Torrens system of land registration there. On his return to England he was appointed as Commissioner of Land in the Straits Settlements, and became recognised as a local authority on land questions there. The Governor was therefore experienced in matters relating to land problems of rural societies.

He drew upon such experiences to recommend certain modifications of the Draft Bill. His dealing with the problems showed how quickly he was able to understand the land tenure system and the problems associated with the mining industry. Although like Griffith, he would have liked to take a decided stand, he could not fail to take into account the mounting opposition against the measure. He thus considered it expedient to delay action on the Bill until he had studied the question further. An additional reason why the immediate introduction of the Bill might be unhelpful was the desire to bring more native polities under British protection.

Therefore in a letter to the Secretary of State he wrote:

> "With the Ashanti question still unsettled, I would rather postpone for a short time, the passing of a measure which might possibly result, temporarily, here and there, in disaffection within the Protectorate." [279]

However, further delay in the passing of the Ordinance meant the continued perpetration of the evils at which it was meant to be directed. Maxwell found a temporary remedy in reviving the idea of the publication of a notification to the effect that the Government would not recognise land grants made without the Governor's consent. Therefore, pending the introduction of the Bill in a modified form, a government notification was published as follows:

> "Whereas grants and concessions have been made by chiefs within the protectorate without the consent of the Governor of this Colony. Notice is hereby given that no document hereafter made purporting to grant or convey any rights over or interest in, land, save and except the right to occupy agricultural land for the purpose of native husbandry or the right to occupy building land for the erection of a native house, will be recognised unless it shall bear the signature and seal of the Governor, or of such officer as he shall appoint for the purpose, in token of Her Majesty's approval."[280]

The publication of this notification was followed by keeping the 1894

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279 Maxwell to Ripon, 7 June, 1895, C.O. 879/46.

280 Published 5 October, 1895, in Enclosure No. 32, 11 October, 1895, C.O.

draft Bill in abeyance. But it led to organised opposition from natives and Europeans alike. Three days after Maxwell had asked the opinion of the Secretary of State as to the desirability of publishing the notification, he sent another Dispatch in which he sought advice on the propriety of providing in the Ordinance a provision which would enable the Governor in Council to impose at his discretion an export duty on timber and other forest products.[281]

Although Maxwell did not think that the time had come to levy tax upon produce, whether in the shape of an export duty on timber or royalty on gold, should these industries become largely developed, the situation would have to be altered, for the roads, railways and river improvements required by miners and timber merchants could only be undertaken if they contributed materially to the revenue. He thus suggested inclusion in the Bill of a provision empowering the Governor to secure the payment of royalties of not more than 10% in kind or in money. Such money, if paid, a portion of it might be given to the local chief.

Chamberlain, who succeeded Ripon, replied that export duties were undesirable and inconvenient but there could be no objection to royalty on minerals and he approved, so far Maxwell's suggestions as one method of raising revenue. "If mineral deposits are vested in the crown", he wrote, "it would seem to be only logical to provide that they shall be liable to the appropriate incidence."[282]

Although the Government notification of October 1895 increased tension and opposition to the 1894 Bill, convinced as the determined Governor was that he was pursuing the best policy for the country, in 1896 he proceeded to cause altogether a new Bill to be drafted in an expanded form to include the establishment of a Concession Court. This Court was to examine and approve the validity of concessions.

B. Objectives

The main objectives of the new Bill, which was published in 1897, were contained in the preamble. The introductory part stated that the Bill was being introduced to regulate the administration of public lands, to define certain interests therein and also to constitute a concession Court. The preamble outlined several reasons for the introduction of the Bill.

In a summary, it stated that:

i. from time to time various instruments purporting to create interests or rights over land in the Gold Coast colony, especially in regard to mining and timber had been executed by natives claiming to be chiefs or persons in authority;

ii. the claims of such persons to have the requisite authority to create such rights and interests was not in all cases admitted, and that it was doubtful if the disposition of the land of a native tribe or community to foreigners was lawful according to native custom;

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281 Maxwell to Ripon, 10 June, 1895, C.O. 879/46

282 Dispatch from Chamberlain to Maxwell, 10 September, 1895, C.O. 876/46. No. 513, African West.

iii. there was reason to believe that certain of the instruments referred to above had been made improvidently and without adequate consideration;

iv. in respect of certain alleged concesssions, nothing had been done to develop the land in respect of which such instruments were created; and

v. uncertainty concerning native customary tenure was calculated to retard the development of the country.

Therefore, it was expedient to provide for the proper exercise of the powers by those entrusted with the disposal of public lands and to prevent the improvident creation of interests therein and rights thereover. It was also necessary to facilitate the acquisition of public lands by private persons on proper conditions and to decide upon the validity and scope of claims founded upon grants of land or mineral rights or other concessions alleged to have been already acquired from native chiefs or other persons.

It will be seen from these stated objectives of the new Bill that its principles did not differ significantly from those of the suspended 1894 Bill. Like the later Bill, the present one was based on the principles of governmental control and administration of lands generally. The intention was to protect the generally illiterate and ignorant land authorities, including the ordinary man, against the sharp practices of the urbanized natives and European capitalist speculators who more often than not took advantage of the former in land transactions.

What was new about the new Bill was the omission from its provisions of any clause vesting waste lands in the Queen. The reason for this is obvious. The provision vesting the lands in the Queen in the previous Ordinance was construed by the natives as taking the land for the Queen as her personal property. Therefore a similar formulation in the vesting clauses was avoided in the new Bill. Similarly, the much criticised phrase "waste lands" and its previous definition was omitted as its definition was criticised on the grounds that there was no land without an owner in the country.

C. Rights of the Government

Part II of the draft Bill dealt with the rights and the powers which the government could generally exercise in matters relating to land administration in the country. Clause 4 of the Bill conferred power on the government to administer all public lands. Public lands were defined as "land over which there has not been one of the inferior rights mentioned in Section 13 and which has not been, or may not hereafter be acquired or reserved for any public purpose." [282]

By adopting the procedures prescribed by the Bill, the Governor,

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282 See clause /.2. The rights mentioned under clause 13 were those the exercise of which could result in the establishment of rights to land by means of effective occupation or land development under the customary laws.

by the exercise of the powers conferred on him under section 5, could reserve or except from occupation, either temporarily or permanently, any portions of public land required for any public purpose whatever. The validity of any grant or the creation of any interest affecting land in favour of a non-citizen, whether in writing or otherwise, was made conditional upon the prior consent in writing of the Governor.[283] Legal action in respect of any transaction not sanctioned by the Governor in favour of either the original grantee or anyone claiming through him was barred by this provision.

One of the most important functions of the Governor was prescribed by clause 21. This section in effect transferred the control functions of the traditional authorities to the Governor. It conferred power on him to authorise any person, whether a native or a foreigner, to occupy public land. In doing so, he could impose any consideration and conditions as he thought fit. The grant of any such occupational rights was to be in a prescribed form of a land certificate signed by the Governor. The certificate may authorise land occupation in perpetuity or for a term of years.[284]

One of the conditions which must be satisfied before a land certificate could be obtained was the survey and demarcation to the satisfaction of the Governor, of the land which the interest acquired related to.[285] Action in respect of any land being the subject of a land certificate was prohibited in any court of law. However, a land certificate could be revoked if a condition therein was broken. Similarly, it might be forfeited where it was obtained either by fraud or mistake.[286]

Persons who obtained grants from natives before the Bill came into force were required to apply for the exchange of their titles for land certificates from the Governor.[287] Power was conferred on the Governor under Section 26 to issue licenses to interested persons to dig for and take away minerals. He could also give such licences in respect of timber and other forest produce. The consideration in respect of the issue of such licences was left to be determined by the Governor at his discretion.

Before dealing with native rights under the Bill it is deemed neces-

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283 Clause 10.

284 Clause 23 made the grant of a land certificate in the prescribed form valid against the whole world including the Government.

285 Clause 24 (1).

286 Clause 30.

287 Clause 24.

sary to make certain observations on the discretionary powers conferred on the Governor under the proposed Ordinance and its effect on traditional land rights. It will be observed that the law sought to vest the administration of what was defined as "public lands" in the Governor. Unlike the 1894 Ordinance, it was the administration, not the land itself, which was vested in him. The effect of these provisions empowering the Governor to exercise the powers outlined above, was to reduce substantially, but not completely the control function of the traditional authorities in matters relating to the administration of the lands referred to in the Bill as public lands.

As will be seen presently when we discuss native rights under the Bill,[288] no prior existing rights, relating to the beneficial enjoyment of rights in land under the indigenous law had been taken away by the proposed Bill. What the law did was to reproduce in clear language already existing rules. Maxwell, having studied the traditional systems, came to the conclusion that they were what he called, superior and inferior rights under the systems. There were superior rights in the representatives of the tribe or family, and inferior rights in individuals. Summing up the debates on the Bill at the Legislative Council he said:

> "From what I have learned since I have been here, and from the practice which I have observed in several cases, the deposition of a chief (and I presume, also the head of a family) is possible if a combination of dissatisfied members of the tribe, community or family is strong enough. If these facts be granted, how can it be argued that there is in a chief or in a head of family any interest approaching to a freehold interest or any right to make any legal permanent sale or concession of land which is the common inheritance of all." 289

Maxwell regarded the protected territories as united under Her Majesty's Colonial government of the Gold Coast. He was therefore entitled, as the head of the new state to assume "superior powers" in the representatives of the tribe or family over the lands which were the "common inheritance of all", that is of all the people of the country. He thus declared:

> "I claim that the right of the paramount power established here is to exercise any and every right which may be exercised by any chief. I claim as Governor of this Colony, and as the representative of Her Majesty, to have in this Colony every and any power which may be lawfully exercised by native custom by any chief; and further,

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288 See pp. 151-156 below.

289 Legislative Council Debates, included in C.O. 96/295.

> I consider that there is an obligation on me, as the representative of Her Majesty to see that native chiefs do not abuse their position, and exceed their powers by encroaching upon the rights of those for whom they are really trustees and by dealing illegally and improvidently with stool lands, which are in other words, public lands of the tribe." [290]

The Bill therefore, sought to distinguish between public and private rights in respect of lands. It was to be made more efficient, fair and just for the benefit of the community at large, the administration of stool lands which were really public lands of the Colony. It was to achieve this result that the Governor was empowered under clause 9 to divide the country into districts if he found it expedient to do so for land administration purposes. He might also sub-divide districts into towns and might by a proclamation published in the Gazette define the boundaries of such districts or towns.

He had power under this provision to distinguish between each district or town by name. Where a district was named and proclaimed, it would hence forth be recognised and known by that name. He could, if it was in the interest of effieient administration to do so, diminish or extend the boundary of any district. He could also alter boundaries or names of any districts. This provision was very important to the scheme of land administration envisaged by Maxwell's policy. As he regarded the lands as public assets of the Gold Coast as a whole, and not the individual assets of the various polities comprised in the Colony and Protectorates under British administration, it was thought expedient to divide the country into the administrative units described above.

The latitude given to the Governor in the matter of dividing the Colony into districts would make it possible for the Governor to divide the country into convenient political and land administration units, not necessarily on tribal or ethnic lines, but on the basis of geographical suitability and political and administrative epxediency. Had the Bill become law, the scheme devised under Clause 9 could have become one of the ways in which the welding of the Colony and Protectorates together as a nation might be encouraged.

As we shall see later,[291] the pursuit of a similar policy in the Northern Territories had proved successful in establishing a sound basis for land administration and the enjoyment of rights in land. Like the North of the country, the beneficial enjoyment of rights in land would

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290 Ibid.

291 See pp. 254-293

have become dependent on Ghanaian citizenship and not on membership of a particular stool community, a traditional state, a tribe or a family.

However, the advantage of a scheme like this was not recognised by its opponents. Sarbah, one of the counsel hired by certain chiefs to represent them at the Legislative Council, was for example quick to point out that the provisions conferring powers on the Governor to authorise the occupation of public lands amounted to vesting "what was practically all the soil of the Gold Coast and the Protectorate in the Government."[292] He contended that if the Bill was allowed to become law, the control which the community leaders of each locality or the headman of a family had over his people would be destroyed.

It would be observed, however, that Sarbah confused the vesting of land administration in the government with the acquisition of the land compulsorily by the government. In the case of the latter, all existing rights would be extinguished where the State would become the ultimate owner. In the case of the former, existing rights would not necessarily be affected, but their administration would be organised by the government and its agencies. In either case, the way in which private rights are determined depends largely on the political and economic policy objectives of the government concerned. Any criticism of state or governmental control of lands or its administration can only be meaningful if such criticism is related to the underlying principles and objectives of the measure.

In Sarbah's attempt to do this, he fell into the common error of confusing the jurisdictional rights and the land control functions of the traditional authorities with proprietary rights in the lands administered by them. There was nothing in the proposed Bill to suggest that the family or local communities were to be prevented from continuing the organisation of production or economic activities on a co-operative basis within the family milieu. There is no doubt that the proceeds from concessions granted to foreigners, parts of which they were entitled to as remuneration for their control functions, became a new source of economic and political power for the chiefs and family elders.

But to suggest, as did Sarbah, that to take this right away from them would necessarily break family ties and the esteem in which chiefs

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292 Ibid.

and the elders were held is not borne out by experience in those parts of the country in which chiefs exercise no such rights over lands at all.[293] As will be seen presently, the provisions relating to the rights of chiefs and their subjects under the Bill confirmed the already existing rights under the customary laws.

D. Native Rights and the Control Function of Chiefs

Clause 11 of the proposed Bill dealt with the rights and duties of native chiefs. The traditional rights of chiefs and family heads to allocate land to stool subjects and family members were confirmed under this provision. The provision made it clear that "it shall be lawful for a native, recognised by the Government as a chief, having by native custom, as a chief or head of a family the right to do so, to authorise the occupation by a native of public land being land subject to native customary rights." Such recognised chiefs or heads of families were not required to obtain the consent of the Governor before exercising these traditional rights mentioned over lands falling within their spheres of jurisdiction. It is thus clear from the provisions under Clause 11 that the traditional rights of the chiefs and heads of families to allocate unoccupied land to members of their communities were not to be done away with under the Bill. The respect in which the exercise of their rights were to be curtailed was in the area of granting unoccupied land to strangers, particularly Europeans.

Clause 13 of the Bill sought to reserve certain rights to the natives and native authorities. The provision confirmed the exercise by the latter, "superior customary rights" in respect of land appurtenant to their stools, subject to the limitations contained in the Bill regarding the exercise of such rights. Under clause 14, a well established rule of customary law to the effect that long possession of stool or family land does not mature into absolute ownership was restated.[294] In a summary, it provided that no person or a family shall acquire or be

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293 In such Chiefdoms as those of the Ewe and some Ga-Adangbe like the Krobos, chiefs do not normally exercise any administrative control qua chiefs over lands within their areas of jurisdiction. In the acephalous societies of the upper Regions of the country also, the political heads of communities do not normally perform land control functions. Yet, we have not seen any evidence of disintegration of family ties and the lowering of the chiefs in the estimation of their subject any more than other areas where chiefs perform such functions.

294 See Adu v Kuma (1937) 3 W.A.C.A. 240, Apapam Stool v. Ataa (1956) 1 W.L.R.117, Owusu v. Manche of Labadi (1933) 1 W.A.C.A. 278, Anane v Mensah /1959 / G.L.R.50, Baidoo v Osei (1953), 3 W.L.R. 289, Manko v Bonsu (1936) 3 W.A.C.A. 62 and Abbey v Ollenu (1954) 14 W.A.C.A.567.

deemed to have acquired absolute rights to the land on which he or the family had been practicing shifting cultivation, no matter how long or frequently such occupation or possession had been resorted to. The results of such long occupation or possession would be the acquisition of exclusive individual rights to the wealth created on the land. For this reason, where by the exercise of any of the powers conferred on the Governor, the occupier of such land was to be dispossessed, compensation would not be paid for the soil on which such development was made. What would be compensated for would be the cost-replacement value of the wealth created on the land.

In a similar way, citizens were free to occupy land in the normal customary way for actual residence and cultivation of the land on a permanent basis or for use for industrial or trading purposes. In such cases, the citizen was not required to seek the permission of the chief or local ruler unless the local law required him to do so.[295] Common and concurrent rights of collecting forest produce or to take timber, to work and get minerals, stones and building materials according to native methods and customs were reaffirmed under clause 16 of the Bill. In respect of such common or undeveloped land no compensation was to be paid to anyone if it was affected by the exercise of any of the powers conferred on the Governor. The rationale for this provision seems to be that the collection and gathering of such products which were not brought about by industry and individual efforts did not create any exclusive individual right for which compensation might be paid.

The Bill included a provision for the acquisition by natives of certain rights described as "a settler's right." A native might be able to acquire this right at the date on which the Bill would come into force, if before that date he had been in lawful occupation of a portion of public land on which he made the development other than shifting cultivation. Alternatively, where, before the coming into force of the Bill, he was in effective occupation for three consecutive years, he would be entitled to acquire the settler's right. Such right was to be "a permanent heritable and transferable right of occupancy" in the land affected by the right.[296]

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295 Clause 15.

296 Clause 17.

However, the free transfer of such right was permissible among natives only. For it to be assigned to a non-native the Governor's approval to do so was required. If approval was not given by the Governor within one year of the assignment of any such right by a native to a foreigner, the transaction shall become absolutely void.[297] On acquisition of a settler's right, the acquirer of such right might be issued with a land certificate, on application to have it exchanged for such a land certificate provided the land to which the interest related was surveyed and demarcated.[298]

Clause 18 of the Bill prescribed two conditions under which a settler's right might become extinguished. Firstly, where the land was used for agricultural purposes, the right of occupancy would become extinct if it had not been cultivated for three years and contained no economic trees planted by man. Secondly, if the site of a building or quarry or a place from which water could be drawn or brick earth taken had remained uninhabited, unworked or unused for three or five years, the interest created in respect of it would come to an end and the land would become public land.

It must be pointed out that there is very little novelty about the prescribed rights of the native authorities and their subjects outlined in the provisions above. What the provisions sought to do was to lay down in a prescribed form rules which were already firmly established in the indigenous law. Taking clause 14 of the Bill for example, it can be observed that it was merely a restatement of the customary law which states that land to which a citizen has acquired rights reverts to the stool or family if it is abandoned. What is not clear about this rule is the time period within which abandonment becomes effectual. The provision under consideration sought to clarify this issue by prescribing three or five years period within which abandonment might become effectual according to the nature of development on the land.

As Maxwell rightly pointed out in the Legislative Council, under the Bill, the people might continue in the usual way to take lands for development. But a person might not "simply by resorting to a piece of land for shifting cultivation acquire any title in the piece of land

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297 Clause 20.

298 Clause 24 (1).

or any interest therein beyond the ownership of the crops which he plants."[299] There is no doubt that this is a principle well understood in the traditional law.[300] The Governor considered it necessary to reformulate and lay it down clearly in a statutory form because he thought it would be "monstrous" if it was the case that because a man planted a crop of cassava or yam on a piece of public land and then abandoned it, he might nevertheless at any time return and lay claim to it and might stand by in the "dog in the manger" attitude and say that nobody was henceforth to take ny crop of it because he once did so.[301]

Maxwell insisted that the land was common land and it ought to be understood that any one of the group or community of people who had a customary right to resort to it might do so. The rationale for clause 14 of the Bill conformed to the same principles and objectives stated by Maxwell. Its provision that long possession and occupation did not mature into absolute ownership of the land possessed or occupied was in accord with the customary principles which placed a premium on wealth created by individual effort rather than the acquisition of absolute right to land which was undeveloped.

Similarly, the limitation placed on the right of individuals to transfer interests in lands to which they had established rights to foreigners was nothing new. Under the traditional law, the transfer of such interests inter se was permitted. But any transfer to a stranger which would have the effect of irrevocably divesting the community of absolute title thereof was unpermitted. The restriction placed on the power of the native including the chief and his councillors and the head of the family and its principal members to alienate interest in public lands to strangers, particularly to Europeans, was regarded by Maxwell as a necessary consequence of British rule over the protected territories within the Gold Coast. As the political head of these states, the exercise of such traditional rights passed to the Governor. But of equal importance was his desire to prevent the anomalies which frequently occurred in land transactions as between chiefs and Europeans. He wanted to avoid the possibility of collusion between natives and land speculators

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299 This meant that the right which might be acquired were those of user and not individual ownereship of the soil itself.

300 Legislative Council Debates, op.cit.

301 Ibid.

which might defeat the whole purpose of the Bill.

Therefore, stating the objectives of these provisions, Maxwell said:

> "I want to give to the natives of this country the right of proprietorship, which in many cases, especially as regards people who have had or whose forefathers have had the status of slaves, they have not got. [302] I should like to see every man with a proprietorship tenure and in a position where he will be safe from oppression on the part of any native authority. But on the other hand, I do not think that he ought to be in a position to part with his land to a foreigner . . . we must not do anything which would lead to collusion between natives with customary rights and foreigners without any. otherwise land might be temporarily taken up by natives simply in order to have something to sell to a white man." [303]

However, Sarbah did not accept the view that the Bill did not seek to alter the customary rights of the natives. He regarded these provisions as having altered the traditional law fundamentally. He was particularly critical of clause 17 of the Bill which was to accord a settler's right to natives in certain cases. He criticised this provision as having practically altered the customary law "under which the land owner is an absolute owner". [304] He argued on behalf of the chiefs that the present Bill was an elaborate and expanded form of the Crown Lands Bill of 1894. He pointed out that the latter Ordinance was even more favourable to the natives. While it referred to "waste lands" and "forests" only, the present Bill referred to the whole land of the Gold Coast "depriving the aborigines of their rights in the soil of their native land." [305]

Sarbah criticised clause 16 of the Bill which sought to accord common rights of enjoying things found naturally on public or unoccupied lands to all natives irrespective of the tribe or community to which they might belong. He argued that the provision was based on the mistaken

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302 The case of Honger v Bassil (1954) 14 W.A.C.A. 569, in which one branch of a family was being denied the right to be consulted before the alienation of family land on the grounds that they were descendants of slaves underscores the Governor's concern in this respect.

303 The Legislative Council Debates, op.cit.

304 Ibid. Compare this statement with what he says in his book, F.C.L., op.cit., 61-62. "In this country, joint property is the rule . . . Absolute, unrestricted, exclusive ownership enabling the owner to do anything he likes with his immovable property, is the exception."

305 Ibid.

assumption that strangers and aliens had customary and other rights to collect rubber, palm kernels, cola nuts and other natural products on anybody's land.

These arguments of Sarbah underlined the fact that while Maxwell saw the land problems in terms of national land policy for the Gold Coast, Sarbah and the majority of opponents of the Governor's policies saw them from a narrow tribal territorial perspective. The main difficulty here was that not only were the people not identified with the government, but the latter had itself done virtually nothing practical to encourage the people to think of themselves as people of one united Colony and Protectorates. What seemed to have united them instead was the way in which they regarded the Colonial administration as a common enemy seeking to deprive them of their lands. These circumstances were to prove damaging to the success of the policies which the Bill was designed to put into operation.

E. The Concession Court

One of the reasons why it became necessary to establish a concession court was stated in the Legislative Council by the Attorney General as follows:

> "For the last 20 years and more, and especially recently, native chiefs have made alienation sometimes by way of out-and-out conveyances, and sometimes by way of long leases of lands for very small remuneration or consideration." [306]

For this reason, Maxwell thought it was necessary for the establishment of a concession court to conduct "a very thorough examination of claims . . . founded upon documents which . . . natives may have been induced to sign . . . " [307]

The concession court was established under clause 37 of the Bill to carry out this responsibility of investigating the validity of past, present and future instruments affecting land. The court was to be properly constituted where one or more commissioners appointed by the Governor by notification in the Gazette was or were either sitting separately

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[306] Ibid.

[307] Message to the Legislative Council, 10 March, 1897, C.O. 96/295.

or together.[308] The court was to have a secretary who would exercise the powers conferred on the Registrar of the Supreme Court and shall duly preserve the records of the court's proceedings.

Although the court was required to follow the procedures and rules of court and practice established and followed under the Supreme Court, it could nevertheless frame other rules and procedures it might deem necessary to follow.[309] The most controversial and the most criticised provision was clause 41. It conferred power on the Court to enquire into and decide upon the validity and scope of any claims founded upon grants of land or timber or other concessions which were alleged to have been acquired from native chiefs or other persons before the coming into force of the Ordinance.

The Court also had power to make such enquiry even if the alleged grant or document had been registered under the Registration Ordinances of 1883 and 1895,[310] or having been so registered were specifically referred to it. To widen the scope of its enquiry into past transactions, clause 42 provided that even matters conclusively decided upon by the Supreme Court in respect of grants could be reopened by the concession court and no writ of prohibition was to issue from the Supreme Court to stop such enquiry or restrain any person from taking any action to the court.

Upon the notification establishing the court being published, all proceedings in the High Court in respect of land titles were to be stayed unless the Governor consented that any such proceedings shall continue. So long as the Court was in existence, the determination and the establishment of the validity of claims to land was to be exclusive to it and the Supreme Court had no jurisdiction over it unless by the consent of the Governor.[311] Clause 46 provided that the Colony was to be deemed a party in respect of all matters coming before the Concessions Court for enquiry, and might therefore appoint counsel or an attorney to intervene or plead or lead evidence on behalf of the Colony. This provision was in line with the principles of the Bill that the government, being the paramount authority, represented the state as the ultimate

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308 See clauses 37 and 38.

309 Clause 40.

310 No. 8 of 1883 and No. 1 of 1895 respectively.

311 Clause 43.

controller of land use, development, disposition of interest thereof and its general administration as a national asset and resource of the country.

Clauses 47-50 dealt with matters relating to procedure, adopting so much of the rules regarding civil procedure in the Supreme Court Ordinance of 1876 as part of the provisions establishing the Concessions Court. Clause 54 prescribed five conditions under which the validity of a grant might be impeached. Grants might be invalidated if:

i. the grant was made by a chief without the express consent or concurrence of the councillors (if any) whose consent was required under native law;

ii. made by a chief in respect of land in possession of another chief or his people without the express consent of that chief and his council (if any) whose consent might be necessary under customary law;

iii. made by fraudulent or improper means or without adequate or valuable consideration;

iv. the Court shall find that any of the terms or conditions upon which such grant or concession has been made have not been duly or satisfactorily performed; or

v. the Court shall not be satisfied with the authenticity of the grants relied upon or that the grantor or grantee well understood the terms, conditions and nautre of the grant.

Under Clause 55 of the Bill, the inclusion of certain conditions in a grant was to become void. Any condition in a grant which purported to confer a right of exemption from taxation, create or confer monopoly, any role or exclusive right of trading or carrying on any commercial operation or undertaking, or any chemical operation concerning the recovery of precious metals, or the reduction of refactory ores was declared null and void under this provision.

Clause 50 of the Bill prescribed certain conditions under which grants declared and certified to be valid by the Concessions Court should be held. If the land affected by a valid grant was located in a town within the meaning of the Town Councils Ordinance of 1892, then a quit rent of two shillings per annum for every thousand square feet was to be paid to the Government. On the other hand, if the land fell outside a town and was acquired for agricultural purposes only, then an annual quit rent of one shilling per acre was payable to the government. Similarly, where the grant was a mining concession or right to fell timber, to extract or take rubber or other vegetable products, a royalty not exceeding 5% on the gross value of all gold, precious stones and other

minerals or timber, rubber or other products obtained from such land was to be paid. However, the Governor in Council had power to change the rate of royalty from time to time by notification in the Gazette.

Wide discretionary powers were conferred on the Governor under Clause 57 to modify terms of transactions. He could if he was satisfied that a claim based on an alleged grant was immoderate or unreasonable, modify the terms, conditions or the scope of the grant. He might impose at his discretion equitable limitations, restrictions or conditions upon the execution of any grant or concessions.

F. The Objections of British Subjects and Financial Institutions

While the debates on the merits and demerits of the Crown Lands Bill of 1894 were raging on, European merchants, who were mainly British subjects, received the measures with mixed feelings. There were certain aspects of the proposed Bill to which they would have no serious objection. British merchants could obtain several advantages from the implimentation of the measure. Firstly, by the direct acquisition of lands from the government, greater security concerning land titles could be assured. Secondly, land grants could be negotiated directly with the government instead of having to pass through native intermediaries.

For such reasons, at the initial stages of the campaign against the Bill, British subjects did not raise any serious objections to the proposed enactment. For instance, as we have seen earlier, Mr. F. Fitzgerald, the London editor of the African Times, who had advocated the creation of "a race of native capitalists" in the Gold Coast, had called on Strahan to declare the whole of the lands of the protectorates to be vested in and held from the Crown. This he believed would lay a sound foundation for a civilised administration.[312]

This attitude was typical of that of British merchants at the time, who on appearance expressed only mild objections to the Bill and that was mainly in respect of the proposed control of the mines by the government. They were accustomed to the traditions of free enterprise based on laissez-faire notions of freedom of contract and private enterprise in the Gold Coast for more than three centuries. The idea that the government should break this tradition by having the power to police their activities in the mines and to interfere with their profitable bargains in land

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312. See p. 98.

transactions was not received favourably. What they feared most was the proposed imposition of custom duties on exported goods, the limitation to be placed on the size of land holdings, and the general onslaught on speculation which the proposed measures implied.

The first direct European merchant opposition to the 1894 Bill was demonstrated by a deputation of the Accra branch of the Liverpool Chamber of Commerce to Governor Maxwell in 1895.[313] The deputation met the Governor to complain about two Ordinances, viz. the Town Councils and the Crown Lands Ordinance. As to the former, the Chamber did not think that there was serious objection to it in principle. What it disapproved of was the way in which it had been introduced. It was an Ordinance, the Chamber complained, which naturally affected a very large section of the community, "especially the more intelligent and educated sections", and they knew nothing about it until it was passed "behind their backs". As to the latter Bill, although it was regarded as very important, the deputation believed it was one which concerned the native much more than it did Europeans. The only opinion expressed on it then was that it was capable of considerable amendments.[314]

A remarkable feature of the Chamber of Commerce's objections to the 1894 Bill was the mild tone in which they were made. Although they had some misgivings about certain aspects of the Bill, their main complaint was the failure of the government to consult them before introducing it. However, in terms of their economic interests, British entrepreneurs were soon to realise that they were mistaken in believing that the Bill concerned natives much more than it did Europeans. When the details of the expanded version of the Bill under Maxwell became known, with its new title of "Public Lands Bill", the mild protest begun by the Chamber of Commerce in Accra developed into a vigorous campaign against the Bill.

When the extended Bill was introduced containing a provision to set up a Concessions Court to investigate past transactions, it angered and frightened concessionaires and speculators. Reaction to the new Bill from British business organisations and financial institutions was quick. Even before the Bill had reached the Legislative Council for debate, the Liverpool Chamber of Commerce sent a telegram from London asking the Governor not to proceed with its passage until he had received

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313 24 June, 1895, C.O. 96/257.

314 Ibid.

representation from their members. [315]

The nut of the controversy between British businessmen and financial institutions, the native middle class, the chief and people on the one hand, and the government on the other, was stated by the Financial Post in England as follows:

> "The Bill also provides that the Government receive a royalty of 5% on the gross value of all gold and other mineral, timber, rubber or other products obtained from the land where the concessions are granted. The 5% which is tantamount to export duty appears to be one of the main causes of the objection raised by natives and Europeans in the colony. Another matter to which they take exception is that the Bill is to be retrospective where land which has been owned for years and years, but not developed, will come under the terms of the new Ordinance." [316]

The publicity accorded the proposed measures in England was an indication of how seriously the matter was regarded in business circles in Liverpool, Masnchester and London. Certainly, if the Bill had come into force, it would have had a damaging effect on speculators whose main business was the buying and selling of concessions with no intention of actually working them. Unlike the government, individual British businessmen were not so much concerned with the social and economic development of a country where they were not going to reside permanently. If they were paying tax in England to which they would return, they saw no justification in the payment of the prescribed 5% royalty on produce.

The general view of British businessmen was that which a director of a mining firm in the Gold Coast expressed in his letter of protest as follows:

> "In respect of the proposed royalty on timber and gold, I must crave your excellency's pardon in saying that such a step would be a grave error, calculated, as it is to scotch the industry it is supposed to foster and promote. As regard gold, it has never been found necessary on any goldfield in the world." [317]

In the face of mounting opposition, Maxwell had to defend his policy before the Liverpool Chamber of Commerce in England before presenting the Bill to the Legislative Council for debate. At a meeting of the Chamber of Commerce and other trade associations concerned in the business of concessions in the Gold Coast, he tried to explain the issues involved

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315 Telegram of 8th May, 1897, C.O. 96/293.

316 24th May, 1897, C.O. 96/295.

317 Letter from Dr. Bourke, Director of West African Gold Recovery Syndicate, to Sir William Maxwell, 17th December, 1895, C.O. 879/46, No. 513, African West.

in the matter to these interested bodies. In his defence of his policy of vesting the administration of all lands in the government, he made strenuous efforts to find a theoretical justification for it. He pointed out that in colonies which had become British territory by conquest or cession, the land was theoretically vested in the Crown, and owners held by grant or lease according to English law.[318] He conceded the fact that the Gold Coast, which was "a group of native territories taken under British protection and moulded by the force of circumstances into something approaching a Colony", differed altogether from the colonies and possessions under British rule with regard to the manner in which land was acquired and held.

In the Gold Coast, native rights had not been interfered with and the Crown had not insisted on full control over the disposition of waste or forest land.[319] Maxwell's opinion was, however, that even if all the theoretical and doctrinal basis of the Crown's sovereignty was not satisfied in the Gold Coast, the country was in practice ruled as a British colony. Sovereign rights were regularly exercised.[320] It was therefore unrealistic to ignore this fact and to leave matters to be mismanaged to the disadvantage of the Colony as a whole and to the advantage of a few individuals.

He argued that the lack of clarity and obscurity which existed with regard to the real nature of the rights of native chiefs, landholders and cultivators "leads to all kinds of mischief" in the Protectorate. He told the Chamber of Commerce:

> "It encourages the African native, if he be a 'scholar' and knows something of English tenures, to claim a great deal more than his native customs really give him. Misrepresentations of all kinds are made from sordid notives, men whose real duty it is to administer public rights for the benefit of a tribe, dispose of them for their private benefit, and the greatest uncertainty exists, the result being endless litigation."[321]

He warned the meeting against what he called the tendency of Englishmen

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318 Speech before the Liverpool Chamber of Commerce, Enclosure No. 116, 4 July, 1896, C.O. 879/46, No. 513, African West.

319 Ibid.

320 Ibid. As he argued before, he believed that the very theory of protection seemed to imply something in the nature of sovereign rights in the protecting power. See Maxwell to Ripon, 9 May, 1895, C.O. 879/46, No. 513, African West.

321 Ibid.

to reason about land tenures as if English theories and practice regarding freehold and leasehold, mortgages and the disposal of real property by will were common to all the world. He stated that these concepts might not readily apply to native ideas of occupancy founded upon community rights. There was therefore a danger that such persons would be disposed to recognise absolute rights in systems where none existed.

Maxwell described the dangers and the problems inherent in the confusion of English tenurial concepts with native tenure in the following words:

> "Now to a native community so constituted, there comes a white man or an African 'scholar' and demands a concession of mining, agricultural, or residential rights, in consideration of a payment. He very possibly succeeds, by giving what is really a very small sum, but one which seems to the up-country native a very large one, in obtaining a document, duly signed by various persons purporting to give him rights of all kinds, over an unsurveyed and imperfectly described track, for a long period or in perpetuity. Now, what has he really got? If the head chief had made the concession, has he any power to do so without the concurrence of his Council? Who are they, and have they concurred? If the concession was made by the subordinate chief within his supposed local jurisdiction, has he any power to act independently of the paramount chief?" [322]

Anyone familiar with Ghana's land tenure problems will readily recognise from the issues raised by Maxwell's questions that he had great insight into the land tenure problems of the country. The questions raised by him nearly a century ago are still being asked today. His problem was that the aims and objectives of his social and economic policy as Governor of the Gold Coast were different from those of the financial and business concerns. While Maxwell's social policy goals were the provision of social services and the development of the infrastructure by the construction of roads, railways, schools, health facilities etc., as a justification for British rule over the country, [323] the entrepreneurs' objectives were the promotion and the protection of their commercial and economic interests based on maximization of profit.

For these reasons, Maxwell's speech fell on deaf ears. He made his case worse by outlining those aspects of the proposed Bill which provoked the strongest criticism from the business community. For example, he concluded his speech by saying that because of the problems he had outlined, legislation was urgently required in line with his general policy as follows:

i. the rights of the native chiefs must be defined;

ii. concessions by native chiefs must be made impossible except with the concurrence of the Governor.

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322 Ibid.

323 See pp. 145 and 163.

iii. the recognition of mining and timber concessions must be accompanied by a condition that substantial payment, either in cash or in the shape of royalties should be secured to the government, the native chief or tribal representative getting a share;

iv. concessions upon which bona fide work was not being done or upon which there was no reasonable prospect of bona fide work being done within a reasonable time, say five years from the passage of the Ordinance, should be liable to cancellation;

v. all dealings with and payment to native authorities in respect of lands must be conducted through the colonial Government. [324]

By insisting that the mining firms and concessionaires should pay "substantial" royalties either in cash or in kind, Maxwell was attempting to give effect to his policy founded on the belief that "the construction of roads and railways by Government in mining districts was not to be expected, if companies and individuals who would profit by them were not ready to contribute to their cost." [325]

British businessmen took two different objections to the Bill. The first was the payment of royalties. The second was the proposed limitation on the size of concessions. Chamberlain had suggested two types of concession for Maxwell's consideration. The first type was concessions involving the creation of monopoly rights over large tracts of land. The second type was to be of much more limited kind which would not require a large sum for acquisition and devlopment. [326]

In the first class of concessions, concessionaires might be required to pay large sums of money either in cash or by instalments to be used for construction of roads and railways. In the second category of concessions, the government might be satisfied with guarantees that their development would be speeded up together with the payment of royalty of some kind on minerals and profit.

British firms and individual entrepreneurs down from the start had hoped for the first category of concessions. This would have enabled them to acquire monopoly over large areas of land on the same scale as the Ashanti Goldfields Corporation. In such cases, even if they were unable to work all of it, the rest could be sold on a speculative basis in the open market. However, Maxwell opted for the second class

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324 Ibid.

325 See Secret Dispatch from Maxwell to Chamberlain, 19 August, 1897, C.O. 96/295. Maxwell made the same point in 1895 when he wrote to Ripon saying ". . . the roads, railways and river improvements required by miners and timber merchants can only be undertaken if they materially contribute to the revenue". Dispatch of 19 June, 1895, C.O. 879/46

326 Dispatch from Chamberlain to Maxwell No. 72, 13 March, 1896, C.O. 879/46, No. 513, African West.

of concessions and placed a time limit on their development, without which they might be cancelled. This would have the effect of putting a brake on speculation, which was one of the main business concerns of some British firms and individuals, including prominent members of the native middle class. This was a bitter pill for such persons to swallow.

Unimpressed by Maxwell's reasons for the proposed imposition of royalty on produce and the ending of speculation, British firms and business organisations concerned intensified the opposition to his policy and lobbied in Parliament for support. Not long after Maxwell's speech, Mr. Goddard requested the Secretary of State for the Colonies to state to the House of Commons his views on Maxwell's speech at Liverpool which indicated that he was trying to make it impossible for native chiefs in the gold Coast to make a grant of their lands, and to state whether he approved of such a policy. [327] Chamberlain replied that there were many good reasons why such a policy should be approved of, repeating what Maxwell had said about the confusion of English notions of tenure, conveyancing practice and terminology with Gold Coast customary land law and tenure, which was causing problems and confusion.

These answers did not satisfy the critics of the Bill. In May 1896, the African Trades section of Liverpool Chamber of Commerce met and agreed unanimously that the proposed royalty of 5% on the gross value of all minerals produced in the country was too high. They agreed that they would not accept anything beyond 1% royalty on profits. They complained to the Colonial Office that, if the royalty of 5% was allowed to stand, existing industries would be crippled and further investment of capital in the mining industry would be discouraged. [328]

They also complained about lack of good roads and communications. In what was essentially a repetition of Bruce Hindle's argument in 1895, the Chamber of Commerce complained that the firms were working under difficult conditions risking life and capital in the Colony. One would have thought that these conditions could only be improved, as Maxwell had been arguing all along, if the firms agreed to pay the suggested levies on produce.

Certain high officials in the Colonial Office in London who had little understasnding of the problems lent their support to the critics

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[327] House of Commons, 28 July, 1896, C.O. 879/46, No. 513, African West

[328] Dispatch from Maxwell to Chamberlain, 8 May, 1897, C.O. 96/293

of the proposed measures. Sir J. Bramston, for example, commenting on Maxwell's address at Liverpool and on the proposed Bill observed that although the Bill in its expanded form was a great improvement on the 1894 Ordinance, some of the old objections still persisted.[329]

It was Bramston's opinion that the practice of alienating stool lands to strangers had grown up in native tenure and there was abundant evidence of the practice, which was extensive and well recognised by the natives. Since this had been acquiesced in by the government for so long, it was now too late to reverse that trend. He further argued that Governor Maxwell had in his address confused the question of the right of property and that of the right of alienation. There could be no doubt that practically all the lands in the Gold Coast were "subject to private ownership", and there was no difficulty in determining who the owners were. What was difficult, Sir J. Bramston pointed out, was the determination of rights, that was whether any one man or number of men had rights to alienate property.

He rejected Maxwell's views that stool land was public land which ought to be administered by the public for the benefit of the public:

> "They are certainly not public lands in this sense. They have in every case determined owners and do not belong to the general public."

Bramston regarded as fallacious Maxwell's argument that, as the Governor of the Gold Coast, the latter possessed every power which might be lawfully exercised by custom by any chief. So far as tribal property was concerned this was probably incorrect; and Sir J. Bramston expressed his surprise that the Governor laid down "so superficial a doctrine".[330]

In the light of what has been discussed about the nature of individual rights in land under the customary law, it can be observed the mistaken premises on which Sir J. Bramston based his arguments in criticism of Maxwell. In the first place, unlike Maxwell, Bramston did not understand the nature of individual rights in land in terms of rights of benefit and rights of control; nor did he appreciate the community basis of enjoyment of such rights. This misconception of traditional schemes of interests in land was reflected in the latter's statement that practically all lands in the Gold Coast were "subject to individual ownership" and that there was no difficulty in determining

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329 Colonial Office Minutes No. 531, 19 August, 1897, C.O. 96/295. Bramston was the Assistant Under-Secretary of State for the Colonies.

330 Ibid.

"owners".

Bramston fell into the common error of confusing English tenurial concepts and terminology with customary tenure, a tendency against which Maxwell had warned continually. Sir J.Bramston's argument that stool lands were not public lands, did not take into account the communal principles underlying customary tenure and distribution of resources in the indigenous systems. Maxwell reached the conclusion that vacant or "waste lands" were public lands or should be regarded as such on the basis of his understanding and appreciation of such underlying principles of the customary law.

Unhappily, decisions taken in the Colonial Office in London carried greater weight than those carefully thought out by men who studied, understood and lived with the problems. Indeed, the final decision to abandon the original principles of the 1894 Bill was based on Sir J. Bramston's views, Maxwell informing the Secretary of State that on the basis of the consultations which he had had with the former, he was abandoning the principles laid down originally in Sir Joseph Hutchinson's draft Bill of 1894. By the end of September, 1896, Governor Maxwell was forced to agree that it would be sufficient to establish the principle that waste land was public land and that it might be administered by the Governor or Government for the best interest of the Colony.[331]

It was this amended version, embodying the principles stated above, which became the subject of criticism by Sir J. Bramston, the Liverpool Chamber of Commerce, firms and individual businessmen.

As we have seen earlier, it was not only European firms and individuals who were engaged in the concession business and land speculation. Some prominent Africans, particularly of the merchant class and the elite, took an active part in the buying and selling of concessions. The proposed measures threatened their economic interests even more than Europeans. As they lacked the capital to undertake actual mining, speculation in concessions was their main area of business activity. The common threat this posed to the financial and economic interests of Europeans and natives of this class united them against these measures.

One must remember that the European firms and financial institutions with their representatives in England were in a position to lobby Parliament

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331 Maxwell to Chamberlain, 28 September, 1896, C.O. 96/286.

and the Colonial Office, and were therefore in a better position to influence the course of events than organised native opposition in the Colony. There was no doubt that native protests were taken into account in the decision to withdraw the Bill, but they were not the crucial factor. Surely, if these measures had been supported by the European firms, the Bills would have been passed, native protests notwithstanding. The prominence given to native opposition to the measures creates the wrong impression that such protests were the crucial factors in the withdrawal of the Bill. [332]

332. See David Kimble's discussion of the issue in his book, A Political History of Ghana 1850-1928, London, 1963, pp. 338-362; see also Francis Agbodeka, op.cit., p. 146, where he expressed the view that the protests of the A.R.P.S. and the deputation from the Chiefs to the Queen in 1898 were effective against the Bill. C. Ilegbune's discussion of the issue creates a similar impression. op.cit. pp. 180-196.

CHAPTER VI

CHANGE OF POLICY

A. Introductory

In a summary, it may be said that political expediency was one of the key considerations that compelled Maxwell to postpone the passage of the Crown Lands Ordinance of 1894. The need to bring other areas, including Ashanti, which was not yet under British "protection" into the Protectorate made it expedient to delay action on the Bill, and it was finally abandoned. The 1897 Public Lands Bill met a similar fate, mainly because of the objections raised by British businessmen, their financial institutions and native opposition

Left to themselves, Sir William Brandford Griffith and Sir William Maxwell would certainly have resolutely insisted on pushing their policies through. But this was not to be. As we have seen earlier,[333] Lord Knutsford and his successor as Secretary of State, the Marquess of Ripon, were favourably disposed towards the implementation of the schemes proposed by the two Governors. The Chief Justice, Sir Joseph Hutchinson, had since his objection to such policies in 1891, changed his views and lent his support to these Land Reform programmes. However, by the end of 1895, all the advocates of this policy, except Maxwell, left their posts and were succeeded by persons who either adopted a via media or opposed these land policy objectives altogether.

Therefore, when by misfortune Maxwell lost his life in the autumn of 1897 and was succeeded by Sir Frederick Hodgson, one of his land policy critiques, the stage was set for a change in direction of policy. The governship of Sir F. Hodgson marked the end of a gradual but progressive development of a national land policy, the effect of which would have been the harmonization of the land tenure systems of the country on the lines of land tenure and administration in the Northern Territories of the Gold Coast and Northern Nigeria.

In place of a policy of this kind, the new Governor proposed to introduce a measure which would give the government the right to:

> "Watch the land operations of the natives, and to insist upon the observance of certain regulations with respect to them as may appear to be called for in the interests of the Natives on the one hand and capitalists on the other." [334]

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333 See pp. 109-110.

334 Sir Frederick Hodgson proposed this measure as an alternative to Griffith's policy in his comments on the Crown Lands Bill. As the new Governor of the Gold Coast, he was now in a position to implement this policy. See the Dispatch from Maxwell to Chamberlain, 13 September, 1895, C.O. 879/46, No. 513, African West.

On the basis of such a policy, government inspectors of mines and officers to supervise mineral and timber concessions would be appointed and

> "a more complete arrangement for survey and registration of grants as well as regulation for conservancy of forests and the working of grants, both in case of minerals and woods"

should be made.[335]

Previous reaction to land legislation had taught Hodgson that before introducing any new measure he should have wide consultations with those whose interests might be affected. While he was in England at the end of 1898, he therefore used the opportunity to discuss the subject of the kind of legislation required for regulating concession grants and the mining industry with the Secretary of State and Foreign Office officials. Following these consultations, it was agreed that legislation should be introduced to provide for the establishment of a concessions court with the power to examine the validity of concessions and to ensure compliance with certain rules prescribed by law. But before doing so, British business men and their commercial bodies were widely consulted in order to enlist their views and support for the Scheme.

One of the main objections to previous land bills on the part of British business men was the tax and royalty which the law sought to impose on timber and minerals. The Secretary of State, therefore, summoned many of the interested business organisations to the Colonial Office in order to discuss matters relating to the mining industry, particularly those concerning taxation and royalties. At the meeting, the latter explained to the firms and their representatives the need for imposing some form of taxation on minerals and timber.[336] He stressed the fact that concessions were obtained on a large scale and some of them had been very productive, yielding enormous profits. Chamberlain referred to the Ashanti Gold Field Corporation in particular, whose paid up capital was £125,000 with shares at £18 per share. He noted that:

> "a paper profit of two million pounds sterling was made by its shareholders entirely because of the expenditure of treasury /sic/ by the Imperial Government and the Gold Coast Colony."[337]

The Secretary of State was of the opinion that under such circumstances there was no justification for non-payment of tax. "They have got to be taxed", he declared. He proposed that beside seeing to the interest of the natives, the government should be entitled to a sum down which should be in some way proportionate to the amount of concession obtained.

> "A moderate sum, in return for the title which we have made possible, would be recognised, I think, as a fair demand", he emphasised.

He regarded the five percent royalty on all gold won as proposed in the abortive Land Bill of 1897 as insufficient. If profits were what they were expected to be, then this percentage was too small. He noted that this was

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335 Ibid.

336 Notes on the meeting of the Gold Coast Traders, Colonial Office, 28 March, 1899, C.O. 879/59, No. 592, African West.

337 Ibid.

nothing comparable to what was obtained in the Transvaal or Rhodesia. While he did not grudge any profits made by those who were the first in promoting the mining industry in the Gold Coast and did not intend to curtail them, the payment of royalty could not be avoided.

He assured the businessmen that the Imperial Government's policy was not to hamper the development of the industry. Where there were genuine reasons to show that there were mines which would not sustain a tax levied on output, some other means of taxation might be found. In such cases a tax on profits might be imposed, but in other cases a five per cent royalty on total output would not be too excessive. As far as large companies were concerned, Chamberlain believed, such a tax might not be too difficult to collect, because its returns might be passed on to shareholders. As far as small firms were concerned their books of account would have to be inspected and profits ascertained. In conclusion he declared:

> "I do not mean to oppress or in any way to hamper this industry, but I do not mean all the profits to go to the private individual." [338]

Mr. Moorcroft, Tarquah and Abosso Mining Company's representative at the meeting, argued that miners had to deal with low-grade ore apart from expenditure on transport and that this factor alone threatened to kill almost every undertaking in the Colony. For this reason, the Imperial Government would have to adopt a lenient policy with regard to taxation on minerals. Firms, he suggested, should not be made to pay tax until they began to reap the benefit from railways. He thought that should there be taxation at all, tax on profit rather than on gross produce would be the fairest means of income tax. Mr. Hunt, on the other hand, was not particularly concerned with the mode of taxation, but thought it would be inconvenient to impose tax ad valorem. The Ashanti Gold Field Corporation representative, Mr. Gordon, expressed the view that the simplest form of taxation would be tax on output but the fairest method would be tax upon profits. The only problem would be the complicated method of profit calculation which would be involved, having regard to the considerable amount of expenditure on development. Mr. Tarbut, representing British Gold Fields Syndicate, on the other hand was prepared to accept a percentage tax on output because, as he argued, tax on profit in the Transvaal had caused a great deal of problems and was therefore objectionable. It was finally agreed after a long debate that tax should be levied on profit.[339]

Although the majority of the businessmen were forced to agree in principle that some form of taxation on minerals and timber was required, they could not agree on the percentage of tax which must be imposed on profits. Chamberlain thus secured only a partial support

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338 Ibid.

339 Ibid. 17 persons voted in favour and 9 against.

from the business community for his concession and mining tax policy. But this did not mean the problem of finding a definite land policy which should replace the Public Lands Bill and its principles was nearer to solution. Divergent opinions on what the position of the Government in relation to lands ought to be persisted both in business and official circles.

When the Land Bill was withdrawn Chamberlain sent a confidential dispatch to Sir F. Hodgson in which he outlined the conditions under which provisional recognition could be accorded to concessions acquired from native chiefs.[340] Hodgson understood the dispatch to mean that the government would provisionally recognise concessions acquired from native chiefs if certain conditions were satisfied. Firstly, the government should be satisfied as far as it could be that the concessionaire had obtained his right in a manner which made the provision for remuneration for the chiefs conceding the mining or other rights. Secondly, apart from being certain that the terms of the grant were fair, the government must satisfy itself that the concessionaire meant bona fide business and was not "concession mongering".[341] When these conditions were satisfied, the government could recognise the concession provisionally, subject to any conditions which might be prescribed by the government. It should be observed that these policy statements did not differ substantially from what Maxwell had proposed in his Land Bill. If the government recognised the right of traditional authorities to make valid disposition of lands under their control, then there would seem no reason to question the validity of any such transactions even without the recognition of the government. However, from the conditions set out above, it could be inferred that the validity of such transactions was being made subject to governmental recognition.

In what would appear to be a clear departure from the policies of the past, W. H. Mercer expressed his views on what official policy on concessions ought to be in his comments on certain problems arising out of concession agreements entered into between the representatives of Obuasi Gold mining Syndicate and certain government officials. He criticised the underlying asumptions of the agreement as following the mistaken theories of Sir William Maxwell as to the ownership of the soil. He argued that in concluding the agreement, it was erroneously

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340 Chamberlain to Hodgson, 8 December, 1898, C.O. 96/241.

341 Hodgson to Chamberlain, 12 August, 1898, C.O. 96/342.

assumed that native chiefs had accepted the government as the veritable paramount chief and as such had authority to dispose of lands. He stressed the importance of obtaining the consent of the chiefs with regard to acquisition of interests in land.[342]

On the other hand, he recognised the advantages to be gained from providing that the government, and not the "concession-hunter", should deal with the chiefs. This would maintain the authority of the government which the native understood and at the same time prevent abuses and mistakes. Under this plan, anyone who desired a concession would apply to the government, who would then make enquiries and if it was thought proper would make an agreement with the native owners, on the authority of which a grant would be made to the applicant. In such cases, grants might be drawn at once and placed before the "owners" for their consent which should be given in writing before the execution of the grant.

Mercer believed that this process would avoid the legal question of ownership and might constitute the best solution to a problem which was difficult and complex. It should be pointed out that the suggested machinery for the acquisition of landed interests could not be adequate to avoid the legal issues involved. If as he argued, Sir William Maxwell's theories of the government becoming the "veritable paramount chief of the tribe" was wrong, and the native chiefs were still "owners" of the soil, then his suggested procedure would still run counter to the rights of the "owners" to conduct transactions in respect of what belonged to them without let or hindrance. As Wingfield had rightly pointed out, Mercer's suggested procedure formed a sort of intermediary position between ownership by the crown and ownership by the chiefs and would help the government authorise concessions and open up the country, a development which the government desired. But in his opinion from the legal and legislative viewpoint, the proposed solution still left the question of ownership of the land in a "somewhat nebulous condition".[343]

It will be observed that the government in its search for a new policy to replace those of Maxwell came face to face with the fact that a large measure of governmental involvement in land transactions was inescapable. In this respect, government officials were forced to admit one way or the other, the utility of the principles underlying

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342 Minutes on the Ensor agreement, 7 July,1899, C.O. 96/342.,

343 Ibid.

the abortive Public Lands Bill. But the respect in which Maxwell and advocates of his policy differed substantially from successive colonial Governors and officials in the Gold Coast was the way in which either of them understood traditional schemes of interest in land.

Maxwell's approach was influenced by his greater insight into the nature of the systems and their inherent problems. Other officials and Governors succeeding him fashioned their policies on the basis of a superficial understanding of the tenure systems of the country and the confusion of English tenure concepts with indigenous notions of tenure. It will be observed from the above treatment of the land problems by Hodgson and his officials that they still saw the problems in terms of "ownership" by chiefs and traditional elders. Their primary concern was the safeguarding of the chiefs' interests, not the interest of the community at large or the ordinary citizens. While Maxwell saw the problems in terms of protecting the interest of the ordinary citizen against their generally ignorant, illiterate, improvident and selfish leaders who were representatives of the community, his successors regarded the latter as "owners" and therefore needing protection against British concessionaires and the educated native. This was the fundamental difference between Maxwell's policy and those of his critiques.

However, some of the colonial administrators learnt from experience that the best solution for the land problems was that which Maxwell had proposed in his Public Lands Bill but thought it was too late to return to it. Thus although Chamberlain regarded the principles underlying the Concessions Ordinance which was to replace the Public Lands Bill as materially different from the latter, he considered it "absolutely necessary for the Colonial Government to supervise grants of Land", so as to protect all parties against fraud or misrepresentation.[344] This policy was enshrined in the Concessions Ordinance under which a Concessions Court was created to deal with concession and other dispositions of interests affecting land. As will be seen presently, this machinery was ineffective against the evils at which it was directed and the problems magnified as its administration was attended with many difficulties.

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[344] Chamberlain to Hodgson, 22 December, 1899, C.O. 879/57, No. 578.

B. The Concessions Ordinance

i. The Objectives of the Bill

The principal goals of the Ordinance were contained in a memorandum to the draft Bill. In his Memorandum, Chamberlain stated that the basis of the new Statute was to be materially different from the Public Lands Bill. Unlike the latter Ordinance, which sought to vest the administration of all vacant lands in the government, the new Bill would recognise the right of the traditional authorities to exercise their traditional rights of land control functions. The government would perform a supervisory role in land transactions in which chiefs and Europeans might be the contracting parties. Chamberlain hoped that this supervisory role of the Colonial Government would help to protect all parties against fraud and misrepresentation. It was essential to secure to all parties the rights given or reserved in concession agreements and to guard against results prejudicial to the public interest. Also important was the need to obtain for the government a reasonable income from profitable operations. These objectives could be achieved through the supervision by the government, land grants by native chiefs. However, the Secretary of State did not wish to make "any fundamental alterations in the rights of the natives such as was apprehended by the Deputations." [345]

Accordingly, Chamberlain was emphatic that the Ordinance did not purport to confer on any government authority the right of claiming or making any grants of land whatsoever which was "owned" by natives of the Gold Coast. The idea of vesting any unoccupied land in the Governor as Crown land was to be abandoned. The memorandum stated:

> "The native owner is left free, as now, to make his own bargain if he wishes to sell to a European, and the benefit of his bargain is not interefered with, but on the contrary more effectually secured to him by the conditions which the Bill imposes on the grantee." [346]

The main objectives to be deduced from the Memorandum to the Ordinance would therefore appear to be an attempt to confirm the rights of chief

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345 Ibid. Reference to Deputation of traditional Elders to the Queen in 1898 protesting against the Public Lands Bill of Sir William Maxwell.

346 Ibid.

and Elders to exercise their traditional role of land administration and to ensure that in the course of transactions with strangers, advantage was not taken of their ignorance to defraud them. The procedure suggested by W. H. Mercer to form an intermediate position between "ownership by the Crown and ownership by the chiefs" was thus repudiated. The government was therefore to be in a position of a referee, superintending the conduct of the parties to land transactions under the indigenous systems.

This supervisory role was to be played by the Concessions Courts which were to be created under the Ordinance with wide discretionary powers to declare valid or invalid land transactions if certain prescribed conditions were not met.

As will be seen presently, henceforth, the principles inherent in the Concessions Ordinance[347] became the guide line for the formulation of land policy during the colonial period. Its most important effect was the foreclosure of all avenues for the development of a national land policy on the lines begun by Maxwell. Unhappily, apart from the Northern Territories, which were singled out as separate provinces in which the inherent principles of the abortive Public Lands Bill should be made to apply, the new policy of the Concessions Ordinance has survived Colonial rule and remains the basic policy of land law, legislation, management and administration, even in modern Ghana.

ii. The Main Features of the Ordinance

The memorandum to the Bill summarised the main features of the Bill. It provided for the establishment of a concession court in the Gold Coast. The court would have to be notified of every concession granted by a native, together with the particulars of the concession and the documents on which the claimant relied in support of his claims. The court was to have power to certify that concessions were valid under certain prescribed conditions. However, any concession acquired before 10th October, 1895, duly registered and undisputed was to be automatically certified as valid if the court was satisfied that the rights granted under such concession had in fact been exercised and that the natives residing in the locality in which it was acquired acquiesced in the exercise of such rights.[348]

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347 Ordinance No. 14, 1900

348 Ibid., See. para. 4 of Memorandum.

The court was to place limitation on the grant of a term of years. A term of a concession was not to exceed 99 years and that of prospecting licence was limited to three years.[349] It was to restrict the area of concessions in the case of mining rights to five square miles and in the case of rights to take timber, rubber or other products of the soil, 20 square miles. Similarly, no one person or corporation was to be permitted to hold, at one time, concessions the aggregate area of which would exceed 20 square miles in the case of mining rights or 40 square miles in the case of rights relating to timber, rubber or other products of the soil.[350]

The Ordinance was to provide for the levying of a tax of five per cent on all profits made by the holder of a concession from the date on which the Ordinance came into force. Prospecting licences were to be made subject to a stamp duty of one pound sterling per square mile.[351] A remarkable feature of the final draft was the wide powers conferred on the courts to make enquiries into concessions. It adopted many of the provisions of the 1897 Public Lands Bill dealing with concession courts. It had powers of re-opening transactions and making enquiry into their validity. It had exclusive jurisdiction over land matters and the jurisdiction of the Supreme Court was ousted in this regard, although appeals could issue from the Concessions Courts to the latter.

Before the final draft was made, the original draft was circulated to interested individuals and commercial bodies for their comments.[352]

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349 Ibid., Para. 5.

350 Ibid., Para. 6.

351 Ibid., Para. 7. In two special agreements made with the Ashanti Gold Field Corporation and the Castle Gold Exploration Syndicate prior to the enactment of the Ordinance, a tax of 5% on profit was imposed on the former company and on the latter a tax of 2½% on the gross value of minerals got. See Section 61 of the Ordinance by which the two companies were excluded from coming under the purview of the Ordinance and therefore the Concessions Courts.

352 Copies were sent to the following Chambers of Commerce: London, Liverpool and Manchester. Copies were also circulated to the West African Trade Association, Messrs. Ashurst, Morris, Crisp & Co., Mr Irvine, Mr Tarbutt, Mr Parks, Mr Kempf, Castle Gold Exploration Syndicate, West African Mahogany and Petroleum Co. and African Estates Co.

But most of the persons to whom the draft was sent were European business-men and financial institutions. During the course of our research, we found no evidence that either at the early stages of consultations with commercial firms in England on the question of taxation or after the original draft was made, the native chiefs or any member of the native business community was consulted on any of the issues concerning the Concessions Ordinance, the declared objective of which was the protection of native rights against foreign concessionaires.

It may well be that the chiefs were regarded as too ignorant about the technicalities of the Ordinance to be consulted on the matter. But this cannot be said of the native middle class of lawyers, business-men and elite who had been very vocal in their opposition to previous enactments concerning lands. Yet it was not deemed necessary to consult this class of natives on the matter at the preliminary stages. This attitude of the government and the Colonial Office lent further support to the view that the protests which carried weight with the Imperial Government to withdraw Sir William Maxwell's Bill were those of the British business men and trade organisations and not so much native protest as it is often made to appear. It was assumed that once European traders consented to the introduction of the measure there would be no great difficulty in putting it through, native protests notwithstanding.

Thus when Chamberlain sent the draft Bill he did not regard it as necessary to require Sir F. Hodgson to circulate it among the natives in order to solicit their views and comments. He indicated that in drafting the Bill regard was had to previous native protests in connection with the withdrawn Public Lands Bill. Perhaps, believing that this was enough, he simply required the Governor to explain to the natives the character of the new Bill, the basis of which was fundamentally different from that which was proposed by Sir William Maxwell.[353]

C. Opposition from British Entrepreneurs

We have seen from the discussion which ensued at the Colonial Office between the Secretary of State and commercial bodies trading in the Gold Coast that an agreement was reached that tax should be levied on profits gained from mining and timber operations. However, the percentage by which profits should be taxed was not agreed upon. When the draft Ordinance

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353 Ibid.

was circulated among the business community it provoked strong opposition. As in the past, five main objections were raised to the Ordinance. They included:

i. The retrospective character of the Ordinance, under which it would be necessary for all concessions, however old, to be referred to the Concessions Court and by which restrictions as to area would be applied to concessions not dated prior to 10th October 1895;

ii. the requirement that the concessionaire should prove the adequacy of consideration and consent on the part of those with legal capacity to alienate the property in question;

iii. limitations as to area of concessions;

iv. the tax of five per cent on profits and

v. the power of the court to modify terms of any concession.

Mr Irvine commenting on the memorandum to the Ordinance reminded the Secretary of State about the objections raised against the retrospective aspect of the Ordinance by the representative of the West African Trade Association during their previous meeting with him at the Colonial Office.[354] In the views of his Association all concessions acquired before the coming into force of the Ordinance should be declared valid and should not come within the ambit of the Concessions Ordinance. The Association was also unhappy about the limitation which the Ordinance sought to place on the size of concessions, particularly those affecting timber rights. Mr Irvine wrote:

> "What is the object of having small concessions of 20 or even 40 square miles? It can only be that all the country should be developed rapidly; but what does this mean in the case of mahogany? It means that Europe would be simply swamped with that product resulting in ruin to the importer and years of stagnation to the Colony.[355]

It will be observed that Mr Irvine and the West African Trade Association were concerned that limitations on the size of concessions would enable small firms with little capital to get involved in the timber business. This would have the effect of preventing the creation of monopoly rights over large areas of timber land enabling few large firms to control the timber business, and therefore the market. Yet this was exactly what the large firms did not want to happen. In Irvine's opinion, if the provisions relating to limitations on size of concessions were not

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354 Letter from Mr Irvine to Chamberlain, 10 September, 1899, C.O. 879/57.

355 Ibid.

altered substantially, the infiltration of small firms would devalue the commodity. Expressing his views about what the disadvantages of such a restriction would be for large firms, he wrote:

> "I am myself a director, and the largest shareholder in a timber company which was formed in 1895, and up to the present moment, we have sunk about £10,000 in systematically opening out the enterprise, but if small concessions are going to be the rule, I, for one, shall be tempted to cut my loss now and be done with it, as the importer can never be controlled with an indiscriminate number of people importing." [356]

The objections raised by Messrs. Ashurst, Morris & Co., were on similar lines. Apart from associating itself with what Irvine wrote on behalf of the West African Trade Association, the company attacked the retrospective nature of the Ordinance. It objected to concessions not acquired before 10th October 1895 coming under the purview of the Ordinance. [357] The company believed that only one per cent tax on profits could be acceptable. In a similar way, the London Chamber of Commerce associated themselves with the case made by Mr Irvine on behalf of the West African Trade Association. The Chamber complained that the provisions relating to the inspection of books of account were unacceptable because it would be difficult for traders to render statement of profit at the end of every six months.

Both the Chamber of Commerce and the Association, even before the memorandum on the Bill had come out, insisted all along that if the Gold Coast had to be developed by private enterprise, then the facilities had to be provided by the Government. One such important facility was regarded to be the creation of freehold titles in the land tenure system. [359] It was their belief that:

> "with a view to the expenditure of capital and the development of the country, it is very desirable that it should be made a condition that tenure should be freehold." [360]

As far as leaseholds were concerned, merchants would not lay out capital to any large extent unless they were satisfied that their tenure would be secure.

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356 Messrs. Ashurst, Morris & Co., to Colonial Office, 19 September, 1899, C.O. 879/57.

357 Ibid.

358 London Chamber of Commerce to Colonial Office, 25 September, 1899.

359 See West African Trade Association to Colonial office, 17 May, 1899, C.O. 879/57.

360 Ibid.

The London Chamber of Commerce, in particular, urged the Colonial Office to adopt one of two policies. If it was decided that the creation of freehold titles was impossible, then leaseholds in respect of mining and timber rights should be granted for not less than 99 years with a right to renew at any time during the period and at a fixed scale not exceeding the original consideration. Conveyancing should be made simple and cheap. Having regard to the primitiveness of the Gold Coast, abstract of title should not be required to prove title.

The main provisions of the proposed Ordinance were inconsistent with the creation of these facilities. The firms and individuals were therefore unhappy about most of its provisions. On the vexed question of taxation, most firms wanted it to be made clear in the Ordinance that the percentage tax was on net profit and not on gross profit. They wanted provision to be made for appeals to lie to the Privy Council in London and would like the Concessionscourt to consist of equal numbers of business men and government officials and with the Governor of the Gold Coast for the time being having a casting vote.

Despite these objections to the Bill, no substantial alterations were made to the original draft. The main concession to the firms was a provision enabling appeals to lie from the Concessions Courts to the Supreme Court and the Privy Council in London. The provisions relating to limitations as to size of concessions and tax clauses remained almost the same. As will be seen in due course, these objections foreshadowed the way in which the hated provisions were violated in the teeth of the law and thus defeated the whole purpose of the Ordinance.

D. Violations of Conditional Clauses

The preliminary part of the final draft of the Ordinance dealt with matters relating to definition of terms and the powers of the Governor. The objections raised to certain aspects of the Bill by those in the concession business were early indications that any loopholes in the Ordinance might be exploited to evade those provisions. It was exactly what happened. Indeed, so frequent were the breaches of these provisions that it might be concluded that they were rendered ineffective against the evils at which they were directed.

The main duties of the Concessions Courts consisted in the exercise of the power and authority to declare as valid or invalid concessions if certain prescribed conditions were satisfied. These conditions were

set out under Section 11 of the Ordinance. Under this provision, no concession was to be declared as valid:

i. "Unless made in writing signed by the grantor or some person duly authorised by him;

ii. unless the court is satisfied that the proper persons were parties to the concession and that it may be reasonably presumed that they understood the nature and terms thereof;

iii. if obtained by fraudulent or other improper means;

iv. if made without adequate or valuable consideration, regard being had to the circumstances existing at the time of the concessions;

v. unless all of the terms and conditions upon which the concession was made, which ought to have been performed, have been reasonably and substantially performed;

vi. unless the court is satisfied that the customary rights of natives are reasonably protected in respect of shifting cultivation, collection of firewood and hunting and snaring game;

vii. if it grants or purports to grant rights to collect natural produce other than timber, to the exclusion of natives;

viii. if it grants or purports to grant rights to remove natives from their habitations within the area of such concessions;

ix. unless the court is satisfied that the customary rights of natives are reasonably protected in respect of fetish lands."

The only concessions excluded from the ambit of these provisions were those acquired prior to the 10th day of October 1895, duly registered under the Registration Ordinance before the commencement of the Concessions Ordinance. Even in respect of such concessions, they could come under the purview of the concessions courts if despite their registration under the Registration Ordinance, there was an action pending in the courts in respect of them at the date on which the Ordinance came into force. Yet again, although an action might not be pending in any court of the Colony in respect of this class of concessions, the courts would certify them as valid unless the latter were satisfied that the rights granted under such concessions had been exercised in fact and that the natives resident in the locality in which the rights were acquired, and the natives by whom such concessions was acquired had known of and acquiesced in the exercise of such rights. [361]

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361 S. 11, No. 14 of 1900, Cap. 97, (as amended by S. 20 of 1901, S.6, No. 16 of 1912, S.6, No. 16 of 1912, S.2 and 22 of 1918).

It will be observed that although section 11 purported to exclude concessions acquired prior to the specified date from the operation of the Ordinance, it virtually brought them under its scope by providing, though indirectly, that they could only be certified as valid where the conditions specified above were satisfied. The rationale for this provision was consistent with the objectives of the Ordinance which sought to enable the courts to conduct retrospective investigation into many land transactions believed to have been tainted with fraud and various forms of illegality.

Apart from these requirements, the Ordinance also prescribed other conditions, the non-compliance with which could render concessions invalid. Sections 19 and 20 for instance, placed limitations on the size of concessions which could be acquired by a person or corporation. These provisions were aimed at concession "hunters" and speculators who acquired large areas of mineral and timber land with no intention of working them but to hold them until they appreciated in value so that they could sell them in the open market to the highest bidder at fantastic profits. In spite of these detailed provisions setting out conditions under which concession could be validly acquired so as to ensure fairness and the prevention of fraud in land transactions, concessionaires were able to acquire interests in land in clear violation of these provisions.

This was possible, not only because certain loopholes in the Ordinance were exploited to their own advantage, but mainly because of the attitude of the courts in the application and interpretation of certain provisions of the Ordinance. The preliminary part of the Ordinance which dealt with definitions, described a "concession" as:

> "Any writing whereby any right, interest, in or over land with respect to minerals, precious stones, timber, rubber or other products of the soil, or the option of acquiring any such right, interest or property purports to be either directly or indirectly granted or agreed to be granted by a native, but shall not include an assignment of a concession as above described." [362]

It was the interpretation placed on this definition that gave rise to problems. When during the course of determining the validity of concessions, the issue arose as to what amounted to a concession within the meaning of the provision referred to above, the courts in certain cases drew an artificial distinction between two types of concessions. Any writing whereby a concession right was acquired in respect of minerals

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362 S.2 No. 14 of 1900. The interpretation placed on it gave such problems that it was amended soon after it came into force by Ordinance No. 20 of 1901, S.6, again by S.6 of No. 16 of 1912 and again by S.2 of No. 22 of 1918.

and other products of the soil fell within one category and the option of acquiring such rights fell into the other. This distinction often became crucial in determining whether or not a concession agreement fell foul of Sections 19 and 20 of the Ordinance prescribing the minimum size of concessions which a person could acquire at a time.

Section 20(1) of the Ordinance provided that no concession should be valid which purported to confer any rights over an area exceeding:

a. "in the case of land in respect of which mining rights are conferred by such concessions five square miles;

b. in the case of land in respect of which rights to cut timber or to collect rubber, or relating to other products of the soild are conferred twenty square miles."

The section also provided that no person should hold at one time concessions the aggregate area of which should exceed in the case of mining rights, twenty square miles, or in the case of rights relating to timber, rubber or other products of the soil, forty square miles.[363]

From the following provisions it becomes evident that one of the conditions which must be satisfied before a certificate of validity might be issued in respect of a concession was the limitation of the size of the concession to the areas prescribed by the provisions. However, the court had in certain cases taken the view that the provisions did not place any limit on the amount of concessions which might be acquired in the case of concessions falling under the second class described above, i.e. concessions being a writing whereby an option of acquiring[264] any right, interest or property in minerals purported to be granted by a native.

To take an example, in Concession Enquiry Number 767 at Accra, a concession in which exclusive rights to take up mining and timber leases within an area of approximately 120 square miles for one year with an option to renew on the same terms were certified as valid by a concessions court, although this would appear to be a concession the area of which exceeded by far the limits imposed by section 20 of the Ordinance.[365] The Court's view was that this agreement being an "option" fell outside the definition of a concession so as to become subject to the restrictions imposed by the area clauses of the Ordinance. In another Concession Enquiry, a certificate of validity was issued in respect of a concession

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363 S. 20(2).

364 Emphasis supplied.

365 See Certificate of validity No. 214 in respect of "Wallace's Western Axim Option", in Gold Coast Gazette No. 71, 3 October, 1909. For the facts see MLB Syndicate Ltd. to Crown Agents for the Colonies, 25 November, 1909, C.O. 879/109, No. 977, African West.

acquired by William Ambrose Pritchard in September 1909.[366] The terms of the transaction were the same as those described above except the area of the present concession which was 80 square miles. Here again, the size of the grant exceeded the limits imposed by the Statute. In the present case, the NLB Syndicate Limited discovered after the notice of the Certificate was published in the Gazette that many of their concessions in respect of which a certificate of validity had been granted earlier were absorbed by the possessions of the Western Akim Option.

When the Syndicate discovered the anomaly, it drew the attention of the Colonial Office to it complaining that the concession in question violated the area clauses. The Colonial Office admitted that the matter was prima facie a violation of the provisions and therefore a matter for the courts to adjudicate upon.[367] The Colonial Office advised the Syndicate to consider itself as aggrieved by the Court's Order and should take, without delay, such proceedings as the law of the Colony sanctioned under such circumstances. One of the things the company might do was to apply for leave to appeal to the Supreme Court under rule 11, Order 52 of the Supreme Court Ordinance.

When Purcel, J., the judge who made these decisions, was required to justify the basis of his action, he defended his stand by reliance on the artificial distinction drawn between the two types of concessions. The learned judge argued that there was no provision in the Ordinance placing restriction on the size of options which only granted the right of acquiring mining rights. He referred to a precedent where a certificate of validity was issued by Pennington, J., in 1903. He noted that in that concession, the grantee secured an option to acquire mining rights over an area of 15 square miles. Yet the validity of that decision had bever been questioned.

It should be pointed out that the fact that the decision referred to by the learned judge had never been questioned could not dispose of the issue as to whether options to acquire mining or other rights fell within the definition of a concession so as to bring such agreements under the ambit of the provisions restricting the size of concessions

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366 See Concession Enquiry No. 772 in respect of which a "Certificate of validity was issued in the name of "Pritchard Western Akim Option", 7 Spetember,1909, Cert. No. 215, Gold Coast Gazette, No. 71, 3 October, 1909.

367 Colonial Office to Governor, 11 December, 1909, C.O. 879/109, No. 988, African West.

to specified limits. It would amount to begging the question simply to refer to a similar decision by another judge in the past as constituting a precedent. Purcel, J.'s decision can be seen to be indefensible if we read the whole of Section 20 together. Sub-section (3) of Section 20 provided that where a concession or concessions purported to confer rights or an option of acquiring[368] the same in respect of any area or areas exceeding the limits imposed by the Ordinance, the court might issue a certificate of validity in respect of a portion of such area or areas as might be selected by the grantee and declared void the excess by which it exceeded the prescribed limit.

Certainly, if the Ordinance purported to exclude options from the operative effect of these relevant provisions, then it would be superfluous to include an option of acquiring mineral rights "in respect of such area or areas" in the sub-section. Surely, the fact that the Ordinance conferred power on the courts to declare valid an option to acquire mineral rights which might be within the required limits and to declare void the residue by which it might exceed the limit implies that options were not excluded from the purview of the relevant provisions. Both the Attorney General and the Governor, John Roger came to a similar conclusion. The latter, for instance, expressed the opinion that the interpretation placed on the "area clauses" would have the effect of stultifying the whole object of the Statute.[369] Referring to Wallace's Western Akim Option case discussed above, he regretted that the case was not appealed against, the parties concerned "finding it more profitable to divide the spoil between them."[370]

In view of the problems raised by cases of this nature, and the way in which the Concessions Courts were issuing certificates of validity in respect of concessions in clear violation of the provisions and the purport of the Ordinance, the Secretary of State had to issue a press statement reminding the business community of the conditions under which grants of land or other rights relating thereto by natives in West African colonies, could be recognised as valid. It stated that such grants were not valid and would not be recognised by the Imperial Government unless

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368 Emphasis supplied.

369 John Roger to Secretary of State, 29 August, 1910, C.O. 879/109, No. 977, African West.

370 Ibid.

certified by the Colonial Government in pursuance of the laws of the dependency concerned.[371]

Despite measures such as this, one often found in the Gazette notices of certificates of validity in respect of concessions in clear violation of Section 20 of the Ordinance. For example, in 1906, Ofin River Gold Estates Limited acquired four blocks of five square miles each, the aggregate of which amounted to twenty square miles. A certificate of validity was issued in respect of them; just what Section 20 (2) of the Ordinance declared should not happen.[372] In a similar way, the Equatorial Rubber and Mahogany Company claimed to have acquired a concession of over 50 square miles in 1910 and Panni Lands and Rubber Estates Limited made a similar claim in respect of a lease of 64,000 acres for 99 years. The mining lease of 20 square miles acquired by the Boinsu Rubber Company Limited and the acquisition in the Axim District by the Aywara Rubber and Cotton Estates Limited, a lease aggregating 30 square miles in area, all provide good examples of the way in which certificates of validity were issued in respect of concessions in clear violtation of the provisions of the Ordinance.[373]

The evidence so far suggests that the machinery devised to tackle the land administration problems after the withdrawal of the Public Lands Bill suffered from many defects. In the first place, it is evident that the Ordinance was ineffective against speculation, in that the relevant provisions could not prevent the acquisition of concessions in excess of the prescribed areas. Also the overlapping grants of the kind which occurred in the Wallace's Akim Option case, showed that the inherent problems of insecurity of title persisted under the system. The scheme administered by the courts suffered from the defect that the Ordinance did not provide as one of the conditions for the issue of certificates of validity that the land to which the interest related should be accurately surveyed. Section 16 (9) provided that every certificate of validity should state the boundaries, the extent and situation of the land in respect of which the certificate was given and Section 16 (b) provided that the nature of the concession should be specified briefly. But these provisions did not impose any obligation on the grantee or grantor of the right

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371 11 May, 1910, C.O. 879/109, No. 977

372 See Morel to Colonial Office, 21 June, 1910, C.O. 879/109, No. 977.

373 Ibid.

to make an accurate survey of the land in respect of which a grant was made.

In a land tenure system like the Gold Coast, where boundaries between various land-holding corporate groups of communities and families were recognised, problems of title insecurity were bound to be prevalent if the definition, demarcation and accurate survey of boundaries and areas of land subject to agreements were not made an essential part of land transactions. These problems were made more difficult by the courts' attitude in not paying sufficient attention to provisions of the Ordinance dealing with description of particulars of concessions subject to enquiries before the courts. In deciding on the validity of a concession, the Ordinance required that not only should the name, situation and boundaries of the land to which the concession rights related be given, but the area of the land, whether for mining or an option for acquiring such rights and rents therefore, should be distinctly stated.[374]

But taking ten concesssions in respect of which certificates of validity were issued and published in the April of 1910 for example, it can be observed that out of the lot, not a word was said about six of them as to their extent.[375] This meant that either the claimant ignored Section 9 of the Ordinance by not giving the prescribed particulars of the grant or the officials concerned in the publication of the notice ignored the provisions. Whichever was the truth, failure to indicate the area and extent of the land in respect of which a concession right was conceded meant that grantees of such rights could conceal any acquisition of rights in excess of what the law permitted. It also meant that prospective acquirers of interest in lands could not be put on the enquiry with regard to such lands already subject to transactions. The result would be overlapping grants and greater insecurity of title with its consequential costly litigation.

When the anomalies in the administration of the Scheme devised to replace Sir William Maxwell's programme of land reform began to cause concern in official circles, the Governor, John Roger, conceded the fact that having regard to what had happened since the withdrawal of the Public Lands Bill, it was regrettable that it was not made to succeed. He, however, thought it was too late then to resurrect the Bill.[376] But in respect of such land as had not as yet been alienated, four policy objectives ought to be pursued. These were:

i. restriction of areas to be acquired;
ii. preservation of native rights;
iii. continuous and effective working of what was acquired and
iv. reasonable payments to be expended for the benefit of the tribe concerned.[377]

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374 See Sections 9 and 10 and Schedule A thereof.

375 The Gold Coast Gazette, 2 April, 1910, C.O. 879/109, No. 977. See Notices No. 1025, 1027, 1032, 1035 and 1036.

376 John Roger to the Secretary of State, 29 August, 1910, C.O. 879/109, No. 977, African West.

377 Ibid.

It will be observed that apart from the last policy objective, the rest were simply a re-statement of what had already been provided for in the Ordinance. Further examination of the operation of the Ordinance would reveal that the administration of the scheme by the courts had not been effective in achieving any of the stated objectives. The Ordinance itself was so defective in many respects that within 18 years of its operation, apart from several regulations to supplement its provisions, it was amended for more than 14 times. However, it should be pointed out that the judges should bear the greater responsibility for its failures. For, it was their failure to exercise the wide discretionary powers conferred on them within the context of the clearly stated objectives of the Ordinance that accounted for many of the problems. This point would become clear as we proceed to consider the protection of native rights and adequacy of consideration under the administration of the scheme.

E. Protection of Native Rights

One of the declared objectives of the Concession Ordinance was the protection and preservation of native customary rights in land. Section 11 (6) of the Ordinance accordingly provided that no concession was to be valid unless the court was satisfied that the customary rights of natives were reasonably protected in respect of shifting cultivation, collection of firewood, hunting and game. However, ten years after the Ordinance had come into force, it became obvious that this objective had not been achieved. In 1910, the Governor, John Roger, was forced to admit that the provisions of the Ordinance were not affording to the native the sort of protection contemplated under it. Commenting on the effect of Section 11 (6), he said:

> "I fear that concession holders pay little attention to any customary rights that interfere with their mining, planting and woodcutting privileges. To render this reservation effective, the courts must standardise their requirements and the District Commissioners should subsequently enforce them." [378]

These views were shared by a correspondent of the African Mail who observed that the framers of the Ordinance were well aware of the fact that many leases were granted for the period of 99 years with an option to renew for the same period. Such concessions conferred on the lessees rights to use the interest acquired as if they were freeholders. In the result, people were restricted from exercising their communal rights

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[378] Ibid.

of farming, hunting, snaring game and the collection of firewood was forbidden in many cases.[379] Commenting on the failure of the judges to apply the provisions of the Ordinance with its objectives in mind, the correspondent observed:

> "In spite of the objects of the Ordinance, and the plain meaning of its provisions, some of the judges appear to be spellbound by the fetishism of the sealing-wax affixed on a paper writing and make a distinction between a lease under seal and a plain agreement, where the law makes none."[380]

This attitude of the court, the correspondent pointed out, was inconsistent with policy objectives of the Ordinance. It will be difficult to disagree with the views expressed here because the success of the scheme depended on the understanding and awareness on the part of the judges, the policy considerations actuating the introduction of the measure. What is more, on many occasions, concession agreements were ingeniously drawn with the deliberate intention of evading the provisions of the Ordinance.

A classic example of an agreement of the kind was one described as not only "inequitable but iniquitous".[381] In this agreement, the vendor agreed to sell and the purchaser agreed to buy all mahogany of marketable quality found on the vendor's land. The purchase price for every felled mahogany trunk accepted by the purchaser shall be one pound sterling. The agreement provided further that for every felled mahogany trunk accepted by the purchaser, the vendor agreed to give the purchaser 10 mahogany trunks of marketable quality free of charge. This was, in effect, an indirect way of fixing the price of each trunk at less than one shilling. The vendor agreed not to sell any felled mahogany trunks or standing mahogany trees nor grant any timber concession over the land for a period of two years from the date speciftied in the agreement except to the purchaser. One provision carefully provided that in the agreement, the expression "felled mahogany trunk" shall not be construed to include standing mahogany trees.[382]

Apparently, the parties to this agreement drafted the contract in such a manner as would exclude it from the class of agreements which fell within the meaning of "concession" as defined under Section 2 of the ConcessionsOrdinance. This would remove the agreement from the scope

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379 See Morel to Colonial Office, op.cit.

380 Ibid.

381 By the Attorney General, M. A. W. Osborne. See the agreement enclosed in No. 19 of 2 October,1907, C.O. 879/109, No. 977.

382 Ibid.

and purview of the concessions courts. The framers of the contract obviously conceived of the definition of land in terms of English law where land is regarded as including things attached to the land but excluding things detached from it. As the mahogany trunk was detached from the land before its sale, it ceased to be part of the land and therefore an ordinary chattel, an agreement in respect of which would fall outside the definition of a concession defined as

> "anything whereby any right, interest or property in or over land, or in or to minerals, precious stones, timber, rubber or other products of the soil, in or growing on any land, or the option of acquiring any such right, interest or property purports to be either directly or indirectly granted or demised or agreed to be granted or demised by a native . . ." [383]

The subject matter of the transaction being "felled mahogany trunk", it did not only become detached from the land but was no longer a "product of the soil in or growing on any land." Similarly it could not be described as a right to land in the strict sense of that term. Both the Colonial Secretary and the Attorney General agreed that the agreement by its ordinary meaning was not a concession, but to the layman the fact that timber, felled or unfelled, was a product of the soil, would seem to bring the agreement within the wide definition of Section 2 of the Ordinance as granting an interest in land, although indirectly. [384]

However, it is arguable that considering the transaction as a whole, it could be held to fall within the general framework of the definition which it sought to avoid. Having regard to the objects of the ordinance, it should not be difficult to argue that in any land transaction by which mineral or timber rights were acquired, the right to take and enjoy the product of the soil was always contemplated. But such rights could only be enjoyed if the right to take or detach the product of the soil was accorded. It will be seen that the only distinction between the agreement under discussion and those falling within the definition of "concession" was that in the case of the former, the subject matter of the transaction was assumed to have been detached from the land at the time of the contract while in the case of the latter, the subject matter of the transaction would have been in, under or attached to the land. But in both cases the grantees would enjoy timber or mineral rights. The distinction can

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383 S.2

384 Minutes by Colonial Secretary, 6 October, 1907, C.O. 879/109.

therefore be seen as one only as to form and not of substance.

On the basis of this reasoning, a concession court, alive to its duties and aware of the underlying policy basis of the Ordinance, should have had no difficulty in bringing agreements like this one under the scope of the Ordinance, particularly when, as in this case, it became apparent that the agreement was calculated to evade the provisions of the Ordinance. The court could achieve such results by the exercise of additional powers conferred on it in its discretion to make such modifications in the terms of any concession and to impose such conditions with regard to the issue of any certificate of validity as to the court may seem just.[385] In the Cankinbamu Concession Enquiry referred to by the West African correspondent of The African Mail for instance,[386] Nicol J., decided at Axim that no freehold right could be acquired, for to hold otherwise would have left the door open for "company promoters and financial speculators from abroad to despoil the inhabitants of their inheritance". He accordingly reduced the freehold title which the grantee purported to have acquired to a lease for a term of 99 years.

However, not many of the Judges in the concessions courts were willing to exercise the discretionary powers conferred on them so readily. The general view of the Courts was outlined by the Chief Justice, Brandford Griffith, when defending the accusations levelled at the manner of the courts' administration of the scheme under the Ordinance. Griffith admitted that some of the certificates of validity issued in respect of certain concessions evidently omitted to state their situation and areas, but argued that little harm could have resulted from that. He believed that the object of the notices in this regard was to inform the public so that interested persons could enter caveats.[387]

We can agree with the Chief Justice that the purpose of such notices was to inform the public so that those persons who might find their rights threatened by grants should enter caveats, but we disagree with him in believing that failure to state the situation and areas of land affected by concessions would cause little harm. How could this objective be achieved if the area and location of a grant was not specified in a notice? For example, if I issue notice to the whole world that I have acquired timber or mineral rights in Warsaw or Appolonia without indicating the

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385 Ordinance No. 20 of 1901, S.8 which became Section 12(a) of the Principal Ordinance.

386 Morel to Colonial Office, op.cit.

387 See Griffith's reply to the African Mail correspondent, VERITAS, C.O. 879/109, No. 977, p. 36.

exact location and size, how can anyone know if his rights are affected? With due deference to the Chief Justice, his arguments would seem unconvincing.

In what would appear to be the policy considerations guiding the courts in the administration of the scheme, Griffith said:

> "Gold mining is largely a lottery, and people will not put down their money unless they are assured that the prize will be substantial. The Gold Mining industry has not yet reached such a height of certainty and prosperity that we can afford to check would-be mining companies, a reduction from 99 to 70 or 75 years, as is suggested, would take off some of the gilt." 388

It was because of reasons such as these that he fully supported the artificial distinction drawn between agreements whereby mining rights were acquired and those in which an option to acquire those rights was obtained. In his defence of Purcel, J.'s issue of certificates of validity in respect of concessions the areas of which far exceeded those prescribed by the Ordinance, he declared that agreements of the last category were not concessions at all. In other words, options to acquire timber and mineral rights did not come under the scope of the Ordinance at all. The exclusion by the Courts, of this class of land grants, from the scope of the Ordinance meant that the Courts had left the door open for concession hunters and speculators to acquire large areas of land far in excess of what the law permitted.

If it is realised the fact that an option to acquire mining or timber rights virtually accorded the grantee the right to do on the land, under the guise of prospecting, what a concessionaire was permitted to do with his concession rights, then the seriousness of Griffith's conclusions can be realised. This attitude of the courts in not taking into account the policy goals of the Ordinance during the course of the interpretation and application of its provisions, tended to defeat the object of the whole scheme. In the result, the Act was unsuccessful in imposing the limitations which the framers of the Act sought to place on the size of concessions so as to curb speculation and its consequential evils. The general outcry against the anomalies which occurred in the administration of the scheme by the courts, both from official circles and the public at large would suggest that the scheme was, to a large extent, unsatisfactory. The frequent amendments of its provision designed to fill the gaps, some of which were created by the interpretations placed

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388 Ibid.

on them by the courts, underline the fact that the administration of the scheme suffered from many defects.

D. Inadequate Consideration and the Protection of Native Rights

Among the stated objectives of the scheme were the protection of the natives' rights in the exercise of their inherent customary land rights such as shifting cultivation, collection of firewood and snaring game. It was also declared that the purpose of the Ordinance was to protect the natives against fraudulent and unfair transactions in which land rights were acquired without adequate consideration therefor. In order to achieve this objective the Ordinance conferred power on the courts to declare concessions invalid even where the chief or the person granting them raised no objection to the terms. The judge was to exercise this power where the terms and conditions were plainly fraudulent. Similarly, where the grant was made improvidently, having regard to the bargaining positions of the parties, locality and future requirements of the natives, the court might exercise its powers to declare the transaction invalid notwithstanding the contract between the parties.[389]

However, the courts were not favourably disposed towards the exercise of these discretionary powers with the results that some agreements which might be regarded as being in breach of some of the conditions prescribed by the Ordinance were certified as valid. In certain cases the exercise of traditional customary rights were qualified on the grounds that they could only be exercised if the rights conferred on the grantee were not to be prejudiced.[390] As the West African correspondent claimed:

> "Instead of protecting the customary rights in a fair and reasonable manner against the exercise of timber or rubber rights, the judges inexplicably support the lessee, who has things all his own way as soon as he says or thinks the exercise of these reserved rights by natives is prejudicial to him".[391]

Some of these accusations had not been denied by the Chief Justice in his defence of the courts. In fact, official reports and his own comments confirmed these criticisms of the concession courts. There was his own admission that certificates of validity were issued in clear violation of the provisions of the Ordinance but defended such action on the grounds that mining was a gamble and the price should be high

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389 See sections 11 and 13.

390 Morel to the Colonial Office, op.cit.

391 Ibid.

in order to attract capitalists to invest in the industry. On questions relating to the exercise of discretionary powers by the courts to protect the native community against improvident alienation by chiefs and Elders of the community and family lands, the Chief Justice said:

> "I doubt whether it will be within the power of a judge to withhold a certificate of validity from a concessionaire because the native grantor would not consent to a portion of his rent being withheld for educational or road making, or sanitary, or economic, agricultural or other purposes. It is not the province of the judges to decide upon what policy each native chief should pursue in spending his rent." [392]

It will be observed that what the Chief Justice overlooked here was the fact that the Concessions Courts were special courts created to deal with land problems involving questions relating to political and socio-economic issues the policy objectives of which were clearly stated. The powers conferred on the Attorney General to intervene on behalf of the government in certain cases where it appeared to him that a certificate of validity was granted in "contravention of the true intent" of certain sections of the Ordinance,[393] underscores the fact that in applying the letter of the law, the economic and social policy objectives underlying its provisions should not be ignored.

It is submitted that the Chief Justice was mistaken in treating the Concessions Court on the same footing as a regular court which often operates on the doctrine that the judges declare and apply the laws and do not make them.[394] Another factor which Griffith, C.J., seemed to have overlooked was that which Mr Eliot rightly stated in his notes on the "Alienation of Stool and Tribal Lands".[395] Mr Eliot rightly observed that in order to determine whether or not the Concessions Ordinance protected native subjects, it should be borne in mind that the chiefs were custodians of the lands and not their owners. He drew attention to the fact that there was a distinction between the family land of the chief and the communal lands under his control.

Although a chief might be destooled, he would still retain his right

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392 Griffith's reply to VERITAS, op.cit.

393 See Sections 14 and 23 in particular.

394 For a fuller discussion of this point, see pp. 196-197 below.

395 Mr Eliot to Colonial Office, 7 July, 1910, C.O. 879/109, No. 977.

in his own family land. For this reason, he was far more ready to dispose of the communal lands than his own family lands which he reserved for a rainy day. The only check on the chiefs' activities in respect of land alienation was the admonition of their Councillors who generally preferred to retain their positions

> "rather than raise their voices against the mulcting of the rights of the community by serious inroads into the rapidly decreasing supply of common land." 396

The evidence supplied by Mr Eliot's notes showed that subjects of the community were often unaware of the concessions conceded by their Chiefs. In those cases where the subjects' interests were to be affected, they were accommodated on other stool land not yet leased or sold and in some cases, the affected subjects were allowed to remain temporarily on the land so as to comply with those sections of the Ordinance reserving to them the exercise of customary native rights.

The recognition of these factors in the land tenure and administration system in the country was one of the key considerations which influenced Sir William Maxwell to introduce his Public Lands Bill framed on account of the communal principles of the traditional system. Although that system was rejected, the Concessions Ordinance replacing it retained some of its laudable principles seeking to protect the ordinary subjects against the dissipation of community resources through improvident alienations of stool lands by their generally illiterate and ignorant Chiefs for paltry sums. These were some of the factors which the courts ought to have borne in mind in the course of determining the validity of concessions. It was for the protection of the ordinary subjects of the community that wide powers were conferred on the courts to re-open transactions relating to concession grants in spite of the fact that under the ordinary principles of contract law, a binding contract could have been held to exist between the parties.

Under the Ordinance, therefore, the courts need not have adopted the view that the parties should keep their eyes open during the course of negotiations. If the judges were to have adopted such a legalistic approach to the administration of the scheme laid down in the Concessions Ordinance in the manner demonstrated by the Chief Justice, this would have been to shut their eyes to the peculiar problems with which the courts were created to deal.

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396 Loc cit.

The general illiteracy of the population, the ignorance of the chiefs, and the peculiar systems of land tenure in the country called for the creation of these special courts to deal with peculiar problems. To treat land transactions on the same footing as ordinary contracts in which the outward manifestation of the parties' intent rather than their actual intent form the basis of a contract, and to view the work of the Concessions Courts in terms of regular courts applying rules and regulations in their adjudicative processes would be to overlook the clearly stated policy objectives of the Ordinance. If that was the original intention of the legislature, the creation of these special courts would have been unnecessary. It would have been a simple job of expanding the already existing regular courts.

As the courts seemed to have been oblivious to the aims of the Ordinance, they treated many of the concession grants as ordinary contracts. It was largely as a result of this attitude of the courts that certificates of validity were granted in respect of concessions which might be regarded within the context of the general policy of the Ordinance as invalid for want of adequate consideration. The idea of acquiring a lease of 3,300 acres at £12 a year for 99 years and, say, 10,000 acres at £5 a year for 99 years would evidently sound unjust.[397] Further examination of other concessions declared valid by the courts would disclose numerous transactions of similar nature. The acquisition of over 50 square miles of concession by Equitorial Rubber and Mahogany Concession Limited for an annual rent of £52, the acquisition from Axim chiefs a lease of 64,000 acres by the Rubber Estates Limited for 99 years at an annual rent of £21, the 20 square miles of concession conceded by Bonsu chiefs to Boinsu Rubber Company Limited for an annual rent of £5 and those acquired in the Axim district by Aywara Rubber and Cotton Estates Limited aggregating 30 square miles for 65 years at an annual rent of £102 were all not only in clear violation of the area clauses but they provide evidence of what could be regarded as want of adequate consideration.[398]

Although the terms of transactions like these would appear ridiculous to the layman, one must recall that under the ordinary principles of contract law, consideration need not be adequate. Provided the parties with their eyes open are agreed on the terms, a contract might be held

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397 Ibid.

398 See Mr Ramsay MacDonald's question put to the Secretary of State, House of Commons, 4 July, 1910. Included in C.O. 879/109, p. 49.

to exist if it is not tainted by any vitiating factors such as fraud, deceit, undue influence, mistake, fraudulent or innocent misrepresentation or illegality. Apparently, the courts tended to treat agreements relating to concession grants on the same footing as ordinary contracts. Yet this was certainly not the intention of the framers of the Ordinance. It was in order to treat such transactions differently from ordinary contracts that a special machinery in the shape of Concessions Courts was created with wide discretionary powers vested in the judges to deal with the special problems relating to them.

However, ten years after the introduction of the Ordinance by Sir Frederick Hodgson, it became obvious that the judges were not administering the Scheme established under it satisfactorily, mainly because of their legalistic approach to its administration. Indeed, in 1910 a Colonial Office memorandum admitted that, although the provisions of the Ordinance were fair and reasonable, their administration by the courts was not wholly satisfactory. It was noted that "one at least of the judges has been lax in giving effect to its provisions".[399] It was clearly admitted that at the time the Ordinance was being drawn up, the main problem was that of mining concessions. But later, after 1905 people acquired land on a large scale for growing rubber and cocoa, and increased the difficulty of protecting native rights to snaring game and to practise shifting cultivation. The Memorandum stated that it was extremely undesirable that a large proportion of the land in the country should fall into private hands, for this would destroy the tribal system and was likely to reduce ordinary subjects to the position of day labourers.[400]

The evidence later supplied by actual experience of the application of the Ordinance suggests that where the interests of the community had been in conflict with those of the concessionaire, the courts have been more favourably disposed to resolve the conflict in favour of the latter because of their purely legalistic approach to the administration of the scheme. At the end of the day, the powerful business men, large corporations and the native middle class had their way.

Having regard to the continued existence of the problems which the Scheme was designed to solve, long after its inauguration, it would be fair to conclude that the Concesions Ordinance could not prove to be a better alternative to the 1897 abortive Public Lands Bill of Sir William

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399 Colonial Office Memorandum, C.O. 879/109, p. 49

400 Ibid.

Maxwell. It is arguable that the administration of the Scheme by the courts even exacerbated the problems. In the Colonial office memorandum referred to above for example, it was admitted that the problem of identifying those persons with the legal capacity to dispose of property in the traditional system was one of the difficulties faced by the Concessions Courts. In the absence of a Domesday Survey of the country, it would be impossible for the judges to go behind the evidence adduced before them by chiefs who were anxious to dispose of their supposed rights.[401]

The fundamental problems of the land tenure system, which were the twin problems of uncertainty of title and costly litigation, themselves incidents of uncertainty of boundaries and the inability to identify persons with legal capacity to deal with property, had persisted under the Scheme. The fact that these problems became so serious that Sir Conway Belfield was required to investigate them in 1912, and that a West African Lands Committee was set up in 1913 to enquire into them, underlines the magnitude of the problems which had persisted long after the Scheme was introduced.

G. Policy towards Ashanti

i. Questions relating to Sovereign Rights

When a combined force of British and the allied forces of certain native chiefs in the southern part of the Gold Coast Colony defeated the Ashanti in 1874,[402] Britain did not proceed to assert sovereign rights over that State as a conquered territory. This was in line with her policy of avoiding the costs involved in claims of such rights over territories in which Her Majesty's subjects were engaged in trading activities. However, when Sir William Brandford Griffith was introducing his Crown Lands Bill in 1894, he realised that land problems in the Protected Territories and Ashanti were similar to those of the Colony in the south. Therefore he did not see any good reason for keeping up the distinction between the Colony and the Protectorate in the Gold Coast.

Making his case for ending such a distinction he informed the Secretary

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401 Ibid.

402 This was the "Sagrenti" war led by Sir Garnet Wolsey.

of State, Chamberlain that it appeared to him that the Colony and Ashanti were virtually the same. Having regard to the distinction which rested in the native mind upon the subject, unless there were strong reasons of state why it should not be done, he would suggest that the term protectorate should be discontinued. A short Ordinance should be passed if necessary unless the matter could be dealt with by an Order in Council to authorise the change so that the whole territory of the Gold Coast may be known subsequently as that of the Gold Coast Colony.[403]

This suggested move was intended to pave the way for policies directed towards the harmonisation of the tenure systems of the country. Five years earlier, Lord Knutsford was prepared to admit that there were many reasons in favour of making the whole of the Gold Coast Colony and Protectorates British territory, and therefore Crown Lands.[404] It was his belief that many advantages would be gained from such a measure as it would get rid of many troublesome questions of jurisdiction, pointing out that the country was being ruled practically as if it were British territory though nominally it was not.[405]

Despite these declarations of intent, no immediate steps were taken to declare Ashanti to be annexed as British Territory. Apart form seeing to it that Ashanti honoured her treaty obligations arising from the 1874 war, sovereign rights were not proclaimed over the province as arising out of conquest. Such rights were waived. Thus, at the time of the Crown Lands Bills of 1894 and 1897, sovereign rights of the Crown over the Colony were being denied by the natives. There were even stronger arguments for saying that Ashanti was independent of Britain. Such arguments could be buttressed with the open admission by Lord Knutsford that Ashanti was not a British territory.

In 1896 when the Asantehene Prempeh I was captured, an opportunity occurred for the Imperial Government to assert its sovereign right over that territory but it did not do so until after the Yaa-Asantewa War of 1900. When Kumasi was occupied by British troops in 1896 and the Asantehene was captured, taken to the coast and virtually deposed, the quasi-federation of which he was a paramount chief was broken up. Separate

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403 Griffith to Chamberlain, 11 August, 1895, C.O. 879/46, No. 513, African West.

404 Knutsford to Griffith, 4 December, 1889, C.O. 879/46, No. 513, African West.

405 Ibid.

treaties were made with individual chiefs within the federation, who were treated by the colonial administration as being entirely independent of Ashanti.

Any future permanent arrangement for the administration of Kumasi and the adjacent territories which had hitherto been under the direct domination of the Asantehene was left undetermined. A committee of administrators consisting of three chiefs was appointed to exercise, within the dominion of the King, the powers which were traditionally vested in a King and his Council, subject to the control of a British Resident at Kumasi. The British Resident, the only token of British authority in the area, was stationed there with the main purpose of dealing with matters relating to the performance of Ashanti's treaty obligations, and not necessarily to administer the territory as a conquered state in a representative capacity of Her Majesty.[406]

Here again, it can be seen that the declaration of sovereign rights over that territory as a conquered state was avoided. It was decided not to annex even the Asantehene's dominions, much less the rest of Ashanti, whose chiefs accepted British protection and entered into "Treaties of Friendship and Trade" with the Queen. For these reasons, during the period when Griffith and Maxwell were introducing their Land Bills of such far-reaching consequences, they were not, in principle, to apply in Ashanti. At least, there was no legal basis for claiming that such laws would have applied there.

Noticeable in this regard was the absence of any petition from any Ashanti King or Chief against the Land Bills. One obvious reason why no such petition of protest ensued from Ashanti was not so much because those Bills were arguably inapplicable there, but more so because, until 1895, no mining on modern lines had begun in that region. Moreover, by that time, unlike the Colony, no educated class of native lawyers, merchants and elite around which an organised opposition could centre had as yet appeared there. Hence, although they might have heard rumours of what was happening in the South, there was no rallying point of protest in the matter.

At the close of the last decade of the nineteenth century, however, the acquisition of land in Ashanti for mining and timber works had increased considerably with its incidental problems. Thus when the Concessions Ordinance was being introduced, the colonial administration had in contem-

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406 Chamberlain to F. M. Hodgson, C.O. 879/57

plation its application in Ashanti as well as the Colony. The problem for the colonial government was that there seemed no legal basis for declaring the Ordinance operative in Ashanti. Chamberlain's answer to this problem was that there was no good reason for treating Ashanti chiefs in the matter of concessions differently from the rest of the chiefs in the protectorate in the South. In the same way as the chiefs in the Colony had not been conquered, the Secretary of State declared, so were the Ashanti Chiefs not conquered:

> "The British Government waived any right of conquest over them which could be implied therefrom by entering into treatise with them." [407]

In support of his argument, Chamberlain referred to the concession acquired by the Ashanti Goldfields Corporation in 1895 from certain Ashanti Chiefs. This was a sure indication that the Chiefs still had the power to alienate such lands and the right to do so had not passed to the Colonial government. He was therefore in favour of accepting certain arrangements which the British Resident at Kumasi proposed to adopt for land transactions in that province. These arrangements were to be based on the willingness of the chiefs to grant concessions. Under this arrangement, the desire of the chiefs to grant a concession would be ascertained by prospective grantees of such rights. The consent of the Chief to make the grant would be recorded in a document to be signed before the Resident at Kumasi. When this was done, the grant might be approved by the Governor.

The Secretary of State saw no significant difference between this procedure and what obtained in the Colony and other protectorates. He therefore saw no reason why Ashanti should be excluded from the application of the Concessions Ordinance. Chamberlain could therefore be seen to be advocating a policy which would treat Ashanti Chiefs on the same footing as those of the Colony in the matter of legal capacity to grant concessions. This he did, although it could be argued that it was as a result of "conquest" that the chiefs submitted to British "protection" and entered into the treaties of friendship and trade.

The Governor, F. M. Hodgson, disagreed with these views. He believed it was a questionable policy to raise the status of tribal kings and to a certain extent weaken the power, which according to native custom, the paramount authority possessed over them. He regarded the separate agreements which the colonial government made with individual Ashanti

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407 Ibid.

Chiefs after the immediate occupation of Ashanti as an administrative blunder.[408] Hodgson argued that the administration of the Asantehene's Kingdom by a committee of chiefs appointed by the colonial government under the imemdiate supervision of a British Resident at Kumasi was clear evidence of their submission to British authority. It was therefore not good policy to treat those native states with which treaties had been signed on the same footing as those in the Colony. To do so would make them think that they held a more favourable position by virtue of those treaties and they would be acting under the assumption that it was only the people of Kumasi that the government wished to bring under subjection. It was administratively inexpedient to create such an impression in their minds so as to engender any idea of independence or semi-independence.[409]

Hodgson believed that the best policy to adopt was to maintain the position that the Government

> "has taken the place of the native paramount authority; that the Resident as representing the Government stands in the place of that authority; and that agreements notwithstanding, the tribal Kings and Chiefs are under the same obligations of service to the Government as they were to the King paramount before the change took place."[410]

The Governor agreed with the Secretary of State that it was within the power of chiefs and their councils to grant concessions; but at the same time he considered it necessary, in order to preserve the "feeling of subservience to the paramount authority", that the government should have its hand upon every stage of the proceedings in the matter of granting land concessions. It was his view that the entire freedom of control which was enjoyed by native "Kings" and "Chiefs" within the colony, a freedom which would soon be curtailed by the Concessions Ordinance, should not be accorded to the "Kings" and "Chiefs" of Ashanti.[411] Thus while Hodgson agreed with Chamberlain that Ashanti should be brought within the scope of the Concessions Ordinance, he regarded it as important that the power of the Chiefs in respect of Concession grants should be curbed.[412]

It will be observed that the sort of land policies advocated for Ashanti by Hodgson were not significantly different from what Sir William Maxwell proposed in his abortive Land Bill. The argument of Maxwell had all along been that the paramount authority of native chiefs was superseded

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408 F. M. Hodgson to Chamberlain, 20 November, 1899, C.O. 879/57.

409 Ibid.

410 Ibid.

411 Ibid.

412 Ibid.

by the sovereign rights of the Imperial power established there. Therefore, the colonial government as representing that authority was entitled to exercise the powers of land control which the traditional authorities had been accustomed to exercise before the creation of the colony and protectorate. It will be recalled that Hodgson had rejected this argument before and agreed with Sir Joseph Hutchinson that it was inexpedient to weaken the power of the Chiefs by taking away from them their traditional land control functions.[413]

ii. The Concessions Ordinance and Ashanti

It may well be that five years after his criticism of Maxwell, Hodgson had realised the wisdom in Maxwell's policies, particularly as in his position as Governor, he became directly confronted with the problems. The Secretary of State, after consulting his Law Officers of the Crown, was in entire agreement with the Governor that in any legislation as to land, no distinction should be made between "Coomassie and the rest of Ashanti". The concessions Ordinance should therefore be made operative in that Province. He approved of the instructions which Sir William Maxwell gave to the Resident at Kumasi four years earlier. It was stated that no concession of any land in any part of Ashanti, whether dated before or after 20 January, 1896 (the date of the deposition of Prempeh) was to be recognised in any way by the Resident, but that for every concession to be valid, it should be sanctioned by the Governor. The instructions also warned all the Chiefs of Ashanti that the grants of any rights without

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413 His decision that the Concessions Ordinance should apply in Ashanti was in sharp contrast with his earlier decision to exclude the application of the Supreme Court Ordinance there. The question of jurisdiction in Ashanti was raised in a trial of the European Manager and two native assistants of the Ashanti Goldfields Corporation on a charge of torturing persons in order to obtain evidence in connection with a robbery committed at the Obuasi mines. The Supreme Court ruled that it had jurisdiction in Ashanti and thus heard the cases. But Hodgson, by an Order in Council under Section 20 (a) of the Supreme Court Ordinance, excluded Ashanti from the jurisdiction of the Court. See Order in Council, 12 March 1900. A similar Order, 23 February 1900 had earlier excluded the Northern Territories from jurisdiction of the Court.

the Governor's authority was not permissible. Every demand for concession in Ashanti was to be filed in the Resident's office, and there enquired into whether the chief concerned had in fact authority to transfer interest in the property in question and whether he thoroughly understood the transaction.[414]

In what could be seen as an unqualified approval of the basic premises of Sir William Maxwell's policies of the past, Chamberlain approved the above policies, saying:

> ". . . as under native rule no King or Chief had power to give away any of his tribal land or to enter into any agreement with foreigners without the consent of the paramount King, and as the British Government is now recognised by the Ashantis as standing in the place of the paramount King, the Ashanti Kings and Chiefs should not be allowed to grant concessions with the same freedom from control as those of the old Protectorate." [415]

For these reasons, Chamberlain agreed with Hodgson that it was very important that the procedure prescribed by Maxwell's rules should continue to be followed in Ashanti. From a legal point of view, he argued that those rules took their sanction only from the fact that the Governor would not recognise concessions obtained or rights acquired otherwise than in accordance with the rules, and without such recognition any concessions or land rights in Ashanti would be unmarketable, and had no commercial value. He therefore authorised the Governor to provide a legal basis for the application of these rules. He advised Hodgson that as soon as an Order in Council had been passed authorising the Governor of the Gold Coast to legislate by proclamation for Ashanti, the rules prescribed on the lines of Sir William Maxwell's should be embodied in a legislative proclamation applying the concession Ordinance to Ashanti making the rules part of the laws of the Ashanti Protectorate.[416]

Accepting the Secretary of State's advice, Hodgson made the rules operative in Ashanti, subject to the provisions of the Concessions Ordinance.[417] They were as follows:

> "i. Any person desiring to obtain concession in Ashanti must in the first instance apply to the Governor through the

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414 See Chamberlain to Hodgson, 20 February, 1900, C.O. 879/57, No. 578

415 Ibid.

416 Ibid.

417 Gold Coast Lands, Draft Proclamation of July, 1900.

Colonial Secretary of the Gold Coast at Accra for permission to hold a prospecting licence.

ii. The Governor, if the application appears to him to be one which should be granted, will so acquaint the Resident at Coommassie and will also advise the applicant.

iii. The applicant must present his letter of advice to the Resident at Kumasi who if he is unaware of any local objection to the application will issue a licence to prospect in the locality named by the applicant and will at the same time acquaint the Chief or Chiefs concerned and instruct them to give the necessary facilities.

iv. In the case of a licence to prospect for minerals within the meaning of the Concession Ordinance the licence fee prescribed by the said Ordinance and in the case of a licence to prospect for timber, rubber or any other product of the soil a licence fee of £10 must be paid by the applicant upon the issue of the licence for the payment of which he will be given a receipt.

v. A licence may be issued to different prospectors for the same locality.

vi. The holder of a prospector's licence may remove from the locality in which he has prospected a sufficient quantity of quartz or alluvial gold or of timber, rubber or other products of the soil to serve as specimens but he must declare them to the Resident and state the name or positions of the place or places from which they were taken.

vii. The holder of a prospecting licence may apply to the native chief or chiefs concerned for a concession of gold mining or other rights over land in the locality in which he was licenced to prospect and the native chief or chiefs concerned may grant the concession if they are willing to do so but no such application or grant may be made in respect of any land which has not been prospected under a licence granted by the Resident.

viii. Every application for a concession of mining or other rights must be notified to the Resident who will instruct the native chief or chiefs concerned to appear before him and will ascertain from him in the presence of the applicant whether they are willing to grant the concession applied for and are prepared to co-operate in the supply of labour and so forth. He will arrange with the applicant in the presence of the native chief or chiefs concerned, the sum which they should receive annually in consideration of the concession.

ix. The terms of the agreement made between the applicant and the native chief or chiefs concerned are to be embodied by the former in a deed of agreement which is to be signed by the interested parties in the presence of the Resident. The deed is to contain full particulars of boundaries and a suitable plan showing the same.

x. No concession or licence or interest therein may be consigned without the consent of the Governor.

xi. Every notification of application for a concession which must be accompanied by the prospector's licence will upon receipt by the Resident be marked by him with the date and time of receipt and applications for concessions in the same locality will be considered and dealt with in the order of their receipt.

xii. Where there is any variance between the concession Ordinance and those provisions the latter shall prevail." [418]

It will be observed from these rules that apart from the consent of the chief which was required by the prospective grantee and the recognition of the right of the chiefs to make the grant, much of the authority in connection with concession grants was left for the Resident to exercise. Despite the declared right of the chief to make the grant, he could be prevented from doing so if the Resident refused to grant a prospecting licence to a prospective grantee of a concession. For under Rule 7, the acquisition of a prospecting licence from the Resident was made a condition precedent to the grant by the native chief of concession to an applicant. The Proclamation made the Concessions Ordinance specifically applicable in Ashanti subject to the foregoing rules. It stated:

> "The provisions of the Ordinance of the Gold Coast Colony entitled the Concessions Ordinance 1900 shall subject to the provisions hereinafter contained apply to Ashanti and for the purposes of such Ordinance, the concessions court established in the Gold Coast Colony under the provisions of the said Ordinance shall within the limits of Ashanti have jurisdiction in all matters relating to the aforesaid concessions and licences in the same manner and to the same extent as if Ashanti formed part of the Colony."

It should be remembered that by this time Ashanti was still recognised as separate from the Colony of the Gold Coast and there was no formal declaration of sovereign rights over its territory. Yet the Colonial Government found it necessary to adopt policies and apply rules from which such rights could be implied. There was nothing in the customary land tenure of Ashanti to suggest that its problems were any different from those of the Colony, and for which reason these policies were to apply there but not in other parts of the territories controlled by the Government. This return to the policies of Maxwell at this stage could be seen as the recognition of the wisdom of his policies and the misunderstanding of the problems by his critiques of the past among whom was the present Governor, Sir Frederick Hodgson.

In pursuit of the present policy, any doubts which might have existed

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[418] See the Draft Proclamation of July,1900, C.O. 879/57, No. 578.

in the past about the right of the Colonial Government to exercise jurisdictional, legislative or other rights in Ashanti was removed by 1901. An Order in Council declared Ashanti a conquered territory. It provided:

> "Whereas the territories in West Africa situate within the limits of this Order therefore known as Ashanti have been conquered by His Majesty's Forces and it has seemed expedient to His Majesty that the Said Territories should be annexed to and should henceforth form part of His Majesty's Dominions and that provision should be made for the peace, order and good government of the Said Territories . . . the Government of the Gold Coast Colony may on His Majesty's behalf, exercise all powers and jurisdiction of His Majesty within Ashanti and to that end may take or cause to be taken all such measures, and do or cause to be done all such things therein as are lawful and as in the interest of His Majesty's Service he may think expedient, subject to such instructions as he may from time to time receive from His Majesty or through a Secretary of State."

Having formally established the legal basis for the exercise of sovereign rights in Ashanti, legislation on land matters no longer faced any theoretical problems. This Order in Council was soon followed by the Administration (Ashanti) Ordinance under which all lands premises and buildings occupied as government property were declared absolutely vested in the Crown.[419] The 1901 Order in Council and subsequent legislation clearly showed that Ashanti was a conquered Territory. It could therefore be inferred that Ashanti lands became Crown lands. Yet in matters relating to land tenure and administration, apart from the Northern Territories, all parts of the Gold Coast including Ashanti, were placed on the same footing. In spite of the fact that there were special rules to be observed by prospective acquirers of interest in land in Ashanti, rules which were made subject to the Concession Ordinance, the work of the concession courts came to overshadow the procedure under which concessions were acquired in Ashanti.

This became much more evident when the Ashanti Concessions Ordinance was passed.[420] A remarkable feature of the working of the system in Ashanti was that greater official influence and participation in land transactions ensured that anomalies concerning transactions between Europeans and Ashanti Chiefs were not after 1901, as rampant as was the case in the mining areas of the South. In fact, such serious problems as arose from the Ensor agreement and the Ashanti Goldfields Corporation's

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419 Ordinance No. 1 of 1904. Cap. 110, (1951), Rev., S.4 (1).

420 Number 3 of 1903.

acquisitions in Bekwai referred to earlier, occurred long before the introduction of the rules of procedure, and their enforcement as part of the Concessions Ordinance. Section 9 (2) of the Ashanti Concessions Ordinance, for example, ensured more diligent action on the part of applicants for concessions and Section 10 provided that survey fees should be deposited within a six month period from the date of acquisition and the transaction would become void if such a fee was not paid.

The relative success of the Scheme established to administer land transactions in Ashanti with greater official controls within the scope of the Concessions Ordinance, underscores the fact that having regard to the ignorance of the people, such controls were necessary if many of the problems within the system were to be avoided. If it is realised the fact that such policies were just part of what Sir William Maxwell had proposed, then the wisdom of his policies would be appreciated the more. However, although it was later realised that his policies were sound, it was considered too late to resurrect them completely. Moreover, the policy of indirect rule pursued by the administration was inconsistent with Maxwell's policy and therefore a policy of via media was adopted. However, the full significance of Maxwell's policy will be recognised when we discuss and assess the implementation of his policy in full in the Northern Territories of the Gold Coast.

CHAPTER VII

The Consolidation of Chiefly Authority and the Misuse of Stool Land Revenue

A. Introduction

It is considered necessary to summarise the main features of Colonial land policy so far discussed as an introduction to the examination of how such policies enhanced the power of traditional authorities and the way in which such powers were exercised in land matters.

It will be recalled that between 1891 and 1897, two unsuccessful attempts were made to vest the administration of unoccupied lands in the Crown. These measures failed because the chiefs and traditional elders, the native lawyers, the nascent middle class, the educated elite and the European firms who were accustomed to their profitable gamble in speculation and direct negotiation with the land authorities united to oppose these measures bitterly. Under pressure from the Aborigines Rights Protection Society, representing the interest of the traditional Authorities and those of the lawyers, middle men and the merchant class, and with protests from presssure groups of influential business concerns such as the Liverpool Chamber of Commerce, the West African Traders Association etc., the two legislative measures which would have had the effect of harmonising the land tenure systems were withdrawn.

The interest groups which stood to gain from the chaotic system then prevailing won the day. The Crown Lands Ordinance of 1894 and the Lands Bill of 1897, having been withdrawn, the Colonial Government saw a solution in the establishment of a Concessions Court whose main job would be to scrutinize the validity of land transactions in which concessions were granted.

As the examination of the Concessions Ordinance and its working in practice has shown, the Concessions Courts failed to provide a cure for the ills associated with land transactions conducted by the traditional authorities. It has been pointed out that frequently, agreements were ingeniously drawn to evade the intention of the Ordinance establishing the Concessions Courts, and on many occasions, concessions were approved in clear violation of the provisions of the Ordinance.

In a summary, the Concessions Ordinance was unable to check the malpractices of the traditional authorities who were blinded by their lust for money, ignorance and temporary pleasures, such as drinks and tobacco which the firms used to lure them into signing away in a reckless manner, the rights of their subjects and the resources of the community. So rapacious they were that no writer on the subject has ever found a kind word for them. Asante, for example, commenting on their role as people placed in positions of trust made the following accurate observations:

> "Thus, the mining boom of the late nineteenth century resulted in alienation of vast expanses of land. A new land market emerged and the prospect of ready cash began to erode the fabric of religious and other restraints upon the alienation of land. Traditional authorities showed themselves utterly insensitive to their fiduciary obligations to the community. Not only were concessions granted indiscriminately, often in flagrant violation of the vested usufructuary rights of their subjects, but also the proceeds were invariably shamelessly misappropriated by the chiefs and their elders. The dictates of the ancestral cult and the solemn incantations of the trusteeship idea appeared to have been forgotten in this obsession with ready cash." [421]

This sad commentary on the control function of the chiefs and their Councillors during the period is reflective of their general pattern of land administration even in the present day of modern Ghana. Unfortunately the colonial administration was not bold enough to relieve them of their land administration responsibilities on the grounds of their ignorance, incompetence and inefficiency.

B. Public Opinion

The problems associated with traditional authority land administration began to cause concern in official circles. The numerous correspondence on the matter and the ridiculous terms of concessions which appeared in British newspapers exposed the problem to the public and the Imperial Government.

On many occasions, the matter was raised in the House of Commons. In one such parliamentary question time, Mr. Cathcart Wason demanded to know from the Secretary of State for the Colonies if his attention was drawn to a statement in the prospectus of Boison Rubber Company that

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[421] S. K. B. Asante, Property Law and Social Goals in Ghana, 1844-1966, Accra, 1975, p. 35

the Boison Lands comprising some 20 square miles in the Aowin district of the Gold Coast had been granted under a lease to Mr. W. S. Rogers for 79 years for £5 per annum; whether he would ask the Governor of the Gold Coast if the lease had been submitted to him for approval and whether any adequate protection was secured to the native whose lands had thus been disposed of. [422]

Similar questions were put to the Secretary of State for the Colonies in the 4th July, 1910 session of Parliament. In the House of Commons that day, Mr. Ramsay Macdonald's questions reveal the nature of transactions the basis upon which companies were being floated in London, Liverpool and Manchester. It is apposite to quote in full Mr. Ramsay Macdonald's question which is reflective of the nature of these transactions. It is as follows:

> "Has the Secretary of State for the Colonies any information that the Equitorial Rubber and Mahogany Concessions Limited claim to have acquired a Concession of over 50 square miles in the Axim District of the Gold Coast for a total annual rent of £52; that the Panni Lands and Rubber Estates, Limited claim to have acquired from the chiefs of Axim a lease of 64,000 acres for 99 years at an annual rent of £21; that the Boinsu Rubber Company Limited claim to have acquired from the chief of Boinsu a lease of 20 square miles for 99 years at an annual rental of £5; and that Aywara Rubber and Cotton Estates claim to have acquired four leases aggregating 30 square miles in the Axim District for an annual rent of £102; whether he could state if certificates of validity under the Concessions Ordinance have been granted to all or any of the claimants." [423]

The honourable member went further to enquire whether the Concessions Ordinance was giving adequate protection to the natives. He questioned the validity of these sorts of agreement entered into by chiefs which had the effect of binding their subjects. Parliamentary debates of this kind began to mould public opinion against these practices.

Apart from raising the matter in Parliament, there were such persons as Mr. E. D. Morel, the Editor of the African Mail, who had become something like a specialist in West African affairs and who brought to the attention of the public through his African Mail the iniquities of land tenure based on chiefly administration. A West African correspondent, for instance, published in the African Mail the grant of certificates of validity to firms by the Concessions Courts in flagrant violation of the provisions of the Ordinance. Commenting on the profligacy of traditional authorities concerning improvident alienation of the communal lands for trifling

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422 C.O. 879/109, No. 977, p. 13

423 C.O. 879/109, No. 977, p. 22

amounts the editorial of the African Mail said:

> "An improvident dealing with property means not only an inadequacy of consideration or rent, oppressive covenants against the grantor and conditions of fraudulent nature in favour of the lessee, but also extravagant use of and reckless waste of the rent received from such lessees and undue interference with the rights, possession, usufructury and customary of any persons as affects them and their successors to the said property or land." [424]

These sort of familiar expressions of dissatisfaction concerning traditional authority resource management were not confined to improvident alienation of mineral bearing lands only. Allied to the mining industry was the extensive use of logs, not only for firewood but for props in the underground workings. In their mining operations, the firms used a lot of timber as fuel because it was cheaper to use such wood for charcoal instead of coal which was relatively more expensive.

Apart from these uses of timber for mining purposes the export trade in timber was flourishing since the eighteen nineties. [425] Chiefs were giving out licences to timber merchants who were felling timber indiscriminately without regard for age or girth. This process, the West African Chamber of Mines informed the Colonial Office, if allowed to continue unchecked would lead to the destruction of the forests, posing a threat to the future supply of water resources and could affect the climate generally. [426]

In response to these public reactions to the problems and the volumes of correspondence piling up on the matter, certain steps had to be taken to curtail the difficulties. On matters relating to forest administration, the advice of the Conservator of Forests in Southern Nigeria, Mr. H. N. Thompson, was sought. He was commissioned to make a four-month study of forestry problems in the Gold Coast Colony and to submit a report thereon. Following his report, a Forest Bill was introduced in 1907 to supplement the Concessions Ordinance. When the Bill was introduced, as was the case of the Crown Lands Bills of 1894 and 1897, it was strongly opposed and rejected by the traditional authorities and the European

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424 C.O. 879/109, No. 977, p. 18

425 The export of mahogany from the Gold Coast in 1899 amounted to 250 tons, this increased to 750 tons in 1890, 4,300 tons in 1891, to 7,000 tons in 1892 and between 1893 and 1894 about 11,000 tons were exported to Liverpool alone, apart from sundry shipments to Hamburg and London where the demand was high. Between 1902 and 1906 the value of timber export was £285,411. See CO 879/99, No. 972, p.5.

426 Ibid. For a fuller discussion on the issues raised by the Forest Ordinance and the Thompson Report, see pp. 307-318.

firms. The African members of the Legislative Council argued that the Forest Bill should deal with the export trade only. To prohibit the cutting of "immature" trees which the native considered suitable for erecting houses, making furniture etc. was not, in the opinion of Sarbah, one of the African members of the Council and an opponent of the Bill, a wanton destruction of forest.[427]

As far as the traditional authorities were concerned, they became alarmed, because they saw in the proposed Forest Bill the resurrection of the previous abortive Bills of the eighteen nineties. As in the past, the duty fell on the innocent and poor subjects to contribute money for the purpose of sending a delegation to London to appeal to His Majesty to withdraw the Bill which sought to take away their "immemorial rights."

The truth of the matter, it must be admitted, is that, as far as the traditional authorities were concerned, they could not understand enactments relating to forest reserves implying prohibitions on cutting of certain trees which were naturally growing wild on the land. Before the export trade in timber began, the huge trees in the forest had no significant economic or market value. However, with the now thriving timber trade, they could earn money on an otherwise "useless" commodity for the felling of the large timber which was previously not being felled.

Under these circumstances, it was beyond the comprehension of the chiefs and Elders that restrictions in any form should be placed on cutting such wood. These measures were therefore regarded as an unnecessary encroachment upon their immemorial rights.

The main problem was the lack of public education and ignorance. The people whose responsibility it would have been to explain these matters to the chiefs and educate them on the future consequences of uncontrolled destruction of the forests should have been the "educated" natives. Unhappily, however, it appeared that their interests coincided with those of the timber firms for which they acted as middle-men and thus allied themselves with the latter to oppose the introduction of a measure which would have introduced some discipline into the exploitation of the forest resources.

Unhappily, on such occasions, the Colonial Government, because of its policy of indirect rule, found itself unable to be firm enough to push its measures through. This was mainly because it had not itself formulated any clearly defined land policy as a framework within which

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427 See Enclosure No. 3 of 11th January, 1908, C.O. 879/99, No. 912, p.20

it could direct its actions. Faced with such problems, it would postpone its solution by setting up a commission of enquiry. It was in response to the protests which were raised against the Forest Ordinance that Sir Conway Belfield was despatched in 1912 by the Secretary of State for the Colonies to investigate and report on land problems in the Colony and Ashanti.

C. The Belfield Report

In the midst of all these land problems, Belfield was sent to the Gold Coast to investigate and report on the legislation governing the alienation of Native lands in the Gold Coast Colony and Ashanti with some observations on the Forest Ordinance.[428] His main task was to make enquiries into the system of land administration prevailing in the country. He was also to enquire into the question relating to the Forest Ordinance the wording of which had caused fears in the minds of the community.

As references in some detail will be made to this Report in the treatment of forest law and policy, it will be sufficient for present purposes to deal with those aspects of the Report which are relevant to the Land Control functions of the traditional authorities. The final Report which the Sole Commissioner submitted bears witness to the incompetence, greed and the inefficiency of the chiefs and the subordination of the interest of the community to those of their own. Referring to the land control functions of the traditional authorities the Report said:

> "When the resources of the country began to attract the attention of European miners and capitalists, and the chiefs were approached with requests that they would alienate land for industrial purposes, in respect of which substantial sums would be paid, they were quick to recognize the advantage which would accrue to themselves from the exercise of their right of disposition of Stool land. Their sense of obligation to the tribe in respect of their trusteeship was frequently obscured by their greed for money, and some cases have certainly occurred where the proceeds of Concessions granted have been misappropriated to their own personal use." [429]

The Report noted that the only check on such misdeeds was the subjects' reactions to such acts by removing the chiefs from office. This remedy was however not frequently applied because of the subjects' unwillingness to press their leaders unduly. The ineffectiveness of this method of control over the chiefs' conduct must however be seen in terms of political

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428 See H. Conway Belfield, Report on Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti with some observations on the Forest Ordinance, 1912, Cd. 6278.

429 H. Conway Belfield, op.cit., Para 29.

constraints on the subjects' assertion of rights in this respect.

To make a move for the deposition of a chief within the traditional political system is to chart a dangerous course. If the subject making the move does not command the necessary support, his action could be regarded as a conspiracy against the ruler, a rebellion, if not treason itself. The political system thus to a large extent insulates the chief from the serious repercussions which would otherwise have flowed from his mismanagement of the community resources. The problem is made even more difficult by the fact that the King makers are themselves Elders. To avert strong objections to their misdoings, the chiefs merely gave a certain proportion of the money to those whose words might carry weight in matters affecting their position and thus protect themselves. Concerning the mismanagement of stool land revenue, the Report makes the following points:

> "Notwithstanding the communal principles on which the native system of land tenure was based, and the unquestionable right of every member of the tribe to participate in the use of the land and in the profits accruing from it, the result of the administration of the reserve land by chiefs and head men had been that they have by degrees arrogated to themselves the profits arising from such administration, until at the present time, the mass of the people derives from it no advantage other than privileges of cultivating alloted portions, and any revenue which is obtained from it is absorbed by their superiors." [430]

These findings of fact give indications as to the violations by the chiefs, the fundamental principles upon which land tenure and administration is based. Under the customary law, there are clear rules prescribing the distribution of revenue accruing from the public lands of the community. Despite the fact that in Akan systems of law, some land is often attached to the stool the revenue of which is intended to be used for the maintenance of the chief, certain proportions of the public revenue is paid to the chief for the maintenance of the stool.

Hence, when stool property is sold for instance, the law provides that a third of that amount be paid to the chief as remuneration for his services. With such revenue he could acquire property to improve his pomp and pageantry. He could build houses and decorate his habitation and do all such things as would improve his comfort and dignity. He could at times use part of this money to liquidate debts incurred by members of his tribe or family, although this is not obligatory.[431]

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[430] Ibid., Para. 21.

[431] Ibid., Para. 32-33.

A third of the amount is paid to the stool. What this means is that this proportion of the revenue goes into the community's account as a general revenue of the polity. As found by Belfield, this proportion going to the stool is for the liquidation of stool debt, the acquisition of regal furniture and to meet the cost of ceremonies.[432] This must not however be regarded as being exhaustive of all the public services that such revenue should be applied for provision. The money is public revenue and ought to be used in the public interest, having regard to the priorities of the community's requirements. As Belfield himself observed:

> "The inability of the mass of the people to share either directly or indirectly in the revenues accruing from concessions is an objectionable feature of the present system, and an improvement would be effected if part of the money were set aside to be expended on works for the public benefit of the community . . ." [433]

It is clear from his comments that the uses to which such revenue may be put can include a wide range of services such as Schools, Hospitals, Water supplies, etc.

The remaining proportion of the revenue goes to the Elders or the Councillors with land administration responsibilities and other matters incidental to acts of government. These monies are receivable by the members of the management Committee, not because of their status as Councillors, but as remuneration for their land control functions. It will thus be seen that as far as the general population is concerned, the only way by which the ordinary citizen can benefit from the stool land revenue is by the enjoyment of such public services as may be provided with the public revenue. The enjoyment of the public revenue by the ordinary man being indirect, he is denied his rights of such beneficial enjoyment if the chiefs fail to provide the services.

Yet, as the evidence from the Report shows, it was those leaders of the community who received the largest amount of revenue from stool lands and who therefore should have improved the material conditions of their subjects who were the ones who lowered the standard of living of their subjects the most. The Report said:

> "It appears to have been the case that the chiefs who have had the best opportunity of raising money by concessions are those who have plunged their stools most deeply into debt. Conversely in the mining districts the stools which are receiving substantial revenues are for the most part deeply involved." [434]

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[432] Ibid., Para. 33.

[433] Ibid., Para. 35.

[434] Ibid., Para. 33.

One of the principal reasons for this indebtedness was the extravagance and the ostentatious living of the chiefs who were keen to display their wealth through the performance of expensive ceremonies, funerals and acquisition of costly regalia. Apart from this form of expenditure there was the major one described by the Belfield Report as "the joy of life for the native". It says:

> "To the native mind litigation seems to be one of the joys of life, and differences with his neighbours regarding the ownership of land which has vastly appreciated in value has supplied the chief with the opportunity of indulging his weakness. The debts, which in some instances show a total of four figures in sterling, have been incurred in respect of what was of the most part unnecessary reference to the courts, with attendant expenses in the form of law costs and lawyers' fees." [435]

The unfortunate aspect of this ignorant attitude of the chiefs is that, it was the ordinary citizen who suffered at the end of the day. Normally the land, the subject matter of litigation was stool land. This meant that all subjects of the stool were obliged to make financial contribution towards the cost of litigation so as to save the land for the community. Also important was the fact that the dispute often involved one community and another. Community sentiments were thus frequently whipped up in order to make the subject a willing contributor to the funds for the purpose of fighting the legal suits.

In this way, the unreasonableness of the litigation and the primitve attitude of the chiefs to litigation as being one way of displaying their wealth and importance were obscured by community sentiments and emotions. The practical results are however clear. Through the unreasonable conduct of leaders of the community, the community suffered in several ways. By granting vast areas of land away for paltry sums, the areas of land in respect of which the Subject could exercise his inherent right through the exploitation of vacant land was considerably reduced. Despite this, they derived no benefit from the proceeds of such grants to compensate for the loss of the community resource. What is more, as a result of the improvident dealings in land by the Elders, the Subject became liable to contribute money to pay for the expenses which the chief incurred through overlapping grants which ended up in litigation.

This incompetent and inefficient administration of lands and stool land revenue had an adverse effect on the standard of living of the

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435 Ibid.

Subjects and the economic life of the people. The misuse of the public revenue and the plunging of the stools into debt had prevented the accumulation of capital for community development. Instead of exploiting the communal principles upon which land tenure is premised by organising production and channelling resources through the family milieu by co-operative effort, litigation and uncertainty of title which had characterised traditional authority land administration had diverted attention from such progressive development plans to costly litigation and unnecessary self-indulgent extravangance and expenditure.

D. Belfield's Recommendations

The Sole Commissioner, Sir H.Conway Belfield recommended a kind of official intervention which would curtail the subordination of the community interest to those of greedy and selfish land administrators who, for pecuniary gains whittled down the inherent rights of the Subjects. It was his opinion that such intervention should be organised in such a way as to assure the natives that their rights of alienation were not to be taken away but to supplement their knowledge in land administration with the expert knowledge of official administrators.

In effect, he suggested a formula whereby the alienation of interests in land by those having the legal capacity to do so might be supervised by Government appointed officials whose responsibilities in this regard would be the demarcation of the boundaries of any land to which an interest to be transferred related and making sure that the consideration therefore was adequate.[436]

It would appear that the Commissioner was influenced by his Asiatic experiences in this suggestion. He was accustomed to commercial treatment of land in the Far East and seemed to him the only feasible way of action. A policy of land control by the State seemed unfamiliar to him.[437] It was perhaps because of such influences that, even in the face of such demonstrable incompetence, inefficiency, corruption and maladministration, his recommendations fell short of suggesting the takeover by Government of the land control functions of the chiefs.

On the subject of disbursement of stool land revenue, the Commissioner recommended a scheme whereby the bulk of the money would be expended on works of permanent benefit to the community. His recommendation was

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436 Ibid., Paras. 24-26.

437 See McPhee, op.cit., p. 150.

that one-fourth of the proceeds from concession grants should be retained by District Commissioners of the traditional areas in which the grants were made. The amount so retained should be paid into a fund out of which monies could be drawn to defray or contribute to costs of constructional works of permanent utility in the stool area from which the revenue was derived.

The kind of services contemplated were the building of roads, schools, waterways, river cleaning, wells, washing places and other elementary forms of sanitation. It may be anticipated, the Commissioner observed, "that chiefs will raise objection to the arrangement, for most of them really care nothing for the progress of their country and the welfare of its inhabitants, and if left to themselves they will never study any interest other than their own."[438] This recognition on the part of the Commissioner of the attitude of the chiefs should have made him realise the need to relieve the latter of their traditional burdens of land administration and to vest such rights in the government to be exercised in the public interest. Possibly, the Commissioner was being realistic. He was making these recommendations in the face of the formidable obstacles in the way of reforms implying governmental control. The alliance of tribal chiefs, native lawyers, "educated" elite, the nascent merchant class and European firms accustomed to their profitable gambles in direct negotiation with chiefs was a powerful force to reckon with in any land reform programme.

The Report however, urged the Colonial Administration to overrule firmly any objections which would certainly be raised with the justification that the welfare of the community as a whole had not been advanced commensurate with the increase in revenues of the rulers of the tribe and that the Government had undertaken to protect the interest of all classes. The Government, it was recommended, should intimate that it was determined "to divert a portion of these revenues from the pockets of the chiefs to improve the condition of life of the people because the rulers have so signally failed to perform that duty themselves."[439]

As was rightly anticipated by the Commissioner, there was strong opposition from the chiefs. Not surprisingly, some of the lawyers who stood to gain from the chaotic system prevailing at the time, supported the chiefs in their opposition to the disbursement of stool land revenue in the manner proposed by the Report. Casely Hayford, one of the ardent

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438 Belfield Report, Para. 110. Emphasis supplied.

439 Ibid.

opponents of the Forest Bill, a lawyer and President of the A.R.P.S., argued that "the use of a certain proportion of the consideration money for the benefit of the tribe as a whole had better be left to the chiefs."[440]

Unhappily, the Colonial administration was not firm in this matter as recommended by Belfield, and once again as in 1897, the local opposition carried the day. This inactivity in this regard was much aided by the arrival of a new Governor in the Gold Coast in the person of Sir Hugh Clifford who believed firmly in the policy of indirect rule and the strengthening of the hands of traditional authorites to enable them to have firm control over their subjects. In the result, the recommendations of Belfield, which may be regarded as one which though not going far enough, could have gone a long way in solving some of the land administration problems of the Gold Coast, merely became part of the historical documents kept on the subject of land administration in the archives. The examination of the role played by the policy of indirect rule in achieving this result for the chiefs will be the immediate subject of discussion.

E. The Policy of Indirect Rule and the Enhancement of Chiefly Authority

Apart from the opposition from the chiefs and the educated natives, it was the policy of indirect rule more than anything else which enhanced the authority of the chiefs and proved a formidable obstacle in the way of land law reforms which might ensure equitable distribution of community resources in accordance with the communal principles inherent in the traditional schemes of tenure.

As indicated earlier, contrary to the recommendations of Belfield, the assumption of the Governorship of the Gold Coast by Sir Hugh Clifford saw the beginning of an era of consolidation of the power of chiefs and traditional authorities. It also marked the beginning of a kind of tacit alliance between the colonial administration and the chiefs for administration purposes.

The Governor was one who firmly believed in political and social controls through chiefs. Therefore, under his administration, he directed his attention to the strengthening of the power of the chiefs and prevented any land reform policies which might antagonise or incur the displeasure of the chiefs from being formulated or implemented. He thus not only failed to consider the implementation of any of the recommendations of

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440 Ibid., Para. 84.

Belfield, but he went further to write an apologia to the Secretary of State for the Colonies in defence of a policy of non-interference in the administration of stool lands.[441]

The Governor, consistent with his policy of chiefly administration, approved a memorandum by C. H. Harper in which he suggested that as between the chiefs and the Government, it was better that the former managed stool revenue. The memorandum said:

> "The choice is between the Government and the stool drawing the rents. If the stool is to prosper and to retain its hold on native sentiments it is necessary that it should retain its interest in the land." [442]

Hence, in 1917 when the issue arose as to whether or not the Government or the chiefs should receive ground rents in respect of Koforidua Township, the Governor approved of a recommendation that the Government should not share in the revenue accruing from such ground rents. The reason assigned for this decision by the Governor was that a claim by the government of a proportion of the rent was likely to discourage initiative on the part of chiefs of independent undertakings. What ought to be done, the Governor thought, was to investigate how far the chiefs recognised their obligation towards their subjects.[443]

Needless to say, there was sufficient evidence, from official correspondence, commissions of enquiry and from empirical evidence from which the Governor could have been informed of the chiefs' attitude towards their subjects in this regard. The concession anomalies and the misuse of stool land revenue which was a marked feature of land transactions could not have been unknown to the Governor in his four years stay in the Gold Coast, the time during which he was making this proposition. It is very doubtful indeed if His Excellency needed any further investigation before coming to the conclusion that the chiefs never recognised their obligations and responsibilities towards their subjects.

The Govern's Policy with respect to stool land administration had little to commend it. By ignoring the Belfield recommendations completely, and strengthening the hands of the traditional authorities in this regard,

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441 See his memorandum on the Land Question, C096, No. 583, 26 December, 1917.

442 Ibid., p. 113, emphasis supplied.

443 Ibid., p. 116.

he had contributed in no small measure to encouraging the chiefs in their maladministration and the perpetration of injustices which deprived the ordinary subject of his right to benefit from revenues generated by the natural resources of the community.

It was during this period that diamonds were discovered in Akim Abuakwa in 1919 by the Geological Survey Department. Through the assistance of the Government officials, the Omanhene, Ofori Atta, was able to negotiate a relatively high rent, having regard to the kind of rents obtained by chiefs for concessions in those days. Apart from the rent, he was entitled to 5% of the profits accruing from the diamonds obtained from the mining operations.[444]

One would have thought that the subjects of Akim Abuakwa stool should have derived substantial benefits from the exploitation of their natural resources, yet it brought them stool debts. Apart from the over 70 square miles of Eastern and Western Akim lands alienated, boundary disputes and litigation concerning certain traditional rights robbed the stool of its revenue. In what may be regarded as one of the most expensive, longest and frivolous legal disputes in the history of land litigation in Ghana, the Omanhene of Asamankese and that of Akim Abuakwa disputed certain traditional rights concerning the alienation of stool lands.

The main issue was whether or not the former needed the permission of the latter in order to make valid alienation of stool land under the jurisdiction of the former. If this question be answered affirmatively, then whether the latter was entitled to one third of the proceeds of such revenue.[445]

Peter Greenhalgh, commenting on this case, writes:

> "It was the development of the Akwatia Diamond Concessions and the Royalties paid that enable litigation to be pursued with such vigour as far as the House of Lords, and involved the employment of the best lawyers in the country, who were the main beneficiaries of the estimated £200,000 spent on the case." [446]

Thus, in the face of continuing dissipation of the Community resources, endless litigation, and self-indulgence, the traditional authorities were allowed to have their way in matters concerning stool land administration and disbursement of revenues accruing therefrom. Gradually becoming powerful allies of the Colonial administration in matters relating to social controls, they became the untouchable human parasites on the Communities of which they were supposed to be representatives.

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444 See Peter Greenhalgh, "Mineral exploitation: European and African Enterprise in the Ghanaian Diamond Mining Industry", a paper presented at University of London School of Oriental and African Studies, African History Seminar 1972/73, p. 4.

445 See Nana Sir Ofori Atta v Nana Kwaku Amon (1930) 1 W.A.C.A. 15.

446 Peter Greenhalgh, op.cit.

F. Reaction of the Educated Natives

The growing rapprochement between the Colonial Administration and the traditional authorities within the context of the policy of indirect rule during the Governorship of Sir Hugh Clifford saw the beginning of a cleavage between the nascent middle class, the educated African elite and the lawyers on the one hand and the traditional authorities on the other. This new alliance was viewed as a threat to the power and influence of the former.

As we have seen earlier, in order to protect their economic interest, among other things, the former formed an alliance with the latter in order to oppose land reform measures which the Colonial Administration sought to introduce and which might prejudice such common interest.

However, with a vigorous pursuit of the policy of indirect rule in which the power of the chiefs was being enhanced, the Colonial Administration which in the past was inclined to curb their powers in respect of their land control functions, was now prepared to give the traditional authorities a large measure of latitude in this regard. It appeared therefore that the chiefs no longer need rely heavily on the educated native in order to maintain their position or retain their "immemorial rights."

Instead, they quickly realised it was better and safer to lean on the government rather than on a less powerful educated class which had been the traditional opponents of the Colonial authorities. The latter also recognised that the chiefs could be powerful and useful allies not only against some of the opposition from the educated natives, but also in matters relating to maintaining law and order at little administrative costs.

It would seem that because the government was keen to cement the new relationship with the traditional Elders, until 1927, no serious attempt was made to introduce legislative measures for the proper control and regulation of stool land revenue. Such a law could have made provision for the establishment of treasuries, for instance, into which chiefs might be enjoined to deposit stool land revenue. Yet this was not done.

Under these circumstances, the chiefs and traditional land administrators were left with the freedom to dispose of the proceeds of concessions and the revenue derived from the sale or leases of stool lands as they pleased. As Lord Hailey has pointed out, the only check on them was

the discontent of those who had not shared in the proceeds.[447]

One of the ways in which the power of the chiefs was enhanced was by allowing them to have jurisdiction over certain matters. As early as 1883, Native Tribunals were established under the Native Jurisdiction Ordinance empowering certain categories of chiefs to have jurisdiction over all personal suits in which the debt, demand, or damage did not exceed seven ounces of gold or £25 sterling.[448] They could also have jurisdiction over all suits relating to the ownership or possession of land held under native tenure and situate within the particular jurisdiction of the Tribunal. These Tribunals could even exercise jurisdiction over certain criminal matters with the prior approval of the Governor.

As Court fines were retained by the chiefs, the right to hold Native Tribunals became a valuable privilege and in the absence of any procedure that tribunals should be constituted by warrant or order, many petty tribunals were established by minor chiefs who would not have been permitted this right under the Ordinance at an earlier period.[449]

The power of the chiefs began to alarm certain elements of the educated natives. Indirect rule, as Lord Hailey points out, "was viewed by progressive opinion in the Gold Coast as a retrograde system, which might transform the "Constitutional" Gold Coast chief into autocrats, and would foster a form of organisation in which educated commoners would neither command influence nor find employment."[450]

The members of the Aborigins Rights Protection Society which had previously been the champions of the traditional cause began to express views favouring a more direct administration through a Cadre of African officials. They wanted the Native Tribunals to be replaced by inferior Courts, subordinate to the Supreme Court. These pressures including the general disapprobation of the misuse of stool land revenue by the traditional Elders, general maladministration of stool property and maladministration of justice at the petty tribunals forced the government to take certain legislative measures for the regulation of stool land administration and the proceeds therefrom.

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447 Lord Hailey, Native Administration in the British African Territories, Part III, London, 1951, p. 201.

448 Ordinance No. 5 of 1881, section 11.

449 Loc.cit., p. 201.

450 Ibid., pp. 202-203.

G. Statutory Control of Stool Land Revenue Administration

In response to public opinion with regard to the dissipation of stool land revenue by chiefs, certain enactments were introduced in 1927 making provisions for the establishment of stool Treasuries. The Native Administration (Colony) Ordinance, for example, conferred power on every paramount chief of everyState, with the concurrence of the Divisional Chief, Chiefs, Linguists, Headmen, Elders and Councillors of State, to make bye-laws:

a. establishing and constituting stool treasuries;

b. specifying what stool revenues were to be paid into the stool treasury;

c. controlling and regulating expenditure from stool treasuries and revenue, and providing for such control and regulation and

d. providing for the matters incidental to the foregoing.[451]

The Ordinance, however, did not make the establishment of such Treasuries mandatory. It merely conferred power on the persons mentioned in the Ordinance to establish such Treasuries without any compulsion on them to exercise the powers conferred. It is therefore not surprising that none of such treasuries were established by the chiefs out of their own volition. The use and administration of stool land revenue was thus left uncontrolled by the Ordinance. Revenue accruing from Court fines also continued to be shared by members of the native tribunals. Litigation had plunged many stools into debt. Since it was customary to meet such debts by special levies on the subjects, it was the ordinary man who suffered most under the traditional authority administration system.

i. The Native Administration (Treasuries) Ordinance

For the purpose of ameliorating the deteriorating situation in the stool land administration and the misuse of its revenue, a new legislation, the Native Administration (Treasuries) Ordinance, was passed.[452] The Ordinance provided that a State Council may establish a Treasury if required in writing by the Provincial Commissioner to do so.[453] Failure to do

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451 Ordinance No. 18 of 1927, ss.45(3)(1) a,b,c, and d.

452 (Cap.96) 1951 Rev.

453 Ibid., S.3(1).

so within three months of being required, may cause the Governor to order its establishment for the State concerned.[454]

Any Treasury established under the Ordinance was to be managed by a Finance Board.[455] If it was the Governor who established the Treasury under the powers conferred on him under Section 5(2), then the appointment of the Finance Board became his responsibility.[456] The Governor was given power under Section 6 of the Ordinance to direct the reconstitution of the Board if a previously constituted Board was not discharging its duties satisfactorily.

It may be observed that here again, the Statutory provisions did not impose any obligation on the State Councils to establish treasuries. For Section 3(1) of the Ordinance merely provided that the Councils "may" establish a treasury if required to do so by the Commissioner. This implied that the State Councils could ignore the Order of the Provincial Commissioner without infringing the provisions of the Ordinance. Although the Governor could order its establishment where a State Council failed to comply with an order within three months after being ordered to do so by the Commissioner, the former was also under no legal obligation to exercise the powers conferred on him by the Ordinance in this regard.

The only indirect compulsive element in the Ordinance was the Finance Board which the Provincial Commissioner might appoint under Section 4 of the Ordinance in which case the State Council might be deprived of the opportunity of doing so by itself under the powers conferred on it by Section 5(3). It would appear that the colonial administration was pursuing a policy of leaving room for negotiation in a matter where a clear provision prescribing peremptory duties and responsibilities for the proper regulation, management and administration of stool land revenue would be regarded as desirable.

The reason for pursuing this kind of policy seemed to be that the Government had learnt from past experiences that any measure introduced with a view to streamlining the administration of stool land revenue would be met with resistance if an element of compulsion was detected

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454 Ibid. S.3(2).

455 Ibid., S.5.

456 Ibid., S.5(4).

in the policy. It was inexpedient to exert undue pressure on its traditional allies, particularly during the inter-war period when nationalist agitation by native politicians in its embryonic stage could be precipitated and triggered by policies, though desirable, which might be exploited to reunite the nationalist educated natives, and the traditional authorities. These factors might explain the cautious attitude to the legislative reforms being initiated to solve land problems which were endemic.

Nevertheless, there was one respect in which the Government was not prepared to allow the chiefs to have their way. In matters relating to the payment of Royalties, it was inexpedient to wait for the traditional authorities to establish treasuries and make regulation for their administration. It was thus provided under the 1939 Concessions Ordinance that such monies should be paid to the Accountant General.[457] This requirement was peremptory, not permissive. Unlike in previous legislation concerning the administration of stool land revenue where the duties imposed by the Ordinances were permissive, the present Section provides:

> "Any rent or other periodical sum payable under any certified Concession to any native shall be paid in the prescribed manner by the holder of such Concession to the Accountant-General and by the Accountant-General to such native, and such payment to the Accountant-General shall be a complete discharge to the person making the same." [458]

It is noteworthy the fact that this provision merely sought, not necessarily to regulate the administration or the disbursement of the revenue, but to facilitate and ensure its payment to the native, usually the chief. In fact, what it did in effect was merely to relieve the traditional authorities of the burden of collecting such revenue by themselves. For this reason, the Accountant General was not given any direction under the Act as to how such monies received might be disbursed. Instead, he was required to pay the money, not to a treasury established by a State Council or a Native Authority, but to a native, the chief. The provision thus did nothing new either for the control or the administration of stool land revenue.

ii. The Native Administration Treasuries Regulation

In what may be seen as a further legislative measure designed to

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457 (Cap. 136) 1951 Rev. S.35(1).

458 Emphasis supplied.

bring some order into stool land revenue administration, certain regulations were made to supplement the main Ordinances dealing with the question. The Native Administration Treasuries Regulation was one such subsidiary legislation.[459]

The Regulation indicates the sources of revenue for Native Authorities. It says that it shall comprise:

> "i. All monies payable to the Native Authority or stool or to agents or representatives of either in respect of rents, royalties, profits or other revenue derived from lands the property of the Native Authority or stool.[460]
>
> ii. All profits derived from the cultivation of farms belonging to or under the control of the Native Authority or Stool."[461]

The Regulation made imperative the payment of all revenue of the Native Authority into the appropriate Treasury.[462] It also provided that the control and regulation of a Treasury should be vested in a Financial Board which was to consist of five members including a Chairman and a Treasurer.[463] This Financial Board was to be responsible for keeping an exact account of all revenues and expenditure supported by the necessary vouchers in connection therewith.[464]

The remarkable feature of these regulations was that, it was a roundabout way of making mandatory what might be regarded as permissive. Although the main Ordinance, the Administration (Treasuries) Ordinance, did not make the establishment of the Treasuries obligatory, by making the payment of revenues due to the stool into the appropriate Treasury imperative, the receipt of that money became an impossibility unless a Treasury into which it could be paid was in existence. The Regulations thus made the establishment of the treasuries under the present Ordinance inescapable.

Also noticeable was the absence in both the main Ordinance and the Rules made thereunder any direction to the Finance Board how such revenue should be controlled, or disbursed. It indicated that it should be responsible for keeping exact account of all revenues and expenditure but how such monies should be received or paid into the treasury or expended

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459 No. 27 of 1940.

460 Ibid., S.3(1).

461 Ibid., S.3(2).

462 Ibid., S.3(4).

463. Ibid., S.5(1).

464 Ibid., S.15.

was left undetermined. Thus apart from those monies which were required to be paid through the agency of the Accountant-General no machinery was provided for collecting revenue from all the sources indicated by the Regulations. Before commenting fully on some of its defects it may be convenient to direct attention to some related Ordinances dealing with the same problems.

iii. The Stool Property Protection Ordinance

The Stool Property Protection Ordinance was an Act made specifically applicable to Ashanti.[465] As its title suggests it was intended to make provision for the protection of stool property. It would appear to be a belated attempt, for the first time in the history of governmental control over stool land administration in the Gold Coast, to place some limitation on the plenary dispositive rights of chiefs and their Councillors in respect of stool lands in Ashanti.

Significantly, Section 3 of the Ordinance seemed to echo Governor Maxwell's Notification of 10 October, 1895, in which he sought to make the validity of concessions granted by native chiefs, subject to prior approval by the Governor.[466] The Section provides:

> "3(1) It shall not be lawful without the consent in writing of the Chief Commissioner for any Native Authority or other person to alienate, pledge or mortgage any stool property and any instrument or transaction (whether in writing or not) which purports to effect any alienation pledge or mortgage in contravention of this section shall be null and void provided that nothing in this section contained shall apply:
>
> (a) To any pledge or mortgage by any native in his personal capacity of any right vested in him (whether by writing or otherwise) in any form made upon stool land.
>
> (b) To any concession within the meaning of the Concession Ordinance, 1939 whereby any right, interest or property or minerals, precious stones or timber is granted to a non-native".

These provisions were clearly aimed at controlling stool land alienation by chiefs. Although they did not purport to take away the right of chiefs and their Councillors or head of families and their principal members to alienate property under their management and control, the validity of the exercise of their rights in this respect was made subject

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465 No. 22 of 1940.

466 This Government notification was published in the Gazette on 10 September, 1895, as a prelude to the Abortive Lands Bill of 1897. See the Enclosure in Maxwell to Chamberlain, 11 October, 1895, CO/96/261, No. 409.

to the prior approval of the Commissioner. The fact that the Ordinance was specifically designed to control the power of the chiefs with regard to the alienation of stool lands is evident from sub-section (a) of section 3 which excluded, by implication, the subjects' right to deal with lands in their occupation from this restriction. Subjects could thus have the right to alienate their interests in land without the prior approval of the Commissioner.

In order to prevent a situation where stool land could be seized in execution at the suit of persons to whom chiefs or other persons might be indebted, Section 4 of the Ordinance provided that no stool property would be liable to be seized in execution at the suit of any person or should be sold in pursuance of any pledge or mortgage unless such property had been pledged with the consent of the Chief Commissioner. This restriction was, however, made inapplicable to those cases in which the debt had been incurred or the property had been pledged or mortgaged before the date of the coming into effect of the Ordinance.

Similarly, no monies belonging to a Native Treasury were to be liable to be seized in execution at the suit of any person, save in the discharge of a debt which had been approved under the Native Authority Treasury rules.[467]

These provisions were subsequently supplemented by the relevant sections of the Kumasi Lands Ordinance of 1943.[468] Section 17 of that Ordinance made provision for the proper administration of stool land revenue. It introduced modern accounting procedures into the revenue administration. In spite of the fact that it dealt with stool lands specifically referred to under Section 4 of the Ordinance, and might therefore be held inapplicable to Ashanti or the Gold Coast in general, it provided a guide as to how future administration of stool lands, its revenue and accounting procedures might be conducted. The Section provides:

> "17. The Asantehene shall, through the Kumasi Native Treasury, collect all rents as they become due and all arrears of rent in respect of lands vested in him under the provisions of this Ordinance (excepting lands described in the Second Schedule) and for such purposes, he shall establish and maintain a proper Staff and books of account and render to the Government on or before the 30th day of September and 31st day of March in each year a proper statement of rents received in arrears together with cash statement thereon".[469]

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467 Ibid., Section 6.

468 (Cap. 145) 1951 Rev.

469 Emphasis supplied.

This provision was revolutionary. It made possible the inspection by the public, the state of the finances of the community and went a long way to make a serious inroad into the long established view that neither a chief nor the head of a family can be sued to account under the traditional law.[470] For if the Asantehene is under legal obligation to establish, maintain and render to the Government a proper statement of account, the existence of a rule which might insulate him from being sued to account would make nonsense of the provision itself. Unless of course, it could be argued that the rule which insulates the chief or the head of the family from accountability applies only to the rights of the stool - Subjects or members of the family to sue in this regard and not to the Government.

This Section of the Ordinance has as its underlying principles and justification, the recognition that stool lands are public assets and resources the revenues of which ought to be properly accounted for. Consistent with this view, Section 19 of the Ordinance provided that the Minister or any representative duly appointed by him for the purpose, should at any time during office hours have access to and the right to inspect the rent ledgers, records and books of account kept by the Asantehene in accordance with the provisions of the Ordinance. He could also take such extracts therefrom as might be deemed expedient.

It will be noticed that this provision did not go far enough in making the accounts subject to the scrutiny of the Accountant-General. Yet that possibility has not been excluded. For the minister could make the Accountant General his agent or "representative" if the need arose. Both the stool property Protection Ordinance and the relevant provisions of the Kumasi Lands Ordinance could thus be seen as the best legislative efforts made by the government to bring some order into stool land and its revenue administration in conformity with the demands of social, economic and political conditions of the inter-war period. Regrettably however, these Ordinances were made applicable to Ashanti only.

iv. The Native Authority Colony Ordinance

Consistent with the policy of the Colonial Administration of treating different regions of the country as if they were separate independent sovereign polities or federated states of the Gold Coast, the last two

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470 See the leading case on the subject, Abude v Onano (1946) 12 W.A.C.A. 102.

Ordinances discussed above were made applicable to Ashanti only.

By the nineteen thirties and the early forties many stools had been plunged into debt mainly because of litigation and the mismanagement of stool land revenue. This was greatly aided by the great depression of the thirties which reflected in cocoa prices unfavourably and thus reducing stool land revenue considerably. This period also saw the emergence and proliferation of local money lenders who took advantage of the situation and charged high rates of interest on loans.[471] The problem of stool indebtedness became so acute that the government had to appoint a committee to investigate the causes of such indebtedness.[472]

Even before the Report had been published, a need was felt to pass an Ordinance some of the provisions of which should deal with stool land revenue and its administration. This was done in 1944 when the Native Authority (Colony) Ordinance[473] was passed. Some of its provisions drew heavily on the relevant provisions of the Kumasi Lands Ordinance and the State Property Protection Ordinance both of which applied to Ashanti only. Its provisions described as revolutionary,[474] give indication as to the sources of revenue to Native Authorities. Section 32 of the Ordinance provides that the sources of revenue to Native Authorities include:

(a) all monies payable to the stool of a chief or to his agent or representative of the stool in respect of rents, tributes, Royalties, Profits or other revenue derived from lands, which are the property of such stool and
(b) all profits derived from the cultivation of farms in the occupation of the stool of a chief.[475]

As pointed out earlier, when discussing similar provisions under the Native Administration (Treasuries) Ordinance and the rules made thereunder, one of the principal defects in these provisions was the lack of any machinery for the collection of the revenue from the sources indicated

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471 The rates of interest from money lenders at the time ranged between 25% and 100%. See the Report of the Committee on Agricultural Indebtedness 1957, page 5.

472 See C. R. Havers' Report (1945) on a Commission of Inquiry into expenses incurred by litigants in the Gold Coast; see a fuller discussion of the Report at pp. 362-368.

473 No. 29 of 1944.

474 See the Report of a Commission of Inquiry appointed to Enquire into the Affairs of the Akim Abuakwa State (1958), Chairman Jackson J., Para. 85.

475 See the similarity between this provision and section 3 of Regulation No. 27 of 1940.

by the Ordinance. The latter identified the sources of revenue, but as the Jackson Commission pointed out, it did not provide for a corresponding liability to pay. "It was merely a statement of the sources of revenue alone, without any provision as to how they should become vested in the Native Authorities", the Commission observed.[476]

By making all profits derived from farms made on stool lands a source of stool revenue, the Ordinance purported to be imposing a form of land tax or what may be termed a property tax on the subject occupant of the stool land including stranger cultivators of the land. In the case of the latter, this would amount to a restatement of an already existing obligation, but to the former this would have been an introduction of property tax which would affect their incomes if the law were to be enforced.

This indeed could be very hard on the subjects of the stool. The subject, as we have seen, did not benefit directly from stool land revenue. Nor did he benefit indirectly by way of the provision of social services with revenue derived from stool lands. It was customary for their leaders to misuse such funds for their personal comfort. In spite of this, when the stool was plunged into debt due to the ignorance, improvident and the maladministration of the chiefs, it was usual to levy special funds on these subjects so as to meet such debts. Under circumstances like these, it would appear unfair to make them liable to pay such tax. It is thus not surprising that the Jackson Report described the provision as an encroachment upon the private rights of the stool occupant and the stool subjects alike.[477]

As might be expected, none of this sort of revenue was actually collected. The sources of revenue thus remained the traditional ones from rents and royalties paid by the commercial firms to the Accountant General, who in turn paid such monies to the Native Authorities in compliance with Section 35 of the Concessions Ordinance.[478]

In consequence, by the mid nineteen forties there was still no comprehensive legislation affecting stool lands, their revenue, administration and management. Nothing was done by way of regularising the disbursement, control and distribution of such funds in a manner justifying the communal character of the resources from which such revenue was derived.

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476 Loc.cit. Para 418.

477 See Para. 418 of the Jackson Report.

478 (Cap. 136) 1951 Rev.

Legislation in this regard remained ad hoc, tailored to suit and solve particular problems at particular places or localities. The various polities or provinces comprising the Gold Coast were still being treated as if they were separate independent states. This is rather surprising because apart from the Northern Territories which were treated as being under a different system., land administration in almost all parts of the country were identical.

Differences did and still do exist at the present times. But the distinctions exist in particulars of detail only and are quite insignificant in so far as they relate to the problems under discussion. One would have thought therefore that a single comprehensive legislation for the whole country should have been considered with a view to harmonising the systems. A measure of the kind could have been aimed at providing a common solution to a common endemic land problem in a united country. Unhappily, it would appear that the Government did not direct its attention to this form of approach to the resolution of the problems.

Thus these hotchpotch of Ordinances discused above remained the main instruments of reform and amounted to mere stop-gap measures scratching the surface of the problems. They neither went far enough nor were they sufficiently comprehensive to tackle the problem at its roots. The traditional authorities meanwhile remained in full control of stool land revenue and were at liberty to dispose of such funds in the manner they were accustomed to do since the mining boom of the eighteen eighties.

During the post war period, the alliance between the traditional authorities and the Colonial Administration deepened the rift between the progressive elements of the educated natives and the chiefs. Therefore, unlike the late nineteenth century and the first decade of the twentieth century when the two groups united to mount protests against any land reform enactment which might prejudice their common economic and political interests, the educated native was now prepared to support and even call for measures which could curtail the land control functions of the traditional authorities.

As was observed by the Jackson Report on Akim Abuakwa State, in the late nineteen forties, the debates in the legislative assembly clearly demonstrated that the chiefs and the traditional Elders would in the future have to rest content with a much smaller share of stool land revenue than they were accustomed to enjoy previously.[479] The general disapprobation

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[479] The Jackson Report, Para. 431.

of the land control functions of the traditional authorities and the manner in which they subordinated the interests of the community to those of their own found expression in the Coussey Committee Report.[480] The Committee directed its attention to these land administration problems. Its final recommendations laid down the principles upon which subsequent enactments on the subject in the early fifties were based. Such Statutory Provisions will be the next subject of inquiry.

But before doing so, it is apposite to quote in full the relevant observations and Recommendations upon which such laws were based. It says:

> "206 The stools hold communal land in Trust for the people. In the past, all revenue and services in relation to land have gone direct to the chiefs and it has been left to them and their councillors to determine what proportion would be made over to their subjects. In these days of rapid economic development with the consequent enhancement of the value of land, some regulation of the uses to which stool land revenues should be put is vital so as to ensure that the people have their due share in the form of social and other services."

The recognition of public character of stool lands and the desirability for clear stipulations as to how revenue derived from them should be utilised so as to "ensure that the people have their due share in the form of social services" is the basic principle underlying the committee's recommendations. It thus recommends the following:

> "207 We recommend therefore, that in each local authority area, by agreement with the traditional authority of the area, a fair proportion of the sum thus collected should be paid to the local authority. The actual proportions should be determined "in situ" and will depend on local circumstances and on the amounts involved. The remainder of the money will remain the perquisites of the traditional authority for the maintenance of the position of the chiefs."[481]

v. The Local Government Ordinance

Local Government featured prominently in the move towards self government in the nineteen fifties. The Local Government Ordinance which was enacted following the Recommendations of the Coussey Committee established District, Urban and Local Councils.[482] These statutory bodies took over many of the functions which were traditionally the prerogatives of the chiefs.

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480 This was a Committee appointed between 1948-1949 on Constitutional Reform.

481 See Report of the Committee on Constitutional Reform 1949, H.M.S.O. Colonial No. 248. The paragraph is quoted from Paragraph 92 of the Jackson Report on Akim Abuakwa State.

482 Ordinance No. 29 of 1951,(Cap. 64) 1951 Rev.

As earlier noted, the principles laid down in the Coussey Committee Recommendations were substantially embodied in its provision.

Significantly, the relevant provisions of the Ordinance made the management and administration of stool lands the responsibility of the urban or local councils as the case may be for the areas concerned.[483] Although such administration was taken over by these statutory bodies, the Ordinance carefully provided that except specifically stipulated, nothing in the Statute should be deemed to affect the ownership of stool lands.[484]

One major defect in previous legislation on stool land revenue administration was the lack of any provision directing how and by whom such revenue should be collected. This defect was evident in the Native Authority (Colony) Ordinance, identifying the sources of revenue without an indication as to how it might be collected.[485] The present enactment is an attempt to cure some of these defects. Section 74(1) provides that the revenues from stool lands within the area of authority of an urban or local council should be collected by such council and to be deposited in such special fund or funds in the custody of the Accountant General in such manner as the Minister may direct.

On the disbursement of such revenue, the present Ordinance does not follow the path of previous statutes which remained silent on the matter. It provides that such revenue shall be distributed between the urban or local council as the case may be and the stool concerned. Such distribution should be made according to such proportion as may from time to time be agreed between the stool and the statutory body concerned. During the interim before such proportion is agreed upon or settled, the revenue shall be distributed in such proportion as may be specified in the instrument relating to the Council concerned.[486] In the case of any diasgreement on the proportion in which the revenue shall be distributed, the matter may be referred to the Minister whose decision thereon shall be final.[487]

In what may be seen as the resurrection of the 10 October, 1895 Notification which it has been observed Section 3 of the Stool Land Protection Ordinance seemed to echo, Section 75(1) of the present Ordinance

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483 Ibid., S.73(1).

484 Ibid., S.72(2).

485 No. 21 of 1944, S.32.

486 Loc.cit., S.74(2).

487 Ibid., S.74(3). It may be noticed that these provisions merely put into statutory form the recommendations of the Coussey Committee to which reference was made earlier.

significantly contains the following provisions:

> "Any disposal of any interest or right in land which involves the payment of any valuable consideration or which could by reason of it being to a person not entitled by customary law to the free use of land, involve the payment of any such consideration which is made:
>
> (a) by a stool; or
>
> (b) by any person who, by reason of 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 urban and local council, as the case may be, for the area concerned, and shall be of no effect unless and until such concurrence has been obtained in writing under the hand of the chairman or clerk of the Council." [488]

The above quote provision is clearly designed to enable the Councils to monitor land transactions in which the traditional authorities might be engaged. It will not only assist the Councils to become aware of the transactions but it will also help them know the consideration which passed under the transaction so that the appropriate revenue could be collected. The clerk or the Chairman of the Council who would normally be literate could refuse its consent to a transaction if there are such vitiating factors as inadequate consideration, or where the transaction is not regarded by him as being in the interest of the community.

Hence, although these provisions do not purport to take away the traditional rights of the chiefs and their Councillors to exercise their traditional rights of disposition of interest in stool lands, the exercise of such rights has been restricted in certain important respects. Section 75 of the Ordinance is revolutionary, because for the first time, a principle which was rejected in the abortive land Bills of 1894 and 1897 has been embodied in traditional land administration in a statutory form. A significant feature of this Ordinance is that, apart from the Northern Territories, it is an enactment applying to the whole of the country and which is intended to regulate and control the management and administration of stool lands and its revenue by a statutory body, independent of traditional authorities.

In effect, the land control functions of the chiefs and their councillors

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488 Emphasis supplied. It is interesting to note that a survey carried out on 80 sample villages by the Land Administration Research Centre between 1975-1976 revealed that less than 2% of all the stranger tenants interviewed were aware of a similar provision under S.8(1) of the Land Administration Act 1962 (Act 123).

have been curbed, at least in theory. This was now possible because the Colonial Administration did not expect any strong opposition from the majority of the educated natives. At the same time, the chiefs could not expect support from the latter if they were minded to launch a protest against these legislative measures.[489]

Yet it must be admitted that even at this stage a lot remained to be done before an equitable distribution of the community resources could be assured. The steps taken to bring such ideals into fruition saw the introduction of further enactments to deal with the question and it is the discussion of such statutes that our efforts will be directed in due course.

vi. a. The State Councils Ordinances of 1952

The Local Government Ordinance of 1951 was a sequel to several Ordinances some of the provisions of which dealt more specifically with the question of stool land revenue administration.[490] The principles upon which such Ordinances were based recognised the communal basis of the enjoyment of rights in land. The provisions were intended to provide in concrete terms, the means by which just and fair proportions of the proceeds from the community resources can be applied to the benefit of the whole body politic of the traditional states from which such resources were to be found.

In order to examine how effective these legislative measures have been, we shall take a critical look at the way in which the new system was operated in two traditional areas. The choice falls on the Kumasi traditional area and the Akim Abuakwa State. The two areas have been chosen for several reasons. Firstly, they both appear to have the best organised Land Departments under the traditional system. Secondly, there are better records concerning their activities including Reports of Commissions of Enquiry on their performance. Thirdly the present writer has had the opportunity of seeing in person how the system operates in practice at Kumasi. Finally, both traditional areas provide good examples of

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489 It is significant to note that both Nana Ofori Atta II, President of Abuakwa State Council and Dr. J. B. Danquah, the Council's Legal Adviser were members of the Coussey Committee whose recommendations favoured these reforms.

490 See State Councils (Ashanti) Ordinance, No. 4 of 1952; State Councils (Northern Territories) Ordinance, No. 5 of 1952; State Councils (Colony and Southern Togoland) Ordinance, No. 8 of 1952.

how selfish considerations tend to blur the vision of traditional rulers when matters relating to stool land revenue administration is called into question.

b. The Akim Abuakwa State

One of the remarkable features of the State Councils established under the Ordinances was that each Council was a statutory body having a small bureaucratic structure consisting of few literate clerks performing official duties. These few clerks and officials may not necessarily be elders or chiefs. The main operators of the system remained the same chiefs and elders against whose conduct in respect of land administration the Ordinances were directed.

For instance, the State Councils (Colony and Southern Togoland) Ordinance prescribes the manner of regulating membership of State Councils.[491] Under its provisions the membership of the Akim Abuakwa State Council was made to consist of Nana Ofori Atta, the Omanhene of Akim Abuakwa as the President and some 62 chiefs and Councillors as members. It is therefore not surprising that the activities of the Council were not dissimilar from what the traditional authorities were accustomed to before the creation of these institutions. The administration of the State Councils was governed by the customary law. One of their important functions was stool land administration.

In discussing the performance of the Akim Abuakwa State Council it will be worthwhile to note that before the coming into force of the Native Authority (Colony) Ordinance,[492] there were established in Akim Abuakwa, many subordinate stools in the hierarchy of the political structure. These stools were occupied by petty chiefs of varying ranks. Each of such stool possessed certain rights in the land appurtenant to its stool. Part of the revenue derived from such lands, by reason of usage, went to the paramount stools. However, in matters concerning the distribution, management or control of such revenues, the paramount stool exercised very little control, its general jurisdictional right over the State as a whole notwithstanding. The bulk of the revenue derived from such petty "stool lands" was thus enjoyed by the petty chiefs occupying such stools.[493]

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491 No. 8 of 1952, S.3.

492 No. 21 of 1944.

493 See the Jackson Report, Para. 84.

It was such revenue that the Native Authority (Colony) Ordinance identified as one of the sources of revenue to Native Authorities.[494] Even though that Ordinance did not provide the machinery for its collection, some of that revenue found its way into the coffers of the Native Authorities, at least, those paid through the agency of the Accountant General by commercial firms in compliance with the Concessions Ordinance did.[495]

When the Local Government Ordinance came into force in 1952, the revenues from all stool lands within the area of authority of each local council were collected by each council and deposited in the special funds in the custody of the Accountant General. The details of such land revenue as was collected in the Akim Abuakwa State had been kept and recorded in the Registers maintained by the officer in charge of the Lands Department of the Akim Abuakwa State.

It was a key register containing all the items set out in sub-registers kept at various centres of the traditional area. When the local councils took over the duty of revenue collection, these registers were handed over to the local council but no receipt was obtained in respect of them.[496] The initial problem of auditing and rendering an accurate account thus became a problem.

Another problem faced during the transitional period was the disagreement concerning the proportion of revenue that ought to be given to the local councils and the stools. According to Section 74(1) of the Local Government Ordinance, the responsibility of collecting stool revenues devolved on the urban or local councils. But the proportion in which such revenue was to be distributed between the stools and the councils concerned was left to be decided between the two bodies.

This provision presented some problems. In the early nineteen fifties the debates in the Legislative Assembly clearly indicated that the traditional authorities and chiefs would have to rest content with a much smaller share of revenue than they were accustomed to enjoying.[497] But the chiefs still wanted a larger proportion of the revenue than the local councils were prepared to give them. As both the council and the stools could not agree on the right proportions in which the revenue should be distributed, the revenue remained un-utilised with the result

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494 No. 21 of 1944, S.32.

495 (Cap. 136) 1951 Rev., S.35. According to the evidence at Para. 86 of the Jackson Report, the Local Council succeeded to £37,000 of such revenue.

496 See Para. 88 of the Jackson Report.

497 Ibid., Para 431.

that the salaries of many elders and chiefs fell into arrears for several months.[498]

Acting under Section 74(3) of the Ordinance which confers power on the Minister to determine the issue, the Regional Officer of the Eastern Province, under the direction of the Minister, devised a formula whereby the Akim Abuakwa State Council would receive 50% of the gross total of stool land revenue in the state each year, and local councils the remaining 50%. If in any particular year the 50% of the revenue should be less than £45,000, then the local council would be required to make a grant to the state council by the sum of which 50% of the revenue falls short of £45,000.[499]

C. Problem of Revenue Collection

Between 1944 and 1948, there were a lot of arrears in respect of concessions and other rents. This was a period when the traditional authorities were directly responsible for the collection of stool land revenue. Between 1951 and 1952 when the local councils took over that responsibility much of these arrears were brought to account. Apart from the revenue which was collected through the agency of the Accountant General, comparatively little revenue was collected by the Native Authority revenue collectors. The average amount collected each year was within the range of £30,000.[500]

This meant that before the creation of the local councils, the traditional authorities could not have been expecting an annual revenue exceeding £30,000 per annum. Yet under the present system, not less than £45,000 was to be made available to them each year, at a time when their functions have been considerably reduced as a result of the local councils having taken over most of their responsibilities.

Thus if the local councils were to justify their existence in terms of the provision of social services, the purpose for which they were brought into being by the Ordinances, then much more revenue would be required than the Native Authority collectors had been collecting previously. While the Native Authority collectors had on the average, collected not more than £7,000 per annum, the local councils were expected to collect over £60,000 each year after deducting £30,000 paid through the Accountant

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499 Ibid., Para. 387.

500 Ibid., Para. 432. This amount included those collected through the Accountant General. The average amount collected by Native Authority Revenue collectors was £7,000 a year. See Para. 433.

General directly.

What made the task of the local councils in respect of revenue collection difficult was that, like Section 32(1) of the 1944 Native Authority (Colony) Ordinance which indicated that occupants and developers of stool land were to be taxed but providing no corresponding provision imposing an obligation to pay such tax, Section 74 of the Local Government Ordinance in a similar manner identified rents and profits accruing from the occupation and cultivation of stool lands, as being the source of revenue without making such developers liable to pay under the Ordinance.

Another difficulty was that stranger occupiers had contractual obligations towards their landlords, the stools. There was no direct or indirect contractual relationship between the local council and the stranger tenant or the stool subject cultivator of stool land. In the agreement between the tenant and the stool, the former's obligation was to pay rent to the latter. One way of solving the problem would have been for the stools to pay such monies to the local council, but there was no statutory provision imposing an obligation on the stools to pay such monies to the local council.

Yet it was estimated that provided all tenants paid rent to the local council and disregard their contractual obligations towards the stools, a sum of £90,000 could be collected from the land situated in the local council areas of Akim Abuakwa.[501] Notwithstanding these difficulties the records indicate that the collection of such revenue by Local Council officials was far more efficiently done than the Native Authority collectors with the result that such revenue increased considerably. Certain paragraphs of the Jackson Report make this clear. It says:

> "315 Following the recommendation of the Coussey Committee in 1949 the estimated Revenue jumped from £34,000 to £44,000 whilst in the year before the date when this revenue would become apportionable between the local councils and traditional authorities the actual collection is observed to have increased by nearly one hundred per cent, i.e. from £34,328 in 1948-49 to £67,879 in 1951-52, during the latter part of which year the duty of collection fell on the shoulders of the local councils."

It is evident from the above quoted passage that the collection of stool land revenue through the agency of local councils greatly increased the revenue of the State Councils. Yet when it came to the utilisation

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501 Ibid., Para. 392.

of such revenue, it was attended with difficulties. The administration of such funds were characterised by the inefficiency and corruption which have over the years been a marked feature of chiefly administration of resources.

For example, when the Akim Abuakwa State Council was established, the council employed a treasury staff of which one Mr. Ofori Ware was the treasurer. A finance committee was appointed within the meaning of Section 22(1) of the Ordinance [502] to manage the revenue. The Adontenhene Nana Kwabena Kena II was the chairman of this committee. It would appear that the treasurer of the finance committee was also a treasurer of a political party. Under the influence of the Paramount chief and his council, the treasurer diverted part of the revenue of the State Council to other sources. Some of the revenue found its way into the funds of the political party of which Mr. Ofori was the treasurer; with the result that many of the subordinate chiefs, particularly those who did not support the political party of the Paramount chief's choice remained unpaid for more than six months. [503]

It was not only the misuse of funds or improper accounting which marked the administration of the revenue. The traditional authorities, through the exercise of their power to determine their own salaries, indirectly absorbed all the funds for their personal use by salary increases. As was justifiably noted by the Jackson Report, with the increase in stool land revenue, through the efficient collection of such revenue by local councils, there was no reason why with the exercise of ordinary prudence, the requirements of the traditional authorities should not have been met. The Report continued:

> "But they were not prudent. Whilst their expenditure upon general administration costs fell far below the estimates of their requirements recommended by the Chief Regional Officer in 1953, i.e. £21,360. the cost of the salaries of the traditional authorities were progressively increased in the estimates for 1954-55, 1955-56 and 1956-57, when they had an increase from a sum of £21,643 (Chief Regional Officer's figures) in 1952-53 to a sum of £55,077, an increase of more than 150 per cent, the salary of Nana Ofori Atta II having advanced from

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502 No. 8 of 1952.

503 See Para. 159 of the Jackson Report. The Paramount Chief and most of his councillors supported the National Liberation Movement, the (N.L.M.) which had a terrorist wing known as Action Troopers. The troopers were in the habit fo beating opponents, destroying their crops and property. Some of the Revenue was set aside for the defence of any such troopers arrested in connection with such terrorist acts.

> £1,500 per annum to £3,000 per annum at a time when it will be remembered, his official responsibilities were far less than they were during the period of the native authorities". [504]

The above quoted paragraph, once again underlines self interest as the guiding principle, in the majority of the cases, for traditional authorities when questions relating to the administration and management of community resources are called into question. It is significant to note the way in which stool land revenue increased even under difficult circumstances during the period when local councils, divorced and independent of traditional authority influence, undertook the duty of revenue collection. Also important is the fact that no general allegation of corruption, ignorance, inefficiency, incompetence and discrimination has been levelled against the local councils during the time when they took over these responsibilities.

These factors must be borne in mind when considering suggestions that state agencies, such as district councils, town and country planning, survey, forestry and land departments should take over completely, the land administration responsibilities of the chiefs and their councillors. For allegations of possible corruption by state officials and abuse of power would seem to be the strongest points against any such suggestion. Such allegations might be very attractive in systems where corruption on the part of such officials is generally assumed. However, a comparative study of the performance of state agency and traditional authority land administration will reveal that a great deal of the corruption is to be found in the traditional system rather than in the state agency administration.

It is difficult to find any state agency whose administration could justifiably be described as "one of salary inflation at the expense of administrative requirements". [505] These considerations lead us to the discussion and the examination of the traditional authorities' performance under the Asanteman and the Kumasi State Councils during the same period.

II. The Kumasi State and the Asanteman Councils

It will be recalled that attempts to bring an order into the administration of stool lands and its revenue in Ashanti by means of legislation

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504 Ibid., Para. 330.

505 Ibid., Para. 339.

antedates the Local and Municipal Councils Ordinances which followed the Coussey Committee Recommendations of 1949. Apart from the Stool Property Protection Ordinance [506] which was made specifically applicable to Ashanti, the 1943 Kumasi Lands Ordinance [507] made provision for the proper administration of stool land revenue and devised a machinery of an accounting procedure on modern lines.

As indicated earlier, Section 17 of the 1943 Ordinance enjoins the Asantehene, through the Kumasi Native Treasury, to collect all rents as they became due and all arrears of rent in respect of lands vested in him under the provisions of the Ordinance. The Section makes mandatory, the establishment and the maintenance of a proper staff and books of account by the Asantehene through the Kumasi Native Treasury. It is imperative under the Ordinance for accounts to be rendered to the Government on or before the 30th day of September and 31st day of March in each year.

When the Kumasi State and the Asanteman Councils were brought into being by the State Councils (Ashanti) Ordinance in 1952, the relevant provisions relating to stool land revenue administration did not make any alteration in the law as it stood in 1943 in this respect. What the new Ordinance does is to move a step forward by providing a more elaborate machinery for the proper adminstration of stool land accounts.

Financial control is regulated by Section 36 of the Ordinance. The statue makes it imperative for every state council to keep account of all revenue and expenditure in such form as the Governor may prescribe.[508] The account is made subject to inspection and audit at such time and by such persons as the Governor may from time to time direct.[509] In compliance with Section 36, regulations were made in 1954 prescribing the accounting procedure.[510]

Section 3 of the Regulation provides that each state council shall:

a. keep a cash book in which all items of revenue and expenditure shall be recorded; and

b. issue a counterfoil receipt of each item of expenditure incurred;

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506 No. 22 of 1940.

507 (Cap. 145).

508 No. 4 of 1952. S.36(1).

509 Ibid., S.36(2).

510 State Councils Ashanti Ordinance No. 4 of 1952 Regulation, (L.N.209 of 1954).

By Section 4 of the Regulations, each state council is under an obligation to prepare:

a. a statement of revenue and expenditure, and

b. a statement of assets and liabilities. [511]

The main sources of revenue for the Kumasi State Council is derived from rents in respect of Kumasi lands, which rents are collected under the authority of Section 17 of the Kumasi Lands Ordinance of 1943. As successor of the Kumasi Native Authority Treasury, the responsbility of collecting such revenue and the administration of these lands on behalf of the Asantehene devolved on the Kumasi State Council.

It is interesting to observe the introduction into the traditional schema of stool lands and its revenue administration, complex modern accounting procedures. These machineries devised under the Ordinances for the administration of the community resources were devoid of traditional superstitions, beliefs and the cult of ancestor worship that often characterized land transactions in the past.

Also noteworthy is the introduction into the stool land and revenue administration system a scheme whereby literate officials could carry out, through modern bureaucratic processes, functions which were hitherto the preserves of traditional authorities. If the collection of rents, the administration of the funds, their disbursement and the use to which they may be put is determined by officials who are to be guided in their action by statutory provisions, then one of the key roles which traditional authorities have hitherto played in land administration matters has been taken away from them. Their land control functions are thus limited to the rights of land allocation to subjects in areas where the exercise of such rights may be necessary; and the alienation of stool lands to strangers the validity of which is made subject to the concurrence of the local or urban councils established under the Local Government Ordinance. [512]

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511 Section 4 of the State Councils (Colony and Southern Togoland) (Accounts) Regulations 1954 (L.N. 208 1954) had a subsection, 4(2) which provides that such statement of account shall be opened to inspection by the public. For some unexplained reason, this sub-section was omitted in the Regulations applicable to Ashanti. It would appear however that this omission was not deliberate. It was an oversight which may not prevent such public inspection of the accounts in Ashanti.

512 (Cap. 64) 1951 Rev.

i. The Asantehene's Lands Department

The Asantehene has a land department which is also a part and department of the Kumasi State Council. In the day to day administration of the department, the officials have continually been under the influence of traditional authorities. As a result, the inefficiency, maladministration and the dissipation of community resources which are usually a marked feature of chiefly administration became also a characteristic of the department's operations.

It would appear that when the department was established in 1943 under the Kumasi Lands Ordinance, the Lands Department of the National Government was of assistance to it for some time. It seems that such assistance did not continue for long in spite of the fact that in 1947 the Department took over the work of suburban land administration and dealt with all matters pertaining to land within the Kumasi Divison. Branches of agriculture and forestry were also attached to the office. It took over the duty of granting concessions of mining and timber. A Survey Branch was opened and the post of Assistant Lands Officer was created.

The duties entailed by these responsibilities as will be noticed, required for their efficient execution an adequate staff consisting of qualified surveyors, draughtsmen, land officers, cartographers, valuers, legal officers and administrative staffs of clerks, accounting clerks and book-keepers. In spite of this, since its inception in 1943, the only officials appointed to the department were two typists, one cashier, a draughtsman, one bailiff and a messenger.

Despite the mandatory provisions of Section 17 of the Kumasi Lands Ordinance which requires that an adequate staff and proper books of account be maintained, the Kumasi State Council which has since taken over the control of the department had not deemed it wise to increase the staff commensurate with the increasing volume of work. The truth of the matter is that the Council was not keen on exercising any control over or supervising the department.[513] It did not realise the need to employ competent staff with the necessary qualification to cope with the additional work and skills required in the management of the department.

As a result, the department was incompetently run with a degree

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513 As of August 1977, no additional staff has been employed.

of laxity bordering on negligence. Such was the general allegation of corruption and maladministration levelled against the department that a Commission of Inquiry had to be set up to investigate its activities.[514] Some of the main complaints about the running of the department were that there was discrimination, on political grounds in the allocation of plots. It was alleged that the department was negligently and inefficiently managed, and that the statutory duties of rendering proper accounts and maintaining an adequate staff were being breached.

The terms of reference for the Commission appointed to investigate these allegations therefore were:

a. to investigate to see if there had been an abuse of power by the Kumasi State Council or the Asanteman Council;

b. to enquire whether stool property has been dealt with improperly by the said Council or by any of their officials purporting to act on their behalf and

c. to investigate any financial transactions which have been entered into directly or indirectly between the said Council and any political party or parties.

Obviously, the number of staff referred to above cannot be said to be in conformity with the requirements of the law that an adequate staff be maintained. Having regard to the volume of work involved and the expertise required to carry out the responsibilities of the department efficiently, a cashier, a bailiff, two typists and a messenger as constituting the only staff of the department makes nonsense of the requirement of maintenance of an adequate staff.

Notwithstanding the lack of an adequate staff, since its establishment in 1943 and until the time of the Commission of Enquiry in 1958, no entries of rents received were ever made into the books of account. This shows that there was no record of stool land revenue received in respect of rents for a period of fifteen years. This was in direct breach of Section 17 of the Kumasi Lands Ordinance which required the recording of such receipts into the books of account. Neither was any account ever rendered to the government twice in every year as the Ordinance provided.

The cashier admitted before the Commission that he had never made an entry into the books of account since he joined the department in 1943 and justified his action on the grounds that he thought he was doing

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514 See the Report of a Commission appointed to enquire into the affairs of the Kumasi State Council and the Asanteman Council, Accra, 1958; Chairman, Justice Sarkodee-Addo.

the right thing because that was the procedure he followed since joining the department.[515]

Thus contrary to the provision of the State Council's (Ashanti) Ordinance and the rules made thereunder in 1954 and the relevant sections of the Kumasi Land Ordinance of 1943 which required the rendering of proper accounts, the staff of the State Council ignored these statutory obligations. Under such circumstances the traditional authorities were free to take funds and dispose of them as they pleased. As there was no record of accounts there was no way anyone could audit them.

Accordingly, although the chiefs were not collecting and administering the revenue directly, they had control over the funds. In those cases where there was a lump sum in bank accounts, they were able to divert all or part of it to be applied for purposes other than those for which they were intended. For example, in one of their Council meetings in 1954, the majority of the chiefs passed a resolution in which they agreed, and in fact, withdrew an amount of £19,000 from the stool funds to be used to finance a political party to which they gave their support.[516]

In a Report of a Commission of Enquiry, the following finding of facts was made about the running of the department:

i. want of efficient supervision over staff;

ii. the absence of well constituted land allocation committee to ensure a fair and equitable distribution of plots;

iii. undue and needless latitude in the collection of arrears of rents resulting in considerable loss of revenue since 1943;

iv. non compliance with the mandatory provisions of the Kumasi Lands Ordinance;

v. general maladministration in all sections of the department.

The Government in accepting the Report noted in its White Paper thereto that the Asantehene's Lands Department had all along dealt not only with the collection of rents in respect of the Kumasi Lands but with various mining and timber concessions in other parts of the Kumasi District from which rents were collected. As a result the name of the Asantehene has been involved in a great number of commercial transactions for which he has had no responsibility. The White Paper said:

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515 See page 11 of the Report.

516 See the Minutes and books of Kumasi State Council, 11 October, 1954. 53 chiefs had sworn the great oath of Ashanti to give their support to the N.L.M.

> "The Government consider that it is derogatory of the position of the Asantehene and of the Golden Stool that they should be involved in the day to day dealings of the Asantehene's Lands Department, particularly when, as the evidence before the Commission showed, many of these dealings have been of most unsavory nature". [517]

The manner in which the Kusasi State Council and the Akim Abuakwa State Council performed their duties relating to stool lands and its revenue administration under the reform Ordinances is illustrative of the general attitude of the traditional authorities to land administration under the indigenous system. The failure of the institutional arrangements provided by the reform Ordinances to have any impact on their attitude and performance highlights the fact that legislation in itself cannot be a panacea for these problems.

The main problems that stand out from the discussion so far appear to be the lack of probity on the part of chiefs and their councillors, their ignorance, self-interest, inefficiency and above all, lack of expertise and the skills necessary to cope with land control responsibilities attendant upon contemporary economic changes in society. It is submitted that the best way of solving these problems is to relieve them completely of their traditional duties of community land management; alternatively they should be given that kind of education which can equip them with the necessary skills required to cope with modern techniques of land administration.

I. Comments

The legislative measures discussed above were introduced, among other things, to help the chiefs draw on the expertise of competent officials and the skills of trained personnel. But as the evidence has shown in the case of the Akim Abuakwa, the Kumasi and Asanteman Councils, the chiefs were only interested in the collection of revenue through the agency of the new bodies created by the Statutes. They were neither prepared to spend the money which was necessary to employ skilled and competent staff, nor interested in learning or acquiring the expertise necessary for a modern system of land administration. Their roles in the workings of the institutional arrangement statutorily devised for the administration of stool land and its revenue were rather obstructive and retrogressive.

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[517] See paragraph 6 of the White Paper on the Report.

Their cupidity and ignorance had always obscured their sense of judgment and made them shirk their responsibilities towards the communities they were supposed to represent. The way in which the chiefs in Akim-Abuakwa indirectly drained the revenue of the State Council treasury through such unusual progressive salary increases, the case of the Kumasi State and Asanteman Councils, where for fifteen years, in the teeth of the law, no record of rents received in respect of Kumasi stool lands was kept, and the case of the £19,000 improperly diverted to other sources, all make the story an unhappy one.

All these events happened because the chiefs have been treated for all these years as if their land control functions were indispensable. Indeed, it will be observed that under the local government Ordinance, where the local councils took over the responsibility of revenue collection and the sanctioning of land grants, the chiefs had virtually no practical role to play in land administration other than the receipt of the monies allocated to them by the local councils. In the Northern Territories where by reason of state agency administration, no chiefs are directly involved in land administration, one does not encounter the kind of problems just discussed.

In fact, in communities where the chief plays no role in land administration no problems of this magnitude are observable. Through self-indulgence, improvident alienation of the community resources for paltry sums, dissipation of stool revenue and costly litigations which were in themselves brought about by indeligent dealings with property, the chiefs incur debts for which their communities become responsible. The ordinary subject becomes liable to pay such debt through the imposition of special levies on them. Under these circumstances, it is difficult to see how the chiefs can be seen to be serving their communities and not the communities on which they have become human parasites serving them.

Once it is borne in mind that the lands/the management and administration of which they are responsible are communal assets to which no one person including the traditional authorities themselves has a greater claim other than through the exertion of effort in the creation of individual wealth on the land, then the injustice of the chiefs' conduct in respect of these resources can be appreciated.

It is submitted that a lasting solution lies in a national land policy designed and formulated to harmonise the whole land tenure system under the administration of State agencies on the same footing as the Northern Territories where the continuation of Colonial policy in this

regard has steered these regions clear of such land problems. There seems no reason why if that system works in one part of the country it cannot be made to work in another. The key obstacle to such reform would be the traditional authorities and some few interest groups whose selfish interests ought not to be made to override those of the majority in the country.

It will be observed that if the Land Bills of the late nineteenth century had been pushed through and land administration were organised on the same principles governing their administration in the Northern Territories of the Gold Coast and Northern Nigeria, the sort of problems which have bedevilled the systems in Southern Ghana could have been avoided.

There is no doubt that the recognition of inter tribal boundaries between the traditional states ~~are~~ is the basis of boundary disputes. If these boundaries are eliminated, the beneficial enjoyment of rights in land can be premised on Ghanaian citizenship instead of individual community membership, and one of the main sources of litigation will be removed.

In order to advance and buttress the views expressed here further, attention will be focussed in the next chapter on land administration in the Northern Territories in the past and the present. The way in which the principles of the abortive Public Lands Bill of Sir William Maxwell has been applied in the North with a relative degree of success will be highlighted.

CHAPTER VIII

The Experiments with Sir William Maxwell's Land Policy in the Northern Territories

A. Introductory

As the understanding by the colonial government of the land problems of the Gold Coast grew with the years, so did the appreciation of the wisdom in Sir William Maxwell's measures to deal with them. While it was thought to be too late to return to his policy in its entirety in the Colony and Ashanti, it was considered expedient to apply it in the Northern Territories of the Gold Coast. This decision was taken not only because the government became convinced that it was the right policy to pursue, but because it did not anticipate the sort of active opposition which such measures had engendered in the past in the Colony, and to some extent in Ashanti.

The introduction of certain ordinances to implement the principles inherent in the abortive Land Bills of 1894 and 1897 had some important and lasting effects on land tenure and administration in this part of the country. Firstly, it led to the creation of a dual system of land administration in the country. In the Northern Territories, membership of a family or a particular tribe or community ceased to be the basis for the enjoyment of rights in land. The enjoyment of such rights became dependent on membership of the Gold Coast Colony and the Protectorates; so that in terms of acquisition or enjoyment of rights in land in the Northern Territories, no one living in the Gold Coast was regarded as a stranger.

Secondly, this policy led, in principle, to the abolition in these parts of the country of the tribal or territorial boundaries which had been the major source of inter-tribal and inter-territorial boundary disputes. As we have seen already, this was one of the main causes of uncertainty of title and costly litigation which had caused the impoverishment of many families, stools and individuals in the rest of the country where such boundaries were recognised and allowed to remain. Thirdly, the pursuit of this policy resulted in the take-over by the government and its agencies, such as the Lands, Survey, and Town and Country Planning Departments, of the control function of the traditional land authorities.

Finally, the overall result of this policy in the Northern Territories was the restriction to the barest minimum of the twin problems of uncertainty of title and costly litigation and speculation in land, problems which have bedevilled the land administration systems of the rest of the country since the introduction of mining on a large scale and the cultivation of the land on a permanent basis.

However, as we shall see presently, for lack of understanding of the background to the introduction of this policy and the way in which the scheme has worked in practice with beneficial effects, this laudable system is currently in danger of being abolished and in its place transplanted systems, similar to those in the rest of the country with its incidental problems of uncertainty of title and maladministration by chiefs and traditional elders. It will be a tragedy if, for political and emotional reasons, this is allowed to happen. In order to appreciate the wisdom of the introduction of this scheme of land administration and the way in which it has worked in practice with a relative degree of success, it is necessary to outline the background to the introduction of the laws governing land administration. This discussion will disclose beneficial effects of this system in these parts of the country in comparison with those areas where such policies had been abandoned in the past because of native and European merchant protests.

B. Background to Land Legislation in the Northern Territories

With the general response to German and French competition during the scramble for territories in the Gold Coast in the 1890s, the colonial administration signed treaties of friendship and trade with leaders of tribal communities in the Northern Territories. As was the case with many of such treaties, the sovereign rights of the traditional authorities were not ceded to the Queen. Similarly, the terms of the treaties did not cover land matters. In one such treaty with the people of Trugu and Bole, for example, Article II provided that:

> "There shall be friendship and freedom of trade between the king, chiefs, princes, principal headmen, and people of Trugu and Bole and the subjects of Her most Gracious Majesty and Queen Empress and it is hereby understood and agreed between the contracting parties to this Treaty that British subjects shall have free access to all parts of the country of Trugu and Bole . . . and they shall have full liberty to carry on trade or manufacture and should any difference or dispute arise with regard to any trading transactions or other matters between the subjects of Her Majesty residing in Trugu and Bole and the People of that country the same shall be decided by the proper local authorities according to the customs

and laws existing in that country".[518]

The basis of the relationship between Britain and the Northern Territories hinged on similar treaties throughout the region. However, they paved the way for the future appointment of Provincial Commissioners with the responsibility of protecting British commercial interests there. British jurisdiction in the Northern Territories was regarded as a matter of expediency and Governor F. Hodgson who, it will be recalled, had held office between 1898 and 1901, was thus inclined to the view that, until the means of communication with these parts of the country were improved and the "civilising influence of a settled form of administration has made its mark on the country", it should be on the whole best to exclude them by amending the definition of the word "colony" and limiting its meaning to Her Majesty's possessions in the Gold Coast, exclusive of the Northern Territories.[519]

The Chief Justice, Sir William Brandford Griffith, disagreed with this view. He believed that the redefinition of the word "colony" to exclude some other territories which might be regarded as protectorates and outside the jurisdiction of the Supreme Court, would be inconvenient.[520] This argument did not convince the Governor, who proceeded with an Order in Council under section 20(a) of the Supreme Court Ordinance to exclude the Northern Territories, from the jurisdiction of the Supreme Court.[521]

However, the replacement of Sir F. Hodgson as Governor by M. Nathan saw an end to this policy. Chamberlain, who supported Griffith's view on the matter, informed the new Governor that in view of the difficulty, if not the impossibility, of determining precisely the limits of the territories which had already been annexed to the dominions of the Crown, and of the practical difficulties which Griffith had pointed out in his memorandum of August 1899 would arise if the territories which had been treated as forming part of the Colony were to be declared a protectorate, he had come to the conclusion that the necessary steps should be taken to effect a formal annexation of the protected territories, as they existed on the 29th day of December 1887, to Her Majesty's dominions.[522] The Secretary of State's intention was that the natives of the Northern

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518 Treaty of 1 June, 1892, CO 879/113. It is interesting to observe how the terms of the Treaty assumed that there were kings, chiefs and princes in the acephalous societies of the North.

519 Hodgson to Chamberlain, 14 September, 1899, CO 879/57.

520 See Griffith's memorandum on Ashanti Jurisdiction, 9 August, 1899, CO 96/432.

521 Order in Council, 23 February, 1900.

522 Chamberlain to M. Nathan, 5 February, 1901, CO 879/67, No. 649.

Territories should thereby become British subjects and therefore subject to the provisions of the Acts of the Imperial Parliament.[523]

Although Sir Frederick Hodgson still believed that it was good policy to exclude the North from the Colony, while he was in London in the autumn of 1900 he assured the Secretary of State that the natives of the region were ready for annexation and that no trouble need be expected if the state of affairs which the natives regarded as already existing de facto were then established de jure.[524] Certainly, the way in which the natives regarded the treaties of trade and friendship signed with the Queen was a very important factor in the establishment of British jurisdiction over the Northern Territories and the determination of land policy towards it. The truth of the matter was that, unlike the Colony and to some extent Ashanti, where theoretical and legal arguments were employed by opponents of the colonial government to challenge British jurisdiction, sovereign rights and its land policy, the people of the Northern Territories regarded the treaties of trade and friendship signed with the Queen as having taken away their sovereign rights.

Thus the Provincial Commissioner for Wa reported in 1914 that:

> "When Treaties were made here in Dagarti and Issala the chiefs, with the consent of the people were unanimous in believing that in accepting the protection of the Government when signing the Treaties, they surrendered to the Government all rights over land, and the powers to deal with them, as formerly were vested in the chiefs. In the Treaties the terms 'friendship' and 'trade' were insignificant compared to 'protection' which they intensely desired and for this they were ready to surrender the rights of the chiefs to the officers appointed by the Crown".[525]

Similarly, in the Colony and Ashanti, the people attached great importance to land rights and were beginning to treat them as an article of commerce. Any policy which appeared to them as likely to violate land rights met with vehement protests. In the Northern Territories, however, attitudes to land rights were completely different. Land was conceived of, not as an estate or a possession of any particular value,[526] but as part of the universe, just as the sun, the moon and the stars, and "no question of monetary interest in land existed any more than in the constellations".[527]

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523 Ibid.

524 Ibid.

525 Report of 5 December, 1914, National Archives of Ghana, ADM/56/1/105.

526 Ibid.

527 Ibid.

In the Provincial Commissioner's Report, it was noted that lands occupied by the Walas, Dagartis and probably the Grunssi, were not recognised as being owned by the tribe, chief, village or individuals.[528] There were no boundaries between the villages, and uncultivated land between them was considered as common ground for the collection of natural fruits and hunting. The Dagombas, for example, were reported to have held land on condition that such land could not be sold. No money could be taken for leasing it, and it could be granted or rights to it given up, only by the consent of the chief.

A report of the Provincial Commissioner for Navrongo gave similar accounts of native conceptions of land in the North and the land tenure systems generally. The report stated that in Lobi, Dagarti, Issala and Grunshie, lands were "commonly owned".[529] A religious leader called the Tindana administered the lands in "trust" for the community. He was not the owner of the land. His role was mainly concerned with the performance of religious rites which were considered necessary to appease the spirits to ensure plentiful harvest. Tribute, if paid at all, was voluntary, and was nominally paid to the Fetish Priest.[530]

In South Mamprusi, the idea of selling land,"or making a man live without it, could not be understood". For purposes of land occupation and use a stranger was one who came from a far country, and who stayed in the community for less than three years. If he stayed there for three years, he had as much right to the land as the native inhabitants living there. In Bawku, a large town in which many strangers could be found, no one was regarded as a stranger having lesser rights to the land. "It was entirely and absolutely against the native law to pay any money or its equivalent as purchase money, taxes or rents for the use of land.[531]

It is significant to note that even in modern Ghana, chiefs in the Dagomba traditional area of the North do not accept monetary consideration for the grant of land rights. I was told by every traditional Elder I spoke to that they would prefer to accept cola nuts and any amount of produce which the grantee might offer as presents. Such presents have no bearing on the size of land occupied by the grantee or the harvest.[532] The over all picture portrayed by these early accounts of the land tenure systems is that no economic value as such attached to land. Land was

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528 This statement would seem to be of doubtful validity. It probably meant no more than that the idea of the land belonging to groups or communities as it is understood today was not highly developed. This was due to the nomadic life of these tribes.

529 Report of 12 November, 1924, National Archives of Ghana, ADM/56/1/113.

530 Ibid.

531 Ibid.

532 These facts are based on interviews conducted in the Dagomba Traditional

abundant, demand for it was negligible, and it thus had no market value. Hence claims of right to or over it did not feature prominently in the land tenure systems of the Northern Territories.

During the time when the Concessions Ordinance was being considered the colonial administration did not have at its disposal the reports discussed above. But it had a fair idea about the general attitude of the natives in the North to land matters. The government had a fair idea about the differences in the land tenure systems of Ashanti and most of the native communities in the Colony on the one hand, and the tenure systems of the tribes in the Northern Territories on the other.

In Ashanti and most areas of the Colony, the system for the administration and enjoyment of rights in land was fundamental to the structure of government. The appreciation of land values due to the development of the mining and timber industries was increasing the economic and political power of chiefs and community leaders who exercised rights of control over lands. Apart from these developments, there was a great deal of sentimental attachment to land in Ashanti and the Colony. These were the main reasons why any land policy which would have the effect of reducing the power of chiefs usually met with strong protests.[533]

In the Northern Territories, however, there was no concrete evidence of such sentimental attachment to land. Land control functions did not necessarily devolve on those exercising political power in the community. The political and economic power associated with the control of land in Ashanti and the Colony were thus absent in the Northern Territories. For these reasons, the government was aware that no serious opposition to its authority was likely even if it introduced laws affecting land, having regard to the general notion of land by the people in that Region, which may be summed up in the words of a Gonja chief of Pombe, who in reply to a question as to whom, in native opinion, the land belonged to, replied:

> "As the people belong to the Government, how much more then does not the land they live on?"[534]

This statement by the chief might well have stemmed from fear and despair and might not have been a genuine reflection of the wishes of the chief and his people. Nevertheless, it showed that they would not

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533 The nature, extent and the form of such protests are discussed in Chapter IV above.

534 Report of the Provincial Commissioner, Navrongo, op. cit.

oppose the government for any land reform programme or policy that might be designed for them.

Under these conditions the government, having witnessed the problems arising from the land tenure systems of the Colony and Ashanti, where chiefs and heads of families were allowed freedom of dealing in land, decided to pursue a different policy towards the North. A policy similar to those of Sir William Maxwell was thus adopted as a basis for land legislation for the Northern Territories. In line with this policy, Governor Nathan in July 1901, made a draft proclamation laying down the conditions and procedures by which land rights might be granted in the Northern Territories. In forwarding the draft proclamation and instructions thereon to the Commandant of the Northern Territories, Nathan drew the attention of the former to the fact that the procedure involved in land grants differed considerably from that adopted for Ashanti and the Colony under the Concessions Ordinance.[535]

The procedure for concession grants, as contained in the draft proclamation, were as follows:

> "A person applies for, and is granted for 6 months, an exclusive licence to prospect over an area of which the limits are approximately defined and pays for that licence on the basis of the area it covers. During the term of the licence its holder can apply and be granted rights of option over the whole or part of the area included in it, the area for such rights being somewhat more definitely defined in the description, and on the ground? The rights are to last one, two, or three years, and each year a payment is to be made to the Government on the basis of the area, and if in the opinion of the Chief Commissioner . . . native chiefs should receive payment on account of the rights given over their lands a further sum also calculated on the basis of area is to be paid to Government for distribution to chiefs. During the term of the rights of option their holder can apply for and be granted a lease over the whole or part of the area over which those rights extended, the area included in the lease being accurately defined by description and survey, and marked on the ground by boundary pillars. The lease will be a valid title for a period not exceeding 90 years, and each year a payment will be made for it to the Government on the basis of area as well as payment for disbursement to native chiefs . . . [536]

It will be observed from this procedure that the Government assumed complete administrative control over the lands, treating them as if they were Crown Lands, although there was no legal basis for doing so. The draft proclamation also provided for payment to the Government of a duty

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535 Governor Nathan to the Commandant, Northern Territories, 1 July, 1901, CO 879/67, No. 652.

536 Ibid.

of five per cent on net mining profits. It embodied clauses empowering the Chief Commissioner to make rules and settle disputes as to areas, restricting the use of lands granted for defined purposes and preserving the existing rights of natives. Rules could also be made empowering the Governor to exercise certain powers over lands leased, preventing their being assigned or underlet without the Governor's consent, providing for the determination of leases if the conditions were not fulfilled, and laying down penalties for offences. [537]

It will be observed that the main area in which these procedures differed substantially from the machinery provided under the Concessions Ordinance for the Colony and Ashanti was that, in the case of the Northern Territories, the grant was to be made directly by the government and not by any native authority, while in the case of the Colony and Ashanti, such grants were made by traditional authorities and subsequently declared as valid or invalid by a Concessions Court. Another interesting point of difference was that while there were prescribed limits on the size of concessions that could be acquired in the South, no such restrictions were placed on the area for which a lease may be granted to one individual in the North.

Making a case for not extending the Concessions Ordinance to the Northern Territories, Nathan wrote:

> "Large tracts of the Northern Territories appear to be uninhabited or sparsely populated by nude savages without recognized headchiefs or central forms of government, and the Gold Coast system would be quite incapable of such tracts". [538]

It seems, however, that the plausible rationale for the policy was his later statement which seemed to echo Sir William Maxwell's views, saying:

> "Further, it seems right that the main part of the rental for unoccupied lands should go to the paramount power which, by a very large expenditure on administration, has made it possible to utilize those lands. At the same time where native chiefs have rights by native custom over minerals and produce got from the soil, they should derive some advantage from the work of European companies in this direction, and also the existing rights of individual natives must be preserved to them". [539]

In order to provide a sound legal basis for the exercise of the powers implied by the scheme of land administration devised for the North, and in line with the Secretary of State's wish that no distinction should

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537 Ibid.

538 Ibid.

539 Ibid.

be drawn between the Northern Territories and the rest of the country, an Order in Council of 1901 annexed the latter to the Gold Coast.[540] This was followed by another Ordinance, the purpose of which was to provide for the general administration of the Northern Territories. This latter Ordinance, the Administration (Northern Territories) Ordinance of 1902,[541] although it was not an enactment dealing with land as such, contained two provisions which are relevant for our purposes. They were sections 5 and 7. These provisions were intended to provide a legal basis for the performance of some of the functions prescribed under the draft proclamation of July 1901, as discussed above.

Section 5 of the Ordinance conferred powers on the Chief Commissioner, or anyone appointed by him, to enter upon any land required for the public service, and to appropriate and take so much of such land as shall be required for the said service. Where such land was taken for such service, no compensation shall be paid except for growing crops, or in respect of, or interference with, any buildings, works or improvement on or near the land taken.[542] Section 7(a) declared ownership in all lands, premises and buildings, which were on the 31st day of December 1901, held and occupied as government property absolutely vested in Her Majesty the Queen, free from all encumbrances, titles, interests, liens, charge and claim of whatsoever nature.

It can be seen that the extent to which land rights might be affected under these provisions did not go farther than what prevailed under the Public Lands Ordinance, under which lands could be acquired for the public service in the Colony and Ashanti. In spite of this, no further legislation affecting land was introduced in the Northern Territories until 1927. This meant that the draft proclamation of July 1901 remained the only basis for the exercise of administrative rights over lands by the government. As pointed out already, this was mainly due to the fact that the government did not anticipate that anyone would seriously question the basis of its actions there. Also, because there was relatively no large-scale foreign involvement in land exploitation there, it was thought that no legislation defining with particulars of detail, the conditions under which land should be held was required. Moreover, the successors of Governor Nathan, particularly Sir Hugh Clifford, pursued vigorously the policy of indirect rule, which was incompatible with the principles inherent in the draft proclamation of July 1901. Hence, no law was enacted

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540 Order in Council of 1 January, 1902.

541 Cap.111, (1951) Rev.

542 S.5(2).

to embody its principles into legally enforceable rules.

By the 1920s, however, maladministration of stool lands by chiefs in the South and the general disapprobation of the anomalies of the land tenure systems of the Colony and Ashanti saw the beginning of a change in policy. For fear that the evils of the systems in the South might spill over to the North, it was decided to crystallise the procedures and rules being followed in the Northern Territories into legally binding rules. Thus, in 1927, an ordinance was introduced with the declared purpose of vesting all lands in the North in the government.[543]

The relevant provision stated that the whole of the land of the Protectorate, whether occupied or unoccupied at the commencement of the Ordinance, were thereby declared public lands. Exception was made in respect of prior existing rights, provided that such rights could be proved. Section 17(2) provided that at the end of every three months, or such other periods as the Governor may direct, half the rent received during such period in respect of leases shall be paid to the town or new town and shall be expended from time to time in such manner as the Governor might consider to be for the benefit of the town or new town.

These provisions would have had the effect of vesting all the lands in the Crown, but it was not brought into force. Its provisions were similar to those proposed by Sir William Brandford Griffith in 1894 by which all vacant lands in the Gold Coast would have been vested in the Crown. In this case, the only exception being that even occupied lands would have been affected by the Ordinance. Section 17(2) of the 1927 Ordinance, like the abortive Crown Lands Ordinance, took into account the communal principles of the land tenure systems. Hence revenue accruing therefrom was to be applied for the benefit of the community at large.

The Ordinance was, however, not brought into force because some government officials, particularly those in the Northern Territories, were not favourably disposed towards the introduction of an Ordinance, the purpose of which would be to confirm what the natives assumed to be true, but which in fact was not. The Chief Commissioner of the Northern Territories, for instance, had argued earlier in protest against such a measure by pointing out that since it was generally assumed by the natives that all unoccupied lands belonged to the Government, and could be utilised as it saw fit, it was unnecessary for the Government to vest them in the Crown. He argued that unlike Northern Nigeria, which was

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543 Land and Native Rights Ordinance No. 1 of 1927, which was not brought into force.

arguably a conquered territory and therefore Crown land by right of conquest, the same argument could not hold for the Northern Territories.[544]

However, four years later, a similar Act, based on the principles of Sir William Maxwell's Public Lands Bill of 1897, was enacted to govern the administration of lands in the region. It was this ordinance which introduced a dual system of land administration in the country providing a basis for comparative analysis of how either system works, both in theory and in practice. Having discussed at length already the working of the system in the South, we shall have a close look at the provisions of this Ordinance and discuss how it is working currently. This discussion would enable us to come to a conclusion as to whether or not it was a right decision to withdraw the Public Lands Ordinance of 1897.

C. The Land and Native Rights Ordinance of 1931

With slight variations, the Land and Native Rights Ordinance[545] could be seen as a replica of the 1927 Act which was never brought into force. The objects of the Ordinance were declared in its long preamble. It stated that it was necessary to protect and preserve existing customary rights of the natives to use and enjoy the land and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families. It was also stated that it was expedient to preserve the customary law with regard to the use and occupation of the land as far as possible, and that it was necessary to define by law the rights and obligations of the government in regard to the whole of the land within the region. The rights and obligations of cultivators, and other persons claiming to have an interest in any such land should be defined.

For our purposes, the most important provisions were Sections 4, 5, 7, 8, 10 and 17. Section 4 of the Ordinance replaced Section 3 of the 1927 Act which was kept in abeyance. Unlike Section 3 of the latter Act, which sought to declare all lands within the Protectorate public lands, the 1931 provision, Section 4, provided that:

> "All native lands and all rights in and over the same shall as from the commencement of this Ordinance be under the control and subject

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544 Letter of 3 August, 1914, National Archives of Ghana, ADM/56/1/113

545 Cap. 147, 1951 Rev.

> to the disposition of the Governor, and shall be held and administered for the use and common benefit direct or indirect of the natives; and subject to the particular reservations set forth in Section 3, no title to the occupation and use of any such lands shall be valid without the consent of the Governor".

Parts of the reservations under Section 3 referred to above related to prior existing rights antedating the commencement of the Act. Such titles if lawfully acquired, were to have the same effect and validity in all respects as they had before the date of commencement. However, in the case of non-natives, the validity of any such title was made subject to their proof to the satisfaction of the Governor in a manner as he may prescribe or direct in five years from the said date.

The effect of this section is far-reaching. Although the lands were not absolutely vested in the Crown as was attempted in 1927, their management, control and administration were vested in the Governor. While it declared that the lands should be held and administered for the use and common benefit direct or indirect of the natives, the right of the latter to occupy land without reference to any person had been taken away. This was the logical import of the provision that no title to the occupation and use of any lands would be valid without the consent of the Governor. Yet another important aspect of the provision was the recognition of the communal principle in the land tenure system by enjoining the Governor to hold and administer the lands "for the use and common benefit" of the natives. This underlined the sort of obligation towards the people which Sir William Maxwell envisaged under his abortive Public Lands Bill. The emphasis was on the public and not on particular individuals.

Section 5 of the Ordinance enjoined the Governor, in exercise of the powers conferred on him, to have due regard to the native customary law existing in the locality in which any land was situated. Section 6 made it lawful for the Governor to:

a. grant rights of occupancy to natives and non-natives;

b. exact a rent in respect of rights of occupancy so granted; and

c. revise rent exacted or due under this section by increasing or reducing the same, and in the case of building purposes, at intervals of not less than twenty years; and in the case of other rights of occupancy, at intervals of not less than three years.

A remarkable feature of the above provision is that while it enjoined the Governor to have due regard to the existing customary law, Section 6(b) provided, quite contrary to the indigenous notions, belief

and practice, that the Governor should exact rent in respect of rights of occupancy. The exercise of this right would necessarily make serious inroads into the generally accepted view and practice among the people in the Northern Territories that no monetary consideration was exigible on the use ~~of~~ or the transfer of an interest in land. Another significant aspect of Section 6 was the power conferred on the Governor to grant land to both natives and non-natives. The right of occupancy no longer depended necessarily on membership of a land holding group, such as the family or a clan. It now depended on the disposition of the Governor. Here, it is important to note that the Act did not prescribe differing terms for strangers and Northerners.

As we shall see presently, one of the far-reaching effects of this provision is that up till now, the Lands Department, upon whom the responsibility of managing lands in the Northern and Upper Regions devolves, does not draw any distinction between the people of the North and other Ghanaians in matters relating to land acquisition, a policy which was to have been the cornerstone of Maxwell's land policy. The cumulative effect of Sections 4, 5 and 6 was that the natives of the Northern Territories could no longer in principle exercise their inherent rights as members of a landholding community validly to establish rights to land through effective occupation unless by the sanction of the Governor. What this means in effect is that the majority of local people are today in illegal occupation of lands acquired through development without reference to the Lands Commission, which now stands in place of the Governor.

Section 10(3) took away mineral rights from people in occupation of any land in which such minerals were to be found, The right of natives to alienate any estate right or interest in, or with respect to any land lying within the North to a non-native without the consent of the Governor was taken away by Section 17 of the Ordinance. Any conveyance, grant, mortgage, transfer of possession, lease, request or other instrument of transaction (whether in writing or not) which purported to effect an alienation of an interest in land without the consent of the Governor was declared void and with no effect under Section 17(2). Perhaps, in order to demonstrate in concrete terms the Government's intention to exercise full control over the natural resources of that part of the country, the Government proceeded to vest all minerals in the Province in the Crown. By Section 3 of the Mineral Oil Ordinance of 1936, [546]

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[546] Cap. 155, (1951) Rev.

the entire property and control of all minerals, in, under or upon any land in the Protectorate was absolutely vested in the Crown.

By means of these legislative measures, a dual system of land administration was established in the country. In the Northern Territories the traditional land control functions of traditional authorities were assumed by the Government and its agencies, while in the rest of the country such traditional authorities were allowed to continue in the exercise of their traditional roles subject to any statutory controls that might be imposed from time to time. It should be pointed out that the role of the State and its agencies in land matters in the North is that of an administrator. The lands are not vested in the State by any of the laws described above. It is important not to confuse this fact of administration with nationalisation. Although the way in which all Ghanaians are treated equally in the matter of land acquisition in the North would seem to create the impression that the lands are State lands, as far as the law is concerned, this is far from the truth. This fact must continually be borne in mind in the discussion of the merits and demerits of the system in the North.

Interestingly enough, although the native inhabitants had criticised this type of policy in the past, these laws were not abolished after independence. Instead of their abolition they were rather consolidated under other statutes. The obvious reason for this attutide of the independent government of Ghana is mainly because it recognised the benefits of such a system. An additional reason why it was not thought necessary to change the system at independence was because the people of the North did not complain about the system imposed on them during the colonial period. Today, however, as a reaction to the power and profit gained by traditional elders, through their land control functions, particularly in Akan communities of the country, the people of the North are now calling for the abolition of the system established for them.[547] Other calls for the abolition of the system by those who now regard the system as the vestiges of colonialism are based on ignorance of the way in which the system works in practice.[548] In order to explain the benefits of the system and how it works in practice, we shall discuss the way in which the independent government retained the system after independence

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547 See Resolution of a Joint Representative Committee of the Northern and Upper Regional Houses of Chiefs, 28 November, 1975, Ministry of Lands and Mineral Resources, Accra, Ghana.

548 See para. 280 of the Constitutional Proposals of the Constitutional Commission, 1978.

because of its beneficial effects. Since the way in which the system works at present is basically the same as it did in the past, it is deemed unnecessary to discuss its working in practice during Colonial times and then repeat the same story for the present. Accordingly, we shall proceed to discuss the way in which the system works in practice in the North today.

D. The Continuation of the System after Independence

After more than two decades of independence, land policy in Ghana basically remains what was inherited from the colonial era. The government having no new policy of its own, various statutes were introduced to re-enact or add to what was previously existing before independence. One such statute which has a bearing on the continuation of the system established in the North is the State Property and Contracts Act, 1960.[549] The main objective of this statute was to bring the statute laws of Ghana into conformity with the Republican status of the State. Section 2 of the Act thus provided:

> "Where in any Act, provision is made that property shall be controlled or conveyed or surrendered to and become vested absolutely or otherwise vested in and held by the Crown, that property shall vest in the President in trust for the public service of the Republic of Ghana, and accordingly, in any such Act, references to 'Her Majesty the Queen', 'Her Majesty the Queen in trust for the public service of Ghana', 'Crown ownership' and 'the Governor General' . . . shall be construed as a reference to the President in trust for the public service of the Republic or the public ownership as the case may be".

This provision had the effect of vesting in the President, the administration of all the lands referred to in section 4 of the Land and Native Rights Ordinance of 1931, by which all such lands were made subject to the control of the Governor.

The State Property and Contracts Act was followed by the Administration of Lands Act, 1962.[550] This Act lays down the conditions under which stool lands might be administered. The provisions which are relevant for our purposes are Sections 7 and 8. Section 7 provides:

> "7(i) 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 publication of the instrument to execute any deed or do any act as as trustee in respect of the land specified in the instrument".

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549 C.A.6.

550 Act 123.

It will be observed that the above section confers power of compulsory acquisition by the State of stool lands to be administered in the interest of the public at large, and not for the benefit of the particular stool to which the land belongs. Under the system prevailing in the North, the President could exercise similar powers without having recourse to the powers conferred on him under Section 77. Similarly, Section 8(1) of the Act provides:

> "Any disposal of any land which involves the payment of any valuable consideration, or which would, by reason of it 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, shall be subject to the concurrence of the Minister and shall be of no effect unless such concurrence is granted".

Here again, it should be remarked that there is no distinction between the above provisions and Section 17 of the Land and Native Rights Ordinance of 1931 which by reason of the State Property and Contracts Act, remained in force in the country. Thus it would appear that no action under Sections 7 and 8 of the Administration of Lands Acts was necessary in respect of the Northern and Upper Regions.[551]

However, without any reference to the previous law, certain executive instruments were enacted to vest the administration of all lands within the two Regions in the President. By Executive Instrument No. 87 of 1963,[552] it was provided:

> "Whereas it appears to the President that it is in the public interest to declare the stool lands hereinafter described to be vested in him in trust.
>
> Here therefore in exercise of the powers conferred on the President by Section 7 of the Administration of Lands Act 1962, Act 123, this Instrument is made this 11th day of July 1963. The stool lands within the areas of authority of councils specified in the Schedule hereto are hereby declared to be vested in the President".

The local councils specified under the Schedule were those in Bawku, Bolgatanga, Navrongo, Lawra and Wa. It should be noted that the areas of authority of the above-mentioned councils covered the whole area of the Upper Region. A similar Executive Instrument specified Tamale Urban Council area, Savelugu, Yendi, Bimbilla, Salaga, Damango, Bola and Walewale Local Council areas, all of which covered the whole surface area of the Northern Region, as being vested in the President in the

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551 After independence, the Northern Territories were divided into two administrative regions named Northern and Upper Regions.

552 Stool Lands (Northern Region) Instrument.

same manner as the Upper Region lands.[553]

It is thus clear that these Instruments were employed to confirm the land administration system established in the two Regions under the Land and Native Rights Ordinance of 1931 during the colonial era. It should however, be observed that the way in which the Executive Instruments were formulated discloses gross ignorance about the indigenous land tenure systems of the Northern Regions. The underlying assumption of the Executive Instruments giving effect to this policy is that all the Local Council areas specified under the Schedules were stool lands. In the Dagomba traditional area of the Northern Region where the Dagomba conquerors established their hegemony over the original settlers, such assumptions might be valid to some extent where skin lands might be regarded as the counterpart of the Akan-type stool lands. But this can certainly not be true of the generally acephalous societies of the Upper Region.[554] Despite the fact that the underlying assumptions of these Executive Instruments might arguably be mistaken, they have been generally regarded as having vested the administration of all lands in the two Regions in the President.

It is clearly not possible for the President to manage these lands personally. The 1969 Constitution of Ghana therefore set out proposals for the creation of a Land Commission to assume the responsibilities of the President.[555] Acting under the provisions of the Constitution, the Lands Commission Act 1971 was enacted.[556] The Act created a Land Commission, the responsibilities of which are defined under Section 1 of its provisions. It provides:

> "1(6) The Commission shall hold and manage, to the exclusion of any other person or authority, any land or minerals vested in the President by the Constitution or any other law, or acquired by the Government, and shall have such other functions in relation thereto as may be conferred, or imposed by this Act, or by any other enactment.

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553 Stool Lands (Upper Region) Instrument, No. 109, 1963.

554 Under Section 31 of the Administration of Lands Act, 1963(Act 123), stool land is defined to include "all land in the Upper and Northern Regions other than land vested in the President and accordingly 'stool' means the person exercising control". This definition is unhelpful as it fails to define stool lands in terms of administrative controls characteristically exercised over it and by which it is identifiable under the customary law. In any case, this type of land is uncommon in the North, particularly in the Upper Region.

555 See Article 164.

556 (Act 362).

(7) The provisions of sub-section (6) of this Section shall be without prejudice to the provisions of the Constitution and any other law to the compulsory acquisition, or taking possession of any land, or mines, minerals, forests or National Parks or reserves, or the tenure, use or management of land.

2(i) Any assurance of stool land to any person shall not operate to pass any interest in or right over any stool land unless it is executed with the consent and concurrence of the Commission".

These provisions remained substantially unaltered by the Lands Commission Decree of 1972.[557] The relevant provision for our purposes is Section 4 which provides that any reference to the President in the Lands Commission Act 1971 (Act 362) shall be construed as a reference to the National Redemption Council. Later, further additions were made to the main provisions by the Lands Commission (Amendment) Decree of 1972.[558] It provides for the appointment of a regional subcommittee of the Land Commission for each region consisting of such number of persons as the NRC may think fit.[559] Such regional subcommittees shall discharge any functions which may be referred to it by the Commission.[560] Subject to the directions in writing of the Commission, the regional subcommittee may, in the exercise of its functions, regulate its own affairs.

These additions made by the Decrees were intended to decentralise the administration system so as to avoid unnecessary bureaucracy, and to encourage the formulation of policy with regard to local circumstances of each region and community. Therefore, in principle, the responsibility for the general administration of lands affected by these laws devolves on the Lands Commission. An examination of how the system works in practice will, however, disclose that the institutions operating the system since the colonial era are still in effective control and the Lands Commission's role is, in theory, that of supervision. This conclusion leads us to the discussion of the role of the Lands Department as the main administrator of lands in the regions in question on behalf of the Lands Commission.[561]

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557 NRCD 24.

558 NRCD 112.

559 Ibid., S.3(1).

560 Ibid., S.3(2).

561 For convenience, in this discussion any reference to "the North" includes both Northern and Upper Regions of Ghana. At independence, the Northern Territories were divided into two Administrative Regions called the Northern and Upper Regions with Tamale and Bolgatanga as their respective regional capitals.

iv. The Lands Department

Within the meaning of Section 1(6) of the Lands Commission Act (Act 362), the Lands Commission is responsible for granting leases, collection of ground rents, the valuation of landed property, the registration of instruments affecting land and all matters relating to the disposition of interest in land in the Northern and Upper Regions of Ghana. These functions, it must be noted, were performed by the Lands Department in the past. The creation of the Lands Commission did not, however, result in the establishment of a new body to asume these responsibilities. As before, the Lands Department in Tamale and Bolgatanga continued to discharge the responsibilities entailed by State management and control of lands in the two Regions. As can be observed from the discussion of the various statutes regulating the administration of lands in these Regions, their cumulative effect is that any acquisition of interest in land in the area affected by their provisions is rendered invalid and of no effect unless the appropriate State institution with the power to grant interests in such lands has approved or sanctioned such acquisition.

The main functions of the Lands Department in Tamale and Bolgatanga are therefore land allocation, their valuation and the registration of instruments affecting them. Thus anyone wishing to acquire land in the North must apply to the Lands Commission through the Lands Deparment at either Tamale or Bolgatanga, depending on whether the land in question is in Northern or Upper Region. When the application is received, the applicant is advised to engage his own surveyor to carry out a survey of the area concerned. The area when surveyed is called a site plan and must be signed either by a licensed or a government surveyor in order for it to be acceptable.[562] Three copies of the site plan so certified are required from the applicant by the Lands Department.

From the topographical maps supplied to it by the Survey Department, the technical officers of the Lands Department check the accuracy of the site plans. If in doubt, it will be referred to the Survey Department for further verification. If their accuracy is determined, the application with all other documents relating to the land would be put before the regional subcommittee of the Lands Commission. This committee consists of:

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562 This condition is required to meet the requirements of Section 6 of the Survey Act, 1962 (Act 127).

1. The Regional Commissioner as chairman;
2. The Regional Lands Officer as a member secretary;
3. The District Chief Executive;
4. The Lands Commission's Regional Representative
5. The Regional Town Planning Officer, and
6. The Regional Surveyor who is a co-opted member.

This subcommittee is required to meet once every month to consider applications presented to it by the Lands Department. The Committee provisionally approves and recommends formal approval to the Lands Commission in Accra, the chairman of which is the Commissioner for Lands and Mineral Resources. When the recommendation of the subcommittee with the accompanying documents get to Accra, it is normally approved by the Lands Commission.[563]

If approved, the Lands Department at Tamale or Bolgatanga, whichever is the case, is informed. At this stage, the senior State Attorney at Tamale, who is also the Registrar of instruments affecting lands in both regions, prepares the lease. The lease is granted on various terms, depending on the purpose for which the land is required. If it is for residential purposes, it is usually granted for a term of 99 years at the current rent of 40 cedis per acre per year, or nine cedis for one building plot per year.[564] If the land is required for industrial use, it is normally granted for a 50 year term, currently at 100 cedis per acre per year. For farm lands, the lease is often of shorter duration and of cheaper terms. Presently, such leases are of 10 years duration at a current rent of 50 pesewas per acre per year. This means in effect, that one can obtain a hundred acre farm at a ground rent of 25 cedis per year.

When the Senior State Attorney has completed the preparation of the lease with all the terms clearly spelt out, the Lands Department's technical officers make a final scrutiny of the documents. If they are found to be in order, they are sent back to Accra for the signature of the Commissioner for Lands. If the latter's consent is obtained by means of his signature, the triplicate copy of the site plan and a copy of the lease are retained in the Lands Department in Accra for record purposes. The original and duplicate copies are returned to

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563 Since its establishment, I was informed by the Lands Departments of Tamale and Bolgatanga, that no recommendation of the regional subcommittee on land grants has ever been disapproved by the Lands Commission in Accra. In fact, the Commissioner for Lands' signature is only a rubber stamp.

564 Currently, one pound sterling is equal to about 5.60 cedis.

the
/North where the Lands Department informs the applicant to come forward and sign the lease. But where the applicant's place of residence is far from the regional capitals, the documents are normally posted to him for his signature. The lease is executed by the representative of the government, that is the Commissioner of Lands on the one hand, and the lessee on the other.

Although the document is ready at this stage, this is not the end of the transaction. The lessee is required to pay at least one year's lease in full before the documents can be released to him. Upon the fulfilment of this obligation the documents relating to the grant are released to him. But this does not mean he has as yet acquired an effective interest under the lease. He is required by law to stamp the document.[565] The stamp duty to be paid depends on the consideration paid for the interest acquired, in this case such consideration being the rent. The transferee of the interest will be able to enforce his rights under the lease at the regular courts only if the requirements of stamping are met. Finally, the lessee may wish to fortify his rights under the lease by making sure that his interest is certain, valid and unassailable by getting his instruments registered. As will be seen later in the discussion of land titles registration, registration of the instruments is necessary for the transaction to be effective within the meaning of the Land Registry ACt, 1962,[566] the Conveyancing Decree of 1973[567], and the High Court decision of Asare v. Brobbey.[568] But before the lessee can be allowed to register his interest, he must fulfil another condition. He is required to bring along his tax clearance certificate, a document which is a proof that the lessee has fulfilled all his tax obligations to the State from which he is to acquire the interest. Upon presentation of this certificate, his instrument is registered. This effectively concludes the transaction which becomes legally enforceable, even against the Lands Commission.

It should be borne in mind that in terms of beneficial enjoyment of rights in land, the Lands Department does not draw any distinction between the tribes of the Northern Territories. In the same way, people from other parts of the country are accorded the same rights as those from the North in matters relating to land acquisition. In effect,

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565 See the Stamp Act, 1965, Act 311.

566 Act 122, S.24.

567 NRCD 175, Sections 1-7 inclusive.

568 350. /1971/ 2 G.L.R.331.

lands in the North are virtually administered and controlled in the same manner as lands acquired by the State under compulsory acquisition statutes. In doing so, the Lands Department is only continuing a land policy established by the colonial government for the North over the years. Like Sir William Maxwell's abortive Land Bill, which was based on the principle that all lands in the country were to be regarded as a common asset and resource, and therefore, public lands, successive enactments concerning lands in the North were based on similar ideas.

Neither the Administration (Northern Territories) Ordinance of 1902, nor the Lands and Native Rights Ordinance of 1931 drew any distinction between natives of the North and natives of other parts of the Gold Coast. Post-independence legislation on lands in the North, as we have seen, proceeded on the basis of similar policies. The cumulative effects of these laws and their underlying policies have been the abolition of inter-territorial boundaries between one tribal community and another, at least in terms of beneficial enjoyment of rights in land. This led inevitably to the harmonisation of the land administration system throughout the North and the elimination of disputes concerning land titles. The total absence of litigation over land titles at the regular Courts in the North can be seen as one of the most important and self-evident beneficial results achieved through the pursuit of this policy.

In this regard, the originators of the policy should be commended for their foresight and initiative. Evidently, the principles governing land administration in the North today are practically those originated by Sir William Brandford Griffith in his Crown Lands Ordinance of 1894, reformulated and clearly articulated by Sir William Maxwell in his abortive Public Lands Bill of 1897 and in his memoranda and speeches thereon. Although many of their critics did not appreciate the wisdom of their policy then, with time they grew to understand the good sense of it and thus introduced it in the North. The results achieved today can thus be seen as a clear indication of the vision and foresight of Maxwell. It must not, however, be overlooked, that the pursuit of this policy is attended with certain difficulties. These problems notwithstanding, the present system of land administration in the North is by far a more equitable and beneficial system than those prevailing in the rest of the country. We shall consider next the nature of the problems and how they may be minimised or resolved altogether.

v. Problems arising from the Administration System

Within the meaning of the laws regulating the administration of lands in the North, any acquisition of an interest in land without the approval of the Lands Commission is illegal and will have no effect of conferring title on the acquirer. Similarly, any disposition of an interest in land without the Lands Commission's sanction will be of no legal effect. However, members of the general public are inadequately informed about the true legal position on these matters. As a result, some of the traditional authorities operate under the mistaken belief that they have legal rights to dispose of interests in land in their areas of authority. Today, the majority of the local population are, in principle, in illegal occupation of lands in their possession with the acquiescence of the Lands Commission. This lack of public education has led to unnecessary conflict between officials of the Lands Department and its lessees on the one hand, and some traditional authorities and their subjects on the other.

All these problems need not arise if the role of the Lands Department in land matters is properly explained to the latter. For an examination of the Lands Department's land allocation policy will reveal that the principles upon which it operates are not significantly different from the indigenous principles. For instance, under Dagomba customary land law, land is not regarded as an article of commerce. The sale of land is regarded as an abomination punishable by the gods of the land. It is also a sin against the gods to deny a man the use of it. As we have seen earlier, it is not only the indigenous people to whom the use of land ought not to be denied but strangers as well. These ideas generally permeate traditional land tenure systems of the North.

Thus a stranger requiring land in the North, on approaching the chief or the Tindana, whichever is the appropriate authority in the community concerned, is required to present a gift of Kola nuts. The Kola nut is only a present. It is not a consideration for the grant, but is of political and religious significance. It serves as a recognition of the grantor's authority in the area and is at the same time used for prayers to the gods, the givers of rain and sunshine which are necessary for plentiful harvest. The grantee is warned that the right conceded is for surface use only, and if the land is abandoned the right reverts to the community. The only obligation on the land user is that at the end of each harvest he must present a portion of

his harvest to the grantor. The quantum of his present has no relation to the amount of harvest on the area of land cultivated. Such a present is only a token gift in recognition of the grantor's authority over the land.

An examination of what the Lands Department does on behalf of the Lands Commission will disclose that the principles upon which leases are granted to people largely conform to the traditional norms. What the Lands Department has done is actually to assume the role of the traditional authorities and to perform their land control functions for them. As outlined above, the Lands Department does not make an outright grant of lands. It grants leases on clearly defined terms.

The duration of the lease depends on the purpose for which the grant is required. Included in the terms of the grant is always a term to the effect that if the land remains undeveloped in the manner stated within a specified period the lease will lapse. This is consistent with the indigenous law under which the land reverts to the community upon abandonment. The way in which land grants by the Lands Department differ from the traditional methods is that it requires the payment of monetary consideration for the grant.

However, this is not something against which the local people should complain in modern times, and there is no evidence that the practice is objected to. Indeed, the payment of money for land grants is one of the ways in which state administration confers benefit on the communities of the North. As noted earlier, although the lands are managed and controlled like State land, it is recognised that they were once held by the indigenous inhabitants of the North. Therefore rents accruing from land grants are employed for the development of the communities from which they are due. Thus, where such monies are received, the Lands Department retains 10 per cent of it to meet its administrative expenses, such as the cost of surveys, site inspection and the processing of documents. Into the local council treasury is paid 45 per cent of the amount as a contribution to its development project's funds. The traditional authorities of the area receive the remaining 45 per cent of the amount.

It will be seen that in this way, communities of the North benefit from the competent administrative skills of government officials in land administration, while the ordinary citizen benefits from community resources through the social services which the monies paid into local council treasuries might help to provide. An additional advantage

for individuals of State control of lands in the North is certainty concerning titles thus saving people from the problem of costly litigation which has so much helped to enrich lawyers, land surveyors and valuers while rendering stools, families and individuals impoverished in many parts of the country.[569]

In spite of these advantages, as a result of lack of public education on the beneficial effects of State land administration in the North, many people are ignorant about how the system works in practice. This lack of knowledge about the nature of the Lands Department's role has created some few problems and misunderstandings between the Department and some local chiefs. During the colonial period, the people of the North were prepared to allow the government the freedom to exercise control over lands, erroneously believing that the Treaties of Friendship and Trade entered into with the Queen took away their land control rights. They did not attach any great importance to land as an article of commerce. This was largely due to the fact that the slave trade had virtually depopulated the area. Furthermore, although there were rumous about gold and lime deposits in the area and its potential for cotton growing was recognised, no large-scale demand for concessions on the scale witnessed in the Colony and Ashanti occurred in the Northern Territories. The traditional attitude to land was therefore rather casual.

After independence, however, communication with the South improved considerably, and the region's potential as the future granary of the country became recognised. The recent rice boom in the region during the "Operation Feed Yourself Campaign" is a pointer to this fact. Apart from these factors, the population is increasing, particularly in the Upper Region. Before independence, not many educated classes of elites existed in the North as a rallying point for protest against what they might consider as an unfair land policy towards their region. Today, there are many persons who belong to the educated elite and nascent middle class in the North. These factors have all combined to create new problems for the Lands Department in the exericse of its administrative responsibilities.

Unhappily, without any critical examination of its advantages in comparison with the systems prevailing in other areas of the country,

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569 See pp. 362-364.

where chiefs and traditional elders still exercise administrative control over lands deriving substantial revenue from it, the people of the North are now calling for the abolition of the present system as being unfair. Resentment against the present system of land administration in the North is caused by what they see as a discriminatory policy towards them. Dissatisfaction concerning the present system is reflected in a resolution of a joint representative Committee of the Northern and Upper Regional Houses of Chiefs in 1975.[570] In that resolution, the chiefs of the North acknowledge the right of the government to acquire compulsorily land in the two regions for development purposes, and expressed their willingness to co-operate in such matters.

Calling for the abolition of the present system they resolved:

> "3. That in view of the fact that persons wishing to acquire land for development purposes can secure safe and quick titles from the chiefs we propose that all disposals of skin lands in the two Regions be executed by the chiefs concerned as prevails in other parts of the country subject to concurrence of the lands Commission.
>
> 4. That in order to obtain uniformity in the management and administration of all lands in the Northern and Upper Regions as in the other parts of the country we consider that Executive Instruments EI.87 and EI.109 of 1963 and others which vest almost all skin lands in the Northern and Upper Regions in the President/Head of State be revoked and the lands in the two regions re-vested in the chiefs and people".

A remarkable thing about this resolution is that neither in its long preamble nor in any of its six paragraphs was mention made of any grievances concerning the present system. No advantage which the systems in other parts of the country have over the system prevailing in the North was cited as being the reason why the change was being called for. The main reason for desiring the change would seem to be what they regard as lack of "Uniformity in the management and administration of all lands in the Northern and Upper Regions as in the other parts of the country . . ."

With respect, this aspect of the resolution is misconceived. In fact, instead of the uniformity they seek to achieve, the opposite result will be the consequences of the change they are calling for. If the system is abolished, inter-tribal boundaries would have to be redefined and the terms on which land would be acquired would vary according to the customary rules prevailing in each tribe or community. Certain

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570 Resolution of Northern and Upper Region Houses of Chief, 28 November, 1975.

general principles are common to all the systems, but they differ in particulars of detail. Having regard to these facts, it is difficult to see how the abolition of the present system will have the effect of harmonising land tenure and administration in the North.

The resolution is based on the assumption that there is uniformity in the land tenure systems of the rest of the country. This is far from the truth. In fact, it is rather the adoption of the kind of policy towards the North for the whole country that may be able to unify the systems in the South and, therefore, in the whole of the country. Indeed, none of the people I have spoken to in the North has denied that the present system is the ideal one for their Regions. What they object to is the way in which the two Regions have been differently treated from the rest of the country in land matters. They cannot see why, if land policy towards the North is a sound one, it should not be made to apply throughout the country.[571]

There is some justification for the present attitude of people of the North in expressing dissatisfaction about the lack of a uniform policy on lands for the whole country. It must be noted that any Ghanaian, whether he be an Ewe, a Fante or an Ashanti from the South, can obtain land in the North from the Lands Department on the same terms as a Dagomba or a Sissala of the North, but no person from the North can enjoy similar rights in other parts of the country. This is one way in which people of the North can justifiably regard the present land administration system as being discriminatory, although the original policy behind its introduction was not intended to be so.

The problem for the Lands Department at present, particularly in the Dagomba traditional area, is that during this period of rice boom in the Region, certain local chiefs have taken the law into their own hands by conceding land rights to strangers without reference to the Lands Commission. During the colonial period, although land acquisition by the local natives without the consent of the Governor was illegal in terms of the Ordinance, such acquisitions through the cultivation of farms or building houses were acquiesced in by the government. This practice was continued after independnce, mainly because the law was originally passed to protect the natives against strangers and not to prevent them from exercising their inherent rights of land occupation.

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571 A prominent Tamale lawyer at one time the Northern Regional Representative of the Northern Regional Subcommittee of the Lands Commission told me he believed many people objected to the present system mainly because it was regarded as discriminatory.

Thus much of the land allocated by the Lands Department is in favour of strangers from other parts of the country.

At present, some local chiefs are increasingly asserting their right to make land grants to strangers. Some stranger farmers, being ignorant of the legal consequences of obtaining grants from local chiefs without the consent of the Lands Commission, encourage the chiefs in the assertion of their traditional land rights. Even some prospective grantees of land in the North who have some fair idea about the legal stuatus of land in the North, normally prefer the acquisition of land from the local chief to acquisitons from the Lands Department. One important reason for this is that it is quicker and cheaper to obtain land from the former without reference to the latter. Land developers do not like the long bureaucratic processes of getting the necessary consents of the Lands Commission, the preparation of site plans, stamping the document, the presentation of tax clearance certificates and the registration of the instruments. All these cost money and cause delays. While the Lands Department would insist on the payment of monetary consideration for the grant, the local chief would accept initially only some cola nuts as presents, and during harvest-time a proportion of the crops which the grantee might present as a gift to the chief. All these can tempt prospective grantees of interest in land to prefer dealing with the chief rather than with the Lands Department. This temptation can become strong where the grantee has no definite idea about the legal effect of such transactions.

These irregular transactions have caused problems for such stranger grantees and the Lands Department. The first problem for the grantee is that he will be unable to enforce his rights at the regular Courts should the transaction fall into difficulties. Secondly, as a result of the illegality of such transactions, the continued occupation of the land by the grantee depends entirely on the goodwill of the local chief and his people. Thirdly, the grantee runs the risk of his grant being in conflict with grants made by the Lands Department. As we have seen earlier, grants made by the Lands Department are normally covered by an accurate plan of the area to which the interest relates. Copies of such plans are kept in the records of the Lands Department. The way in which the Lands Department avoids overlapping grants is by reference to the topographical maps supplied to it by the Survey Department and the site plans of the areas of land already subject to grants.

Acquisitions of interest in land from local chiefs, however, are

not covered by records and are not reflected by any records of the Lands Department. Therefore, although a man might have acquired land from the local chief, as far as the records of the Lands Department can determine it, the area of land concerned is vacant for allocation. This has in fact happened on certain occasions where lands already granted by the Lands Department were granted to strangers by local chiefs. A classic example of this sort of conflicting grant is provided by the case in which a retired Regional Commissioner of the Northern Region, Colonel Adjekum, obtained large tracts of land from a local chief in 1976 without reference to the Lands Commission. The Colonel quickly brought tractors on to the land and began development. Unknown to him, a large part of the area in his possession had already been granted to another person by the Lands Department and had been duly registered.

The lessee of the Lands Department produced his papers and threatened to sue for trespass and declaration of title. The Colonel insisted that he had lawfully acquired the land from the local chief. The latter admitted the former's claims and justified his right to make the grants by reference to his customary rights. Although the legal position is clear enough, the Colonel could not realise the futility of his claims, and the grantee of the Lands Department sued in the High Court at Tamale.[572]

The lesson provided by this case is very important. It shows that if a person of Colonel Adjekum's standing could be so ignorant about the legal status of lands in the North, then we can expect most ordinary people to be even more ignorant about the land administration system prevailing there.[573] As pointed out already, it is due to lack of public education concerning the legal status of lands in the North that land administration functions of the Lands Department have had very little impact on the indigenous people themselves. The real effect of the laws governing land administration in the North is now beginning to be felt because of the increasing demand for land by strangers through the Lands Department.

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572 This suit was pending at the High Court in 1977 when I left Ghana. I was informed that the case was withdrawn before it could be decided upon. But there is no doubt of the invalidity of the grant made by the local chief.

573 By virtue of his position as the Regional Commissioner for the Northern Region, until his retirement, he was a member and chairman of the Northern Region subcommittee of the Lands Commission and should therefore have been in a position to know better.

As a result of conflicting grants and growing resentment against the role of the Lands Department, the latter has evolved a system whereby the local chiefs are involved in the land acquisition process. By this process the Lands Department advises an applicant to consult the local chief of the area from which he wants to obtain the land. If the chief agrees to the grant, the applicant will obtain from the chief what is called "a consent note ". On presentation of the note, the Lands Department makes the grant to the applicant by going through all its laid-down procedures. When the transcation is completed, the local chief is not made a party to the grant. This is a clear indication that there is no legal basis for the degree of participation allowed the local chief.

The Lands Department believes that participation by local chiefs in the land acquisition process will foster cordial relations between itself and the chiefs, and at the same time promote the goodwill of the chief and the local people towards the stranger-lessee who is going to develop the land within the local community. The Lands Department has made this concession to the local chiefs because it has learnt from experience that the lack of goodwill towards lessees of land from the Department has on certain occasions resulted in the destruction of the crops of such grantees by bushfire.

It must be pointed out, however, that this cannot be an effective and lasting solution to the problem. It must be borne in mind that before the chief gives the prospective grantee the consent note, the latter should have gone through all the customary procedures for land grants with the chief. Under such circumstances, as far as the chief or the Tindana is concerned, the grant has been made by him. For this reason, the traditional land authority expects the lessee to continue paying the usual annual homage to him by presenting him with a portion of the annual harvest. Such a present is not regarded under the customary law as a consideration for the grant, but a practice has grown recently whereby between 10-25 bags of paddy rice are annually presented to the grantor chief. This figure has no relation to the size of land granted or the amount of rice harvested.[574]

The problem here is that the terms of the grant are prescribed by the document by which the Lands Department has granted the interest to the lessee. The latter can therefore insist that there is no agreement between him and the local chief. This has led to a number of incidents

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574 See Kenneth E. Obeng, "Customary Land Holding and Uses in Ghana", 1975, Ghana Law Reform Commission, Working Paper No. 17/75, 6.

in the "rice belt" between farmers who insist on their strict legal rights and some chiefs who want to assert their traditional rights.[575] A case was reported in which a chief went to a farm with a truck to demand some 300 bags of rise, being 10 per cent of what the farmer obtained from his 300 acre farm. The latter refused to hand over the goods, arguing that there was no contractual agreement between them, pointing out that his obligations under the lease was the payment of an annual rent of ₵175.00 to the Lands Department.[576]

Other sources of conflict relate to the exercise of certain customary rights by the indigenous people. In most societies of the North, the local people have some common and concurrent right to collect dawadawa, firewood, mango and other fruits growing naturally on the land. Hence, as far as the local people are concerned, the lessee's rights are subject to the exercise by them of these customary rights. It is, however, evident that the lessee from the Lands Deaprtment is entitled to regard any unpermitted intrusion on his land as trespass, which he can sue for or lawfully resist. In certain cases where the lessee insists on his rights, his farms are found to be "accidentally" desroyed by bush fires.

Apart from these problems, there is a burning issue of the assessment of compensation paid by the Lands Department for lands acquired in the North under compulsory acquisition statutes. It is clear from the provisions vesting the control and administration of lands in the North that such lands have not been compulsorily acquired as State lands. The payment of the rents accruing from land grants by the Lands Department into the treasuries of local councils in the North is an evidence supporting this fact. But whenever the state acquires land in the North under any one of the compulsory acquisition statutes, such as the Administration of Lands Act, 1962 (Act 123) or the State Lands Act, 1962 (Act 125), problems arise as to the basis for the calculation of any compensation that might be due to those whose interests might be injuriously affected.

It is clear from the provisions of the above mentioned statutes that whenever the State acquires land for the public service or in the national interest, those whose interests may be affected should be compensated. Under the State Lands Act of 1962, compensation may be calculated on the basis of the cost replacement value of the land, the cost of disturbance or any other damage resulting from the acquisition may be assessed

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575 Ibid.

576 Ibid.

and paid for.[577] Similarly, where the President authorises the occupation of any land under the Administration of Lands Act, 1962, an annual sum may be paid as compensation for the land from the national treasury, account being taken of the value of the land on the one hand, and on the other, the benefits to be derived by the people of the area where the land is situated from the use to which the acquired land is to be put.[578]

It is clear from these provisions that there is a clear departure from the principles underlying the compensation system established under the Public Lands Ordinance of 1876, under which compensation was payable for wealth created on the land only and not for the land itself.[579] However, the post-independence compulsory acquisition statutes are normally employed to acquire lands the administration of which is not already vested in the State but usually in stools and families. In the North, however, the administration of the lands is already vested in the State. A common complaint in the North is that acquisition of land by the State in the Region is not adequately compensated for. The problem has often been whether compensation should be paid for crops and economic trees growing on the land, including the land itself. It is clearly accepted that economic trees growing on the land, such as mangoes, dawadawa and sheabutter should be compensated for. What is in doubt is whether value must be placed on the land itself and compensated for.

Part of this problem has its roots in the colonial period. During the colonial era, Sir William Maxwell's principles, by which all the lands were to be regarded as public lands, were applied in the North. Compensation was therefore paid for wealth created on the land only and not for the land itself regarded as belonging to the community. Where laws were introduced after independence to enable the laws establishing the present system to continue, no provisions relating to the assessment of compensation in respect of lands in the North was made. It would appear that the Lands Department has continued the practice of paying compensation for wealth created on the land and not for the land affected by the acquisition. I was told by those I intereviewed that even in those cases in which compensation was paid for economic trees, the value placed on them was often so low as to make the system of valuation a mockery.

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577 See Act 125, S.4

578 Act 123, S.10(1).

579 See No. 8 of 1876, S.7(1).

The Lands Department does not deny all these allegations. Its officials claim that the reason for the seemingly low prices paid for economic trees is that values placed on them were fixed by statutory regulations many years ago, and although present price indices make such values out of date, no new law has been passed placing new values on them. The Department does not admit, however, that compensation paid in the North is in general inadequate. The fact is that throughout the country, values placed on economic trees are now outmoded. Compensation for one cocoa tree, for instance, is ten pesewas, although a cocoa tree might be valued at more than ¢50 today. The problem is therefore not one peculiar to the North.

On matters relating to paying compensation for the land itself, the problem is that whenever the chiefs are informed that land is to be acquired by the Government in their areas for certain development projects, as it is their desire that the project, if located in the locality, should provide job opportunities for their people, the chiefs normally write to the Government expressing their willingness to release the land to the Government at no cost. In cases like this, compensation is not paid for the land except for development on it. But where no such willingness to release the land is expressed, compensation is paid for the land, if taken according to the provisions of the statute under which it is acquired. Compensation paid for the value of land in the North may be comparatively low, having regard to the large amounts paid in respect of lands in the southern part of the country. The reason assigned by the Lands Department for this disparity in the amounts paid in other parts of the country, is that the market value of lands in terms of supply and demand has, until recent times, been comparatively low in the North.

It is submitted that the major source of all the problems outlined above is lack of public education. Taking the problem concerning the conflicts arising from the unofficial role of the chiefs in land acquisition, for example, there seems no reason why the true legal position on the question of capactiy to grant lands ought not to be explained to the traditional authorities. It will be a better policy to make the situation clear to them while making certain arrangements which may officially involve them in the land acquisition process than the present arrangement by which the chiefs are given the false impression that they have the legal capacity to dispose of interests in land. Relations could be strained if the chief realised in the end that the

transaction which he had conducted could be superseded by those of the Lands Department when he originally thought the latter was simply confirming what he had done initially.

Turning to the question of payment of compensation, the misunderstanding concerning it is also due largely to lack of public education. It ought to be explained to the chiefs from the beginning that where they release land to the Government for development projects in their localities, compensation will not be paid for the land itself. Taking advantage of their own realisation the benefits which the community would derive from the use of the land by the Government, it should not be difficult to impress upon the local authorities the desirability of establishing the principle that compensation shall not be paid for land acquired for the provision of services which will benefit the community at large. In our opinion, such a policy is not only one which should be adopted for the North, but for the whole country. The amount of compensation which would be paid to the traditional authorities, who as we have seen, do not often use such monies to the best advantage of their people could be channeled into the project for which the land has been acquired for its speedy execution.

Similarly, although the Government has acquiesced in the occupation and acquisition of rights in land by the indigenous people without the prior consent of the Government over the years, it is not a good policy not to explain the legal status of the lands in the Region to the local population and the country at large. This lack of candour and public education has left both the local population and the traditional authorities confused about their rights and responsibilities. Lack of knowledge about the proper procedures for valid acquisition of land in the North has misled strangers in avoiding the Lands Department and to enter into illegal transactions with the local chiefs. Ironically, because the Government has acquiesced in land acquisition by the indigenous people without reference to the Lands Department, strangers are generally much better informed on the legal status of lands and the procedures for valid acquisition of interest therein than the local population itself.

It should be pointed out too, that one reason why people tend to avoid land acquisition through the Lands Department is the result of the unnecessarily long and cumbersome bureaucratic processes involved in land acquisition through it. As we have seen already, the consent of the Minister in Accra is a necessary condition for the valid alienation of interests in land. The creation of the Regional Subcommittees of

the Land Commission was intended to decentralise the system of land administration. This decentralisation is possible only when the Regional Subcommittees are allowed effectively to sanction grants made by the Lands Department on its behalf. The fact that the Minister has never disapproved of any recommendation made to him by the Subcommittee of the Northern Region since its inception in 1972 is a clear indication that the signature of the Minister is only a rubber stamp.

It can be seen that the Subcommittee of the Lands Commission consists of competent authorities on land matters in the Region. The Regional Lands Officer, the Regional Surveyor and the Regional Town Planning Officer are the most competent officials dealing with land matters in the Region. The Regional Commissioner and the District Chief Executives are the chief representatives of government in the Region, and are therefore supposed to be aware of and conversant with government land policy in the Regions. Moreover, all these officials are more conversant with local conditions and circumstances than the Minister who may not necessarily be a specialist in these matters. Decisions taken by these officers in land allocation should therefore ordinarily be regarded as well founded. It is for reasons like these that the Minister normally rubberstamps their recommendations on land grants. Hence, there seem no good reason why real meaning should not be given to the decentralisation policy by giving powers to the Regional Subcommittees to give effective consent to land grants on behalf of the Minister. In such a case, a limited period within which an aggrieved person may appeal to the Minister might be the right procedure. These suggestions, if adoped, would cut down the delays caused by the bureaucratic processes.

The pursuit of present policies has had far-reaching beneficial consequences for the administration system and the community at large. Firstly, the non-recognition of inter-tribal boundaries between the various ethnic groups of the North has harmonised the system of land administration. The elimination of such boundaries means there no longer exists any basis for disputes concerning inter-tribal boundaries. The boundaries which exist are those carved by the Government for political administrative purposes. Questions relating to boundaries are therefore politically determined and settled by government officials with the result that it has become unnecessary for the Courts to determine the issue between contesting parties of different communities.

Secondly, the establishment of the Lands Department as an independent and recognised government body with legal capacity to dispose of interest

in lands which are mainly group-held property has reduced to the barest minimum the difficulty faced by strangers in identifying persons within the traditional systems with the legal capacity to deal with property. The overall effect of the policies and land administration system established in the North is certainty of title and lack of any litigation concerning titles whatsoever. So certain and secure are titles that there is to be found hardly in our Law Reports any reported case of land litigation in the North.

One direct beneficial result of title security in the North is that while the banks and financial institutions would insist on accepting only registered titles as security for loans to farmers in southern Ghana, some of the banks are willing to grant loans to farmers in the North provided there are visible signs that the farmer has begun development in a way that will prove profitable.[580] Insecurity of title, regarded as one of the key obstacles to the acquisition of agricultural credit by the farmer, has thus been removed in the North.

Finally, it is submitted that the most important beneficial effect of land policy in the North is that the enjoyment of rights in land is now based on Ghanaian citizenship. Entitlement of an individual to rights in land no longer depends on membership of a particular community or family. Provided that one is a Ghanaian and willing to develop land, one can approach the Lands Department at Tamale or Bolgatanga and acquire it on predetermined conditions laid down by law. These terms apply equally to all citizens, including those of the North.

This was the cornerstone of Sir William Maxwell's policy regarding all lands in the country as public lands. He recognised in the traditional systems of tenure a communal principle by whch land was regarded as a community asset and resource to which no individual should be permitted to lay exclusive claims. He had wanted to widen the scope of this principle to embrace the whole country through his abortive Land Bill of 1897. The results achieved in the North today are a vindication of the wisdom of his policy. The fact that the post-indepndent government found it unnecessary to abolish the system, but consolidated it with laws, may be seen as a recognition of the advantages of the system. Today, the majority of those closely connected with land problems in the country

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580 Standard Bank of West Africa Ltd., Barclays and the Agricultural Development Banks are some of the financial institutions presently pursuing such policies on agricultural credit in the North.

are agreed that nothing short of the introduction of of a system of land administration similar to that in the North throughout the country can effectively deal with Ghana's land problems.[581]

It may be argued that insecurity of title was no problem in the North because there was no great demand for land in those areas during colonial times. An answer to such an argument is that the question is not whether there was large-scale acquisition of land. What should be considered is whether the conditions which give rise to insecurity have been removed. The elimination of the inherent problems associated with insecurity is the more important thing to consider. In any case, the recent rice boom that accompanied the "Operation Feed Yourself" campaign of 1972, and which has led to a scramble for land in the "rice belt", has not given rise to problems of uncertainty and its associated costly litigation. In fact, in those cases where grants were made by the Lands Department in conflict with the traditional authorities, the matter was easily resolved administratively.

There is ample evidence in the North and other parts of Africa suggesting that state agency administration of lands can lead to greater certainty. In northern Nigeria where, by legislation similar to that of the North of Ghana, lands in that region were vested in the colonial government, a policy continued by the post-independence government of Nigeria, titles have remained certain and secure. In comparison with southern Nigeria, where, like southern Ghana, land administration was left in the hands of tribal authorities, there seems to be a high degree of title uncertainty and costly litigation.[582]

Today, the Nigerian government has recognised the wisdom of such land policies towards its Northern areas and has introduced a similar law to apply throughout Nigeria.[583] The objectives of the Decree are contained in its preamble which is self-explanatory. It states:

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581 In interviews with the Regional Lands Officers of Northern, Ashanti and Volta Regions, the Regional Surveyors of Ashanti, Northern and Volta, the Town and Country Planning Officers of the same Regions and people in similar positions in Accra, there was a general agreement that the answer to Ghana's land problems lies in State administration. It may be thought and rightly too, that the views of these men were influenced by their natural desire to protect their jobs. But there is no evidence to suggest that the continuation of the present system poses any real threat to their positions or to the jobs of their Staff under the Civil Service.

582 See the Land and Native Rights (Northern Provinces) Ordinance, No. 1 of 1901 as amended by No. 23 of 1926. There is a striking similarity between the Gold Coast Ordinance, Land and Native Rights (Northern Territories) Ordinance of 1931, Cap. 147, 1951 Rev., and the Nigerian Statute.

583 The Land Use Decree, No. 6 of 1978.

> "WHEREAS it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law: AND WHEREAS it is also in the public interest that the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved: NOW THEREFORE, THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows: . . ."

Section 1 of the above Decree proceeded on the lines of the above declared policy objectives to vest the administration of all lands in Nigeria in the State. The lands are declared to be held in trust "for the use and common benefit of all Nigerians" in accordance with the provision of the Decree.

This Decree will certainly have the effect of harmonising the land tenure systems of Nigeria if the terms of its provisions are complied with. The logical import of this Decree is that like the northern regions of Ghana, tribal, community or family membership basis of the enjoyment of rights in land has been replaced by the concept of Nigerian citizenship as entitling the citizen to enjoy land and the fruits thereof for the sustenance of himself and his family. It is submitted that this is a progressive and a healthy policy, albeit a colonial heritage.

If we look beyond Africa south of the Sahara, we can see in East Africa a further example of beneficial effects of the abolition of tribal and traditional authority administration. In Tanganyike, now Tanzania, where the German colonial administration abolished tribal tenure before the British took over the country as a mandated territory, the latter did not encounter the sort of land problems with which they became so preoccupied in the neighbouring territories of Uganda and Kenya. This German policy paved the way for the adoption of the present national land policies of Tanzania without any serious opposition from traditional leaders.

The trend in the formulation of national land policies indicates a tendency towards a return to certain aspects of colonial land policies of the past. In northern Nigeria and northern Ghana, there is no doubt that such policies have had their beneficial effects. It should therefore, be not only as a matter of regret but of great concern for what would appear to be a call on the part of the 1978 Constitutional Commission of Ghana for the abolition of the present land administration system in the North of the country by reason only that the system was established during colonial times. In its proposals for a constitution for the establishment of a transitional (interim) National Government for Ghana, the Commission made the following recommendations:

> "Our attention was drawn to the present lack of uniformity in the regime regarding stool and skin lands. Under the present system, certain skin lands in the Northern and Upper Regions are deemed to be 'public lands' and, as such, are vested in the Government of Ghana, whereas stool lands in other regions of Ghana are considered as being vested in the stools concerned. We recognise that this arrangement has been carried over from the colonial era and from previous constitutions and laws. We, however, consider that this system is unjustifiable, inequitable and anachronistic. We therefore recommend that it be abolished. . ." [584]

This recommendation was accepted and embodied in Article 183 of the Constitution which provides:

> "(3) For the avoidance of doubts it is hereby declared that skin lands in the Northern and Upper Regions of Ghana which immediately before coming into force of this Constitution were vested in the Government of Ghana are not public lands within the meaning or provisions of clauses (1) and (2) of this article.;
>
> (3) Subject to the provisions of this Constitution, all skin lands referred to in clause (3) of this article shall vest in the appropriate skin, without further assurance than this clause".

In making this recommendation which has been thus enshrined in the Constitution, the Commission provided no evidence the examination and analysis of which has led it to its conclusions on the land administration system in the North. Taking a decision concerning a matter involving the socio-economic development, not only of the North but the whole country, it is not enough for the Commission to declare that the present system of land administration in the North is unjustifiable, inequitable and anachronistic without indicating the respects in which the system falls short of justic, equity an modern requirements. The Commission seems to have based its conclusion on the erroneous assumption that any arrangement carried over from colonial times is necessarily out of date, unjust and inequitable.

The Commission seems to be saying that because stool lands are vested in stools in other regions of Ghana while skin lands in the North are vested in the Government, the system is unjust and inequitable. Does this means that the operation of two different systems of land administration in one country necessarily leads to inequity and injustice? There would seem to be no logical nexus between the inequity of operating different land administration systems in the same country. The injustice or inequity of the differing systems can only be objectively determined by the examination and analysis of the varying systems on a comparative

[584] See the Constitutional Proposals, op.cit., para. 280.

basis. This comparative analysis, the Commission has not done.

It is submitted that the Commission could only have performed its task creditably and come to the right conclusion by a thorough investigation and examination of the policy considerations actuating the introduction of the system in the beginning. In the course of doing so it would have to examine the ways in which the system has worked in the past and how it is working in practice at present. It is through this kind of investigation that it can discover the respects in which the circumstances actuating the introduction of such policies are still relevant or irrelevant, having regard to the circumstances of modern requirements.

If the Commission had carried out an investigation on the lines suggested above, it would have discovered the beneficial effects of the present system and would prbably have reached a different conclusion about the justice of the land administration system in the North. It may well be that it would have come to the conclusion that the system established in the North would be the best for the whole country. What the Commission has done at present is in effect to plunge the land tenure and administration in the North into the chaos associated with the tenure systems of the South.

It is respectfully submitted that the Constitutional Commission's recommendations being ill-considered, the provisions of the Constitution based on it should be amended so as to retain the present system of land administration in the North. Instead of abolishing it, it is suggested that the system should be extended to the whole country.

CHAPTER IX

FOREST LAW AND POLICY

A. Introductory

The forests of a tropical country like Ghana are important for the maintenance of climatic conditions necessary for agricultural productivity. Most tropical crops such as cocoa, coffee, the oil palm and other perennial plants grow best on forest lands. In addition to their suitability for most tropical crops, the forests help in checking soil erosion and seasonal bushfires, which could destroy farms, animals and much of the vegetation during the Harmattan period.

Adequate water supplies and the production of timber for fuel and furniture, building and for other domestic uses depend largely on the tropical rain forest. Moreover, the growth of the forests can, and do determine the general climatic conditions of the whole country. Apart from human needs, wild life also dpeneds, in many ways, on the forests. There are, therefore, strong reasons why the forests of the country should be treated as a common asset and resource which ought to be efficiently administered for the benefit of the nation at large.

Colonial policy concerning forest administration did not, however, proceed on the basis of a national land or forest policy. Forest policy was governed by the same principles upon which land policy was based. The forests being part of the general lands of the polities within the protectorates, their administration was left in the hands of traditional authorities, subject to such controls as might be imposed by laws and regulations. But mainly as a result of their ignorance and illiteracy, they were not adequately equipped with the necessary expertise to meet the responsibilities attendant upon forest management and administration during the time of the mining boom and the growing timber trade within the first decade of the twentieth century.

Despite this, when the colonial government introduced an Ordinance to make provisions for the creation of forest reserves to be administered by trained and qualified personnel of a Lands Department which was to be established under the Ordinance, there was organised opposition to the measure in the same manner as the Crown Lands Bill, 1894 and the Public Lands Bill, 1897 were opposed. So strong was such opposition from British businessmen and trade associations and the natives, that the Ordinance,

although it came on the Statute books, was never brought into force until it was replaced by another Forest Ordinance in 1927.[585] It is a matter of regret that although the colonial government realised that the traditional authorities and the greater majority of the native population could not appreciate the problems concerning forest administration at the time, it failed to be firm and resolute in pursuit of its policies.

B. Background to Forest Legislation

i. Problems of the Timber Industry

Before mining and timber firms began their operations on a large scale, the need for legislation to conserve forests and regulate their exploitation was not felt. The first enactment having anything to do with forests was the Native Jurisdiction Ordinance, 1883 under which Traditional Councils were empowered to make by-laws for the protection of water courses and conserving forests.[586] The native authorities did not, however, see the need for the creation of any such reserves, and thus did not exercise the powers conferred on them.

Despite this inaction on the part of Traditional Councils, the colonial government did nothing by way of forest legislation until the Report of the Commission on Agricultural Potential of the Gold Coast was published in 1889.[587] This Report provided the basis for the formulation of policy on forest management and administration. The Report, while drawing the attention of the British business community to the opportunities that the forests of the Gold Coast offered for investment, warned of the dangers associated with an indiscriminate and uncontrolled exploitation of the forests, described as an "untouched mine of wealth". The Report warned that while it was desirable to encourage the felling of timber, not only as a source of wealth but as throwing open to cultivation new tracts of land, the concomitant dangers ought not to be overlooked. It noted that there were too many examples of countries where such excessive destruction of forests had

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585 Ordinance No. 6 of 1927, repealed by No. 30 of 1935.

586 No. 5 of 1883, S.11

587 See the Report of a Commission appointed to Investigate the Economic and Agricultural Potential of the Gold Coast, 8 September, 1889; Accounts and Papers Relating to HM Colonial Possessions, 1890, No. 110, ZHC1/5239.

resulted in droughts, inadequate supplies of water, barren soil caused by soil erosion, and uncultivable land.

The Commission recommended the introduction of regulations providing for the replacement of destroyed forests. In any such regulation, provision should be made for preventing forest exploitation along rivers so as to ensure their continued flow. Government policy would seem to have been guided by the views expressed in this Report. Henceforth, its policy was directed towards the maintenance of sufficient land under forest to meet the needs of agriculture, to ensure adequate water supplies and to sustain the production of timber, fuel-wood and other forest products in sufficient quantity for export and local consumption.

Within four years of the publication of the Report on the Economic and Agricultural Potential of the Gold Coast, the operations of timber and mining concessionaires increased considerably, with the accompanying increase in the cutting of timber.[588] Notwithstanding this, the government did not introduce any law for regulating forest exploitation and the protection of its products. The reason for this lack of action on the part of government was due to the way in which it sought to deal with land problems generally. It seemed that both Governors Sir Brandford Griffith and Sir William Maxwell thought that if their respective Crown and the Public Lands Bills were going to bring the whole of the lands, including forests, in the Colony under government control, then special legislation on forests would be unnecessary.

However, when both Bills were withdrawn on account of the objections raised by European firms and the natives, the need for a special legislation for the regulation of forest exploitation was realised. Thus, as soon as Sir Frederick Hodgson assumed the governship as successor to Sir William Maxwell in 1898, he introduced an Ordinance to deal with forestry problems. It was obvious from the nature of the provisions of the Bill that due to past objections to legislation affecting lands, it did not go far enough in conferring general powers on the government to create or constitute forest reserves. Although it was entitled "Forest Reservation and Water Courses (Protection) Ordinance",[589] its provisions looked more like a revenue collection device rather than a forest protection and reservation statute.

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588 Between 1890 and 1894 a total of 23,300 tons of timber was exported to Hamburg, Liverpool and London.

589 The Ordinance was introduced on 6 October, 1899, but it was never brought into force. It met with objections from timber firms and the natives. See Dispatch form Sir F. Hodgson to Chamberlain, No. 108 of 12 March, 1900, C.O. 879/65.

The preamble of the Bill declared that it was designed to make provision for the conservation of woods and forests and the protection of water courses of the colony. However, in a memorandum to the Bill, it was stated that there had sprung up in the colony a class of middle-men land brokers establishing themselves as pricnipal controllers of the rubber industry; that they purchased rubber at cheap rates and resold it at higher prices to exporters, thereby absorbing much of the profit which ought to have gone to the producer or the exporter. To prevent this from continuing, one of the principal provisions of the Bill dealt with the question of issuing licences for cutting timber, the collection of fubber and cola nuts. The provision introducing licences was apparently aimed at middle-men and brokers.

Clause 6 of the Bill thus provided that after the passage of the Ordinance on a date to be notified by means of a Proclamation by the Governor, it would become unlawful for any one to cut down timber, collect rubber or any substance of a like nature, or cola nuts, without first being licensed in the manner prescribed by the Ordinance. For any breach of this provision, a penalty of a fine of not less than £5 and not more than a fine of £50 was attached. The power to issue such licences at a fixed cost of £6 was conferred on the Governor under Clause 7.

There were no provisions placing any significant restrictions on licensees' rights to cut timber. Clause 9 provided that where a person cut down, sold, bought or disposed of any timber, the girth of which was less than nine feet and measured ten feet from the ground, he should be guilty of an [illegible] offence and liable to a fine not exceeding £50, and the timber so cut should be forfeited to the government. As noted earlier, the Bill did not confer power on the Governor to constitute reserves directly. Under Clause 11, it was provided that the Governor "may with the approbation of the Head Chief of a District", constitute any land in such District, a reserved forest or reserve any land for agricultural or other purpose.

It was in respect of such reserves if constituted, that some degree of restriction on the way in which their resources might be exploited was imposed. Clause 14 provides:

> "Any person, who in a reserved forest:
> a. causes any damage by negligence in felling any tree or cutting or dragging any timber, or wilfully strips off the bark or leaves from or otherwise damages any tree, shall be guilty of an offence and on conviction shall be liable to a fine not exceeding twenty pounds".

The making or burning of fire, felling, girdling, tapping or burning of a tree in a reserved forest were prohibited under Clause 15 of the Bill. But it must be noted that these restrictiosn applied to reserved forests only. It can therefore be seen that apart from restrictions on the cutting of timber, the girth of which was less than nine feet measuring less than ten feet from the ground, licensees were free to do all the things prohibited in forest reserves without necessarily breaking the law, provided they were done outside such reserves. Hence the provisions of the Bill would have been inadequate to deal with the problems concerning indiscriminate explotiation of the forest resources even if they had come into force.

To supplement its provisions, Regulations were made pursuant to Clausen 23 of the Bill in order to provide for the replacement of destroyed timber, and to prescribe rules for the tapping of rubber. Rule 3 of the Regulations provided that whenever a tree was cut down, another tree of a similar kind should be planted in its stead within seven days near to the place where such tree had been cut down. This was the only provision dealing directly with matters relating to forest preservation under the Regulations. Most of the rules were devoted to prescribing rules to be followed in the tapping of rubber, its sale and the keeping of account books in respect of the rubber industry.

Not only were the Bill and the rules made thereunder not inadequate enough to meet the problems arising out of the rapidly developing timber industry, but they were not brought into force. The provisions of the Concessions Ordinance under which timber concessions were acquired, were also not adequate to cope with the problems. The rate of growth of the timber industry was reflected in the volume of export of timber to Europe within the first five years of the twentieth century. For instance, in 1902, there were exported ~~form~~ from the Colony no less than 2, 228,618 feet of timber, valued at an export price of £21,896. In 1903, exports more than trebled, amounting to 7,382,684 feet, valued at £48,853. This figure increased in the following year to 16,012,560 feet, the export value of which was £34,294. This trend continued in 1905, where the export value was £84,429. In 1906, the export of the year, excluding the month of January, was valued at £75,939, making the total export of the five years ended 31 December, 1906, excepting the month of January,1906, 41,419,930 feet at a value of £285,411.[590]

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590 See The Memorandum of the West African Branch of the Liverpool Chamber of Mines on the Subject of Timber Rights Reserved to Holders of Mining Concessios, 27 May, 1907, C.O. 879/65.

These figures speak plainly for themselves, showing the extent to which the country was being denuded of timber. What was more, at the same time as the timber industry was flourishing, the mining industry was booming. This was accompanied by the increasing use of logs obtained from the forests around the mining centres. A considerable quantity of timber was required for props in the underground working of the mines. Apart from using logs for props in their mining operations, miners used a lot of timber as fuel. It was cheaper to burn readily available wood for fuel than to buy imported coal. For both fuel and props, miners preferred a particular species called "Kaku" or "fillacopsis Kaku" due to its strength and durability. Mining firms gave the supply of this species to independent contractors who cut down the largest of the trees to be found. As these got exhausted, they cut down under-sized trees near to the firewood tramways in order to save costs on transport.[591] All these opened the forests to serious risks and which might endanger adequate water supplies and injuriously affect the climatic conditions of the colony.

There were difficulties about the exercise of control over the way in which forest resources might be exploited. Timber concessions were acquired under the provisions of the Concessions Ordinance. Yet the Ordinance did not contain provisions making operations of timber concessionaires subject to effective governmental control.

The statutory definition of the word "Concession" under Section 2 of the Concessions Ordinance was "any writing whereby any right, interest, or property over land with respect to . . . timber . . . purports to be either directly or indirectly granted by a native . . . "

As we have seen earlier, any person claiming to be entitled to the benefit of any such concession was required under Section 9 of the Ordinance to file notices thereof within six months of the date of the acquisition.[592] He was also to file the documents relied upon in support of his claim. Under Section 9(2) of the Ordinance, a penalty of a fine not exceeding £5 for every day during which default in compliance with this section continued was imposed. By Sections 27 and 28, a concession holder was burdened with a duty of preparing and delivering to the Treasurer, a statement of profits made by him from the concessions during every 12 months. Under Section 31 of

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591 Dispatch from Governor F. Rodger to Secretary of State, 17 June, 1908, C.O. 879/99.

592 See the discussion of this at p.181-192.

the Act, a penalty of £50 and treble the amount of duty payable were imposed on persons neglecting to deliver such statements.

Despite these provisions of the Ordinance, it would appear that the government was not keen to enforce the law against timber concession holders. This led the West African Chamber of Mines to complain that timber concessions had been overlooked in the anxiety to enforce the law against the holders of mining concessions.[593] Mr. Giles Hunt, writing on behalf of the West African Chamber of Mines, drew the attention of the Colonial Office to the way in which timber firms were allowed to operate in breach of the provisions of the Ordinance with impunity. He wrote:

> "Now /sic/ of all the 183 certificates of validity that have been published in the Gazette up to the 7th of March in this year, only two, viz., Nos. 169, Apani Timber, and 170, Bogosu Timber, are in respect of timber concessions. So far as I know, no proceedings have ever been instituted by the Government to enforce compliance by timber concessions holders with the Sections of the Ordinance which I have referred to above or to recover penalties for non-compliance therewith".[594]

Under the provisions of the Concessions Ordinance, mining in the colony was made unlawful unless a concession was obtained from a native having the right to make the grant or unless a mining licence in the manner prescribed by law was obtained from the Governor, and the necessary stamp duty was paid.[595] It was competent for the Governor to prevent mining promiscuously, not only on the part of the concession holder by civil process, but also through the imposition of penalties. However, as Mr. Hunt had pointed out in his Memorandum, timber concessionaires were left free to operate in the forests as if they were not subject to these laws.

Some timber firms employed "Contractors" to deliver quantities of timber on the tramways. These contractors felled timber at random, and went wherever they chose. On occasions, they might be stopped by a chief if the timber cutting was not by his authority. In those cases where the chief protested and sued for trespass, it had no effect on the culprits because they were often men of straw against whom it was not worth proceeding.[596] It often happened that some firms employed gangs of "Kroo boys" who were sent out as contractors to cut timber. On some occasions, the cutting was done under what was termed a "licence" from a local chief. The effect

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593 The Memorandum of 27 May, 1907, op.cit.

594 Ibid.

595 S.25.

596 Loc.cit.

of such a licence was that the latter allowed the licensee to cut timber at will, paying a royalty for each tree cut and not limiting the licence to a particular area or excepting other concessions from its scope.

Some of the difficulties attending the operations of such timber "contractors" were that although the licences under which they carried out their operations could be regarded as concessions within the meaning of the Concessions Ordinance, they were neither forwarded for stamping by the Commissioner of Stamps, nor were they submitted to the Concessions Courts for their validity to be certified. The result was that apart from the loss of revenue to government, timber was cut in the forests without regard to already existing concession rights. It was impossible for concession holders to police their areas of operation unless an army of men was employed to keep continuous watch and ward over the whole area to prevent the marauding expeditions carried out by the so-called contractors.[597]

What made these state of affairs serious for forest preservation was that timber cutters did not follow any rules of procedure. Rules concerning the scientific cutting of the trees of the forest so as not to endanger their destruction were not observed. As was remarked in the Hunt Memorandum on behalf of the West African Chamber of Commerce, timber cutters never confined themselves to trees of full growth, fit to be cut. They seemed to benefit merely by obtaining so many thousand feet of the timber. Both at Axim and Sekondi, one often saw logs of not more than 14 or 15 inches square, and at times of even less dimensions.[598]

This meant that the trees, which if the forests were conserved, would constitute the future prosperity of the timber industry and would be a great asset to the Colony, were being "ruthlessley destroyed in their infancy, the assets of the Colony being anticipated by thoughtless and irresponsible parties for their immediate gain".[599] Commenting on the consequences of such state of affairs, Mr. Hunt gave the following warnings:

> " . . . the devastation that is being carried into the forest, and the rapid destruction of a most valuable asset to the Colony that must inevitably occur if matters are allowed to continue as at present can only be prevented if something is done by way of legislation".

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597 Loc.cit.

598 Loc.cit.

599 Ibid.

Apart from his caution that irreparable damage to the forest would affect rainfall as it had already done in certain parts of the Colony, he made some specific suggestions as the lines on which legislation might proceed to deal with the problems. He suggested that legislation should be passed prescribing:

a. the land area within which timber may be cut in any one year;

b. the number of years which should elapse before an area should be cut over a second time;

c. the number of trees to be left on each specified area of land;

d. the minimum girth of trees which may be felled; and

e. making regulations for the reservation of selected trees for seedling purposes and reafforestation.

He also suggested the immediate introduction of laws prohibiting the export of small logs. The establishment of a forestry department to be responsible for a scheme of forestry administration in the Colony, was one of the main suggestions. Some of the most important duties of the forestry department, if established, should be the enforcement of rules and regulations concerning forest protection and reservation.

The suggestion was also made that chiefs' rights in regard to timber should be limited. Although they might be "owners", they should also be made to hold a licence if they wished to cut timber. Such a licence should prescribe the area in which the timber was to be felled, and it should be published in the Gazette and persons claiming through the chief should also be made subject to such rules, and their rights should be registered under the Registration Ordinance. As an immediate step to meet some of the pressing problems, Mr. Hunt recommended the amendment of the Concessions Ordinance in order to place timber concessions and timber cutters, who had hitherto not been required to take out any licence, on the same footing as holders of mining concessions in respect of which a licence fee of £30 had to be paid.[600] In lieu of the ordinary royalty of 2½ per cent on the net profits of timber concessions, there should be an export duty on timber concessions.

These suggestions were favourably received by the Acting Governor and the Chief Justice. The former thus instructed the latter to draft a Bill for the amendment of the Concessions Ordinance in accordance with the views expressed by Mr. Hunt on behalf of the West African Chamber

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600 Ibid.

of Commerce. The changes which the amendment sought to bring about were that:

a. notice of concession which was the first legal step in an application for a certificate of validity should not be filed until the Registrar was satisfied that a stamp duty in respect thereof had been paid;

b. no person should for the purpose of a sale, barter exchange, or export, cut or fell any of the trees including mahogany which were to be specified under the Schedules to the Amended Ordinance without holding a written Concession from a native having the legal capacity to concede such a concession, and unless he had obtained a timber cutting licence costing £30 from the Governor;

c. none of the specified trees under the Schedule should be felled without the written consent of a District Commissioner if the girth of the specified tree be less than six feet at the height of six feet from the ground:

d. nobody should collect uncultivated rubber without being the holder of a written concession from the native having the power to grant the right and unles he obtained a rubber collecting licence costing £30 from the Governor.

The operation of these laws, if they were introduced, were to be strictly confined to the Gold Coast Colony, and native holders of land upon which timber or rubber was growing, and in respect of which no concessions were conceded, were to be exempted from the restrictions imposed under (b) and (d). These changes were to be introduced immediately, pending a forestry legislation which was under consideration.[601]

When the draft on the lines outlined above was presented to the Legislative Council, it met with strong opposition from timber merchants and the native authorities. Although the amendment sought was virtually based on the recommendations of the West African Chamber of Commerce, certain aspects of it did not please them. They took exception to the inclusion of the species "Kaku" or "fillacopsis Kaku" in the protected trees under the Schedule to the Amending Ordinance. They alleged that the use of such trees as fuel and as props in the underground works of the mine was indispensable in their mining operations.

Following these protests, an informal meeting between Governor Rodger and unofficial members of the Legislative Council was arranged. As a result of the meeting, the Governor decided not to proceed with the amendment of the Ordinance. Action on it should be delayed pending the Report

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601 From Governor to the Secretary of State, 31 August, 1907, C.O.879/99.

of a Commission to be set up to investigate the problems arising out of the timber industry.[602] In spite of the fact that Governor Rodger was not enthusiastic about an immediate legislation to deal with these problems, the Acting Governor who deputised for him during his absence on leave in England, was favourably disposed towards immediate legislation. He thought it was no longer desirable to delay action on preventing the cutting of immature timber. For this reason, in place of amending the Concessions Ordinance, he proposed a short legislation, the Timber Protection Bill, 1907, for the regulation of certain aspects of the timber trade.[603]

The objective of the Ordinance was expressed in its draft memorandum as being to prevent the "wanton destruction of immature trees which possess economic value".[604] The most important of its five provisions was Section 3. It provided:

> "3(1) No person shall without the permission in writing of a District Commissioner cut or fell any growing timber the girth of which is smaller than the following dimensions:
>
> a. in the case of timber trees in Part I of the Schedule to this Ordinance, a girth of nine feet at a point one foot above the convergence of the buttress roots, if any, or at the base where there are no such roots;
>
> b. in the case of timber trees in Part II of the Schedule to this Ordinance a girth of four feet six inches, at a point one foot above the convergence of the buttress roots, if any, or at the base where there are no such roots;
>
> c. in the case of timber trees in Part III of the Schedule to this Ordinance a girth of three feet at a point one foot above the base".

Section 3(2) imposed a penalty of a fine not exceeding £50 for the contravention of any of the above provisions, and on the second or subsequent conviction for any breach, to imprisonment for a period not exceeding six months.

These provisions imposed the same restrictions to which timber merchants and mining companies took exception under the proposed amendments to the Concessions Ordinance. It was therefore, not surprising that similar objections were raised again. The inclusion of the species "fillacopsis Kaku" in the protected trees to which miners had raised objection was once again included in the Protected Species. As in the past, the West African Chamber of Commerce argued that if miners were prevented from

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602 Acting Governor Bryan to Secretary of State, 18 November, 1907, C.O. 879/99.

603 Ordinance No. 20 of 1907, Cap. 96.

604 Loc.cit.

cutting this particular tree, for use as props in the underground workings, the mines could become exceedingly dangerous underground, owing to the lack of support in the slopes and other workings.[605]

The natives on the other hand, as on previous occasions, attacked the Ordinance on several grounds. Mensah Sarbah, a member of the Legislative Council strongly opposed the Bill. He argued that the Bill should deal only with the timber trade which was principally responsible for the cutting of immature trees. He pointed out that the use of immature trees which natives considered suitable for erecting houses, making furniture and for other purposes, did not constitute a "wanton destruction", and the fact that any of the trees specified under the law had been cut for any such purposes ought not to be made an offence.[606] In as much as a parent did not teach or guide his child to do what was right by convicting him of an offence, Sarbah pleaded, even so ought not the government, which was to a large extent standing "in loco parentis" to the native chiefs and their people, make convicts of them through this sort of legislation. He questioned the soundness of a law which made a land "owner" a criminal by reason only that he made use of what was his own. He argued that the Bill in that form would have the effect of restricting native enterprise by imposing limitations on the people's right to cut wood for various uses.[607]

Sarbah's arguments boiled down to the proposition that where immature trees were cut by a native for domestic and other uses, this should not be made unlawful. If, on the other hand, such trees were cut for export, then such an act could be made unlawful. The problem, as the Acting Governor Bryan had rightly pointed out was that, it was impracticable to distinguish between immature timber felled for export and that felled for local use. In either case, a valuable asset was destroyed.[608] Stressing the need for such a law, Bryan said:

> " . . .this Ordinance has been passed with the object of dealing with the most urgent of the many questions connected with forestry in this colony. It is an endeavour to protect the chiefs against their ignorance and cupidity which prompt them to hand over the exploitation of their tribal land - generally through the medium of a native lawyer - to unscrupulous contractors and middle men. I question whether a 'land owner' of any importance in the sense in which Mr. Sarbah uses the word . . . is to be found in the Colony. The chiefs and councillors are merely trustees for tribal lands, and if they neglect or abuse their trust to the detriment of their successors and people, I consider that their responsibilities should be

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605 Governor Rodger to Secretary of State, 17 June, 1908, C.O. 879/99, Enclosure No. 1.

606 Ibid.

607 Loc.cit.

608 Ibid.

brought home to them as provided in the Ordinance by a fine and on subsequent offence, by imprisonment".

The interesting point to be observed about Bryan's arguments was that they echoed and reflected the views and policies of Sir William Maxwell on the control function of chiefs in the land tenure systems. The difficulties associated with this kind of legislation had an irony that while the government had consistently proceeded by making laws which it believed would be in the best interest of the natives and British trade and industry, one often found both natives and British industrialists on the same side opposing such measures, although their grounds for objection might differ. Not infrequently, the declared objectives of the law had been the protection of the native against the sharp practices of certain European firms and native merchants and lawyers. The truth of the matter, as pointed out already, was that although the latter were natives and theoretically represented native opinion, their economic and commercial interests coincided with those of the former. This fact affords explanation for the main reason why the native capitalist and the European industrialists often found themselves on the same side on issues concerning enactments on lands.

The Colonial Government often found itself in this sort of difficulty because it seemed unable to recognise the fact that those who needed protection were not necessarily the traditional authorities, but the ordinary citizen. To protect them adequately, their support was needed. This support could be obtained if they were enlightened through public education so as to prepare their minds for the changes sought to be introduced. Even if government officials made statements implying the recognition of this fact, no practical steps were taken to devise the means by which this sort of education could be undertaken. Under these circumstances, when measures which would have afforded some measure of protection to the ordinary man were opposed by the native middle class whose economic interests might be injuriously affected by those measures, the ordinary man, who looked up to the former for leadership and protection, being ignorant supported them.

As on previous occasions, the objections raised to the Ordinance led to its provisions not being implemented. On account of the protests Governor Rodger, who was away in England before the Ordinance was enacted, regretted that it was passed without awaiting either the Report of Mr.

Thompson or the Report of the Timber Commission appointed by the acting Governor Bryan.[609] He was thus in favour of its amendment or repeal altogether so that its general provisions could be incorporated in a Forest Ordinance. On the basis of these recommendations to the Secretary of State, the application of the Forest Protection Ordinance was suspended, pending the Reports of the Timber Commission and H. N. Thompson's investigations.

The Reports referred to above provided the guidelines for the future legislation on forests on the Gold Coast. As will become clear from this discussion, a close look at these Reports would reveal that the nature of the responsibilities involved in a scheme of forest administration considered necessary for the Gold Coast at the beginning of the twentieth century, was far too sophisticated for the chiefs and traditional elders to discharge efficiently. The performance of the functions involved would require competent personnel of surveyors, foresters and an educated clerical staff. For this reason, it would be unrealistic to entrust traditional authorities and chiefs with that responsibility. In order to appreciate the duties which the scheme would entail and the reasons why in our opinion, the function of forest administration should have been left in the hands of state agencies, we shall take a close look at Thompson's Report on the subject of forestry administration in the Gold Coast and his guidlines which were based on the Southern Nigerian experience.

ii. The Thompson Report

As a result of the problems arising out of the timber industry discussed above, Mr. H. N. Thompson, Conservator of Forests for Southern Nigeria, was invited ~~to~~ by the Gold Coast Government in 1904 and charged with the task of investigating and reporting on forestry matters on the Gold Coast and to ~~recommend~~ the lines on which a forest leigslation should proceed. At the same time, the Acting Governor Bryan had also appointed a Commission to investigate and report on the subject of forest legislation and the timber industry. Thompson's task was rendered easier by the fact that conditions prevailing in Southern Nigeria were similar to those in the

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609 Dispatch from Rodgers to Secretary of State, 17 June, 1908, C.O. 879/99. Mr. H. N. Thompson was the Conservator of Rorests for Southern Nigeria who was required to investigate and report on forestry matters in the Gold Coast.

Gold Coast.

In addition to submitting to the government his written observations on what he had found from his inquiry in the Gold Coast Colony, he supplied to the latter the guidelines for the organisation of forest administration in Southern Nigeria for which he was responsible.[610] The guidelines prescribed the duties and responsibilities of the senior and junior staff. It laid down rules for the supervision, examination and collection of information on plants of the forest, their analysis and reports thereon. The result of such information would determine policy on conservation, the selection of particular species for protection and questions relating to afforestation.

According to the Southern Nigerian guidelines, forest administration was the responsibility of a senior and a subordinate staff. The main duties of the senior staff consisted of supervision, the analysis of data and information, and the submission of reports. There were Assistant Conservators of Forest of the first and second grades, having the responsibility of examining forests situated in the areas within their charge during the dry season. It was their duty to submit proposals for the reservation of the most important of such forest land under their care.[611] Thus if the Gold Coast was to adopt the same scheme of forest administration and management, then the qualified staff would have to be found to discharge these responsibilities.

In examining the forest with a view to making proposals for forest reservation, the guidelines required special attention to be paid to areas covered with a growth of high forest that did not appear to have been previously felled by the natives for farming purposes. Out of such places, the areas to be selected for reservation should be seen to contain a fair proportion of any or all of certain specified species numbering nine plants. Also important was the identification of specimens of flowers, fruits and leaves of plants. All such plants as could be of economic value were required to be identified and variously labelled as follows:

a. the date of collection;

b. the locality or District name of the forest or the nearest village, whether growing in a dense forest or open forest, on hills or in valleys; and

c. the colour of the flower and its native name.

All specimens so collected would have to be serially numbered and

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610 See Correspondence Relating to Botanical and Forestry Matters in British Tropical Colonies and Protectorates in Africa, 1905-1907. C.O. 879/88, African No. 785. My facts are based on this correspondence.

611 Ibid.

the flowers and leaves procured from the same treee should all bear the same number. All collections of plants, fruits, seeds and other articles of minor forest produce were to be handed over to the District Commissioner with a written request that they should be forwarded to the Director of the Botanical Gardens, Kew, in London.

According to the guidelines provided by Thompson, one of the important duties which a forest officer would have to perform was the investigation of the sylvicultural requirements of the most important species of plants growing in the forest under his charge, paying special attention to some specified species of plants. Information concerning their rate of growth, whether they were evergreen or belonged to the class of deciduous trees that shed their leaves annually, was to be collected. Storing information on these matters was regarded as the most important aspect of the organisation of forest administration because the formulation of policy and decision making about the way in which forest resources should be exploited, protected and preserved depended on the accuracy and scientific analysis of such data.

With regard to ascertaining the rate of growth of plants, the Thompson guidelines required that certain procedures should be followed. The main thing to ascertain was whether the concentric rings found in the wood concerned were annual or biennial. The Thompson Report noted that deciduous trees generally showed well-marked annual period of rapid growth in the form of rings in their woods. Although evergreen trees often did the same, there was normally no means of ascertaining whether the rings formed annually or not. The safe procedure for finding out, the guidelines said, was to compare a number of rings in the wood of every young tree with the age of trees estimated from other known evidence, such as the number of years that might have elapsed since the area on which the young plants were growing was last cleared, and the time that had elapsed since it was abandoned.[612]
Similarly, the correspondence between the ring and the age could be discovered from planted trees, the age of which were known. If the average number of rings and the age could be found out from this evidence, it might be learnt that the consecutive number of rings were put on during each year. In such a case, the data might be sufficient to ascertain the age of trees of the same species from an enumeration of the rings

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612 Ibid.

alone. The correspondence between the rings and the age having been established, the age of any particular plant of the same species could be discovered by counting the number of rings along two or three selected radii of a log of stump and taking the average. The rate of growth could then be established by counting the number of rings occurring along each inch of radius. The same method could be used to find out the rate of growth of the different species and the life of the tree. The Report warned that for data of this kind to be of scientific value, they should be procured from the average of a large number of observations and the peculiarities of each species in that respect would have to be ascertained separately.

The purpose of the exercise outlined above was to ascertain the condition of the gradation of the age classes with reference to any particular species. As pointed out by Thompson, in a well-stocked tropical forest, the girth of the trees may, with a fair degree of approximation be taken as directly proportional to the age of the tree; therefore, if the girth of the various sizes are equally spaced out between the plants of the smallest size and the average size of the mature tree, a convenient workable scale could be arrived at. The classification of the ages into young, middle-aged, mature and subsequent determination of the proportion existing among the number of plants found to fall into each of these classes would be quite sufficient to indicate whether or not the age gradations greatly depart from the normal type.[613]

The value of this classification into age groups of plants was that it enabled the forest officer to offer sound advice to government through the Conservator of Forests, on forest reservation. For instance, by this classification, if the number of plants in the youngest and middle-age classes were found to be less than that in the mature class, then the forest, so far as any particular species under discussion was concerned, was over-mature and great care would have to be taken in its exploitation. If, on the other hand, the number of plants found in the youngest class was very much in excess of that in the middle-age class and the number in the latter class was in turn in excess of that found in the mature class, then the age gradations should be regarded as approaching closely to the normal type. In such a case a large number of mature trees would be available for exploitation without running the risk of encroaching upon the growing stock.

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613 Loc.cit.

These classifications and the identification of growth rate and age of plants were thus of vital importance in the selection of forests for reservation and the formulation of rules for regulating the cutting of plants in the forest. In selecting forest for reservation, secondary growth which had been left untouched for such long periods that it had had time to grow up again into high trees very nearly as good as the original ones that were not felled, should be preferred to young secondary growth. Thompson recommended that apart from selecting forests for reservation on the basis of the classification outlined above, forests growing within reasonable distance of streams capable of floating timber should also be chosen in preference to those inaccessible ~~to~~ for exploitation. The rationale for this recommendation was obviously to prevent many roads from being constructed through the forests and thus destroying forests in the process.

Among the factors which Thompson recommended should be taken into account in selecting forests for reservation were the system of shifting cultivation practised under the traditional system and the requirements of the local population. When the Forest Officer was submitting proposals for forest reservation, he was duty-bound to ascertain and make sure that sufficient forest land would still be available to the natives for their agricultural operations. He would have to make enquiries regarding the size of villages in the area proposed for reservation, the approximate area required by each village in each year for cultivation, the length of the farming rotation, that meant the ascertainment of the number of crops raised on newly-developed farms before they were again abandoned to forest growth.

Apart from submitting reports to the Conservator of Forest on all relevant information concerning the forest as outlined above, the Forest Officer was to have other important functions. He was to exercise adequate supervision over the workings of timber concessions in their respective areas. He was to check as often as possible, work done by his subordinate forest rangers. In this regard, he ought to make frequent tours. He would have to keep watch on rubber nurseries and young plantation, and make adequate provisions for their annual extension and preservation. He was to be responsible for reporting to the Conservator of Forest the infringement of minimum girth rules and any cases of undersized felling of timber by concessionaires. He would have to bring to the attention of any guilty concessionaire carelessness in felling causing injury to young growth. It was his duty to check wasteful logging and to inspect

plantations made by concessionaires to replace trees felled by them. He would have to ensure that the species planted were really the same type as those felled and that they were properly spaced. To be sure that trees felled were replaced, the Forest Officer would be required to inspect the books of concessionaires so as to check the number of trees and logs shown with the numbers actually found on the stumps in the forest.

In addition to his guidelines, Thompson made certain observations on the controversial Timber Protection Ordinance. On the basis of the information received from the principal mining stations he visited, Thompson came to the conclusion that some of the criticisms levelled at the Timber Protection Ordinance were well founded.[614] He was of the view that the number of species protected under the Ordinance was far too ambitious. He observed that they included practically one-third of the arboreal vegetation of the forest in the western province and Southern Ashanti. As far as native farms were concerned, he observed, the protection accorded to trees would result in so many of them being left on the farms as to render the cultivation of crops under them a precarious matter on account of the amount of shade to which they would be exposed.[615]

He noted, however, that the Bill did not go far enough to protect the forest as it omitted certain species the protection of which was imperative. Thompson described past attempts at forest legislation in the Gold Coast as crude, but well-intentioned efforts to solve problems of forest conservancy. He pointed out that long experience in the tropics had shown that it was far better to adopt intensive protection in certain selected areas as reserves, and to introduce only the slightest restriction to the bulk of the remaining forest.[616] He thus recommended the reduction of protected species from 14 to six. He would not advise restriction on mining firms to cut wood for fuel or timber for mine props. In his opinion, such restrictions could only be justified if it was shown that such cutting was causing the destruction of the forest, and bringing about denudation of hillsides or causing diminution of water supply.

His written observations, suggestions and recommendations including the guidelines for the organisation of forest administration, were submitted to the Gold Coast Government to form a basis for a comprehensive forest legislation.

The treatment of Thompson's guidelines in such detail is meant not only to illuminate the nature of the work and responsibilities which

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614 Dispatch of Governor Rodger to Secretary of State, 17 June, 1908, C.0.879/99, Enclosure No. 3.

615 Ibid.

616 Loc.cit.

forest administration would involve, but also to demonstrate that the scheme of forest administration envisaged would be far too sophisticated for the illiterate native chief to manage in a meaningful manner. In predominantly illiterate societies of the Gold Coast, the chief could not be expected to find the necessary qualified staff without which the performance of the functions connected with the organisation of forest administration described above would be impossible. The case for traditional authority administration of forests was made even weaker by the fact that the chiefs were generally ignorant and had shown themselves averse to concerning themselves with matters relating to forest protection, preservation and conservancy. Their unwillingness and inability as we have seen, to exercise the powers conferred on them under the Native Jurisdiction Ordinance of 1883 to make bye-laws for the preservation of forests and protection of water-courses were reflective of their general attitude to forest conservation.

The success of a scheme of forest administration on the lines suggested by Thompson would therefore appear to depend on considerable governmental participation. It was only the government who could obtain and maintain the qualified staff of clerks, surveyors, forest officers, foresters and forest rangers which were essential for the efficient organisation and administration of the scheme. The Colonial Government began to shift from policies by which chiefs were left to make decisions concerning forest reservation and the protection of its resources.

The development of a new policy towards greater governmental control was reflected in the amendments which were proposed to the Concessions Ordinance and the introduction of the Forest Protection Bill. The speech on the Forest Bill by the Acting Governor Bryan in the Legislative Council, reflected and echoed Sir William Maxwell's views about policy on such matters.[617] The former was so keen on basing the proposed forest legislation on sound policies that he set up a Commission to enquire into the timber trade.[618] The Commission's Report was intended to be a supplement to that of H. M. Thompson. As we shall see presently, its Report and recommendations were reflective of the growing realisation that greater governmental controls would be necessary if the objectives of land and forest policies were to be achieved.

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617 See Dispatch from Rodger to Secretary of State, 17 June, 1908. C.O. 879/99.

618 Ibid., Enclosure No. 4.

iii. The Pennington Report on the Timber Industry

The Commission's terms of reference were that it should enquire as to whether any of the provisions of the Concessions Ordinance 1900, and the Ordinances amending the same, had a tendency to place holders of timber concessions at a disadvantage in competition with other persons in the timber trade. It was to find out what system of registration of timber cutters was desirable and feasible. The Commission was required to recommend what type of legislation, if any, was required to correct abuses and hardship which might be brought to its attention.[619]

The Commission sat at Axim and Secondi, the two principal timber-cutting centres of the time. Its terms of reference were circulated among timber cutters and all known timber merchants. In response to this, memoranda were received from various trade associations and individuals interested in the question. From the perusal of these memoranda and oral evidence of those appearing before it, the Commission found that the prevailing laws governing timber concessions were generally disregarded. The Commission found that the provisions of the Concessions Ordinance and its amendments were deliberately and systematically avoided by the majority of persons engaged in the timber industry. As a result, the Government lost substantial sums which could have accrued to it as revenue under the Stamp Ordinance of 1889.[620]

Among other findings of the Commission was the discovery that there were many timber cutters having no licence under the Concessions Ordinance, and that the majority of people in the timber trade were under no control as to the way in which timber should be felled. This resulted in indiscriminate devastation of the forest, which might prove very dangerous to the climatic conditions and water resources of the country in the future. The three members of the Commission were agreed that one way of dealing with the problem was the registration and licensing of persons dealing in timber, and that trade marks should be assigned to each in their several branches. But they were unable to agree on the form and scope of the proposed timber cutter's licence.

Mr. Hunt, a representative of the West African Branch of the Liverpool Chamber of Commerce, and a member of the Commission, took the view that no cutter's licence should be issued to any person unless he held a concession

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619 Ibid., Enclosure No. 5

620 Ibid., Ordinance, No. 12 of 1899.

duly registered and stamped under the Concessions Ordinance. He thought this would prevent to a large extent, trespassers cutting on other people's possessions, and would also make the working of any future forestry department, especially with regard to reafforestation, very much more simple. It would also make it possible for large tracts of land hitherto unsurveyed, to be surveyed and tied on to government datum points.

Strongly advising that the Government would have to assume full control over the forests, he warned:

> "The forests are assets to the Colony which could no longer be neglected or allowed to be wasted. Unless the government is prepared to take, at once, such steps as are necessary to acquire and create large forest reserves, in order to preserve at least some part of the valuable timber in the Colony, I see no alternative to the establishment of the scheme I have advocated". [621]

H. M. Thompson whose views were sought on the form and scope of the proposed timber licence agreed with Mr. Hunt that every timber cutter should be licensed, even where he was the owner of the land on which the timber to be cut was growing. It was his opinion that if exceptions were made, the enforcement of any laws on the subject would prove difficult. [622]

The Chairman of the Commission, Mr. Justice Pennington and Mr. Coghill, on the other hand were of the opinion that if the views of Mr. Hunt and Mr. Thompson were adopted, it would have the effect of practically excluding the natives from cutting timber for sale or export. They noted that under the prevailing law, natives had the right to mine and cut timber with or without a licence. If all persons, including natives, were required to take out a licence, it would amount to the reversal of the policy of protecting the natives in their admitted rights of property in the land, as requiring them to take out a licence might compel them to work their timber through concessionaires. [623] They noted that a great deal of timber cutting for export was in the hands of small cutters, and had been so for the past 12 or 15 years, and there was no evidence to show that such small cutters carried out their business in a dishonest manner. For these reasons, they believed that nothing should be done to throw the timber business into the hands of European companies who would probably take large tracts of land without any immediate intention of working them, as had been the case with mining concessions. [624]

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621 Ibid.

622 Loc.cit.

623 Loc.cit.

624 Ibid.

In accepting the Report, the Governor, John Rodger, agreed with the majority view of Mr. Justice Pennington and Mr. Coghill. Disagreeing with Mr. Hunt nd Mr. Thompson's views on the matter, the Governor argued that having regard to the proprietary rights of the natives which had been formally recognised, the views taken by the former were more consonant with justice than those of the latter.[625]

It should, however, be remarked that for the law to require all persons to take out a licence before cutting timber would not necessarily mean that ownership of the land was being challenged. A man may own land andbe entitled to do as he pleases with his own; but his exercise of rights thereof can always be made subject to the general laws of the society in which he is owner of the land. Thus, if in the Gold Coast Colony, it was found that the way in which timber was being cut would prove injurious to the interest of the society at large, it was competent for the government of the day to make laws to control the way in which timber might be cut. If taking out licences was found to be one of the ways in which abuses in the system might be checked and a general law to bring this into effect was passed, this would not necessarily be inconsistent with rights of ownership.

Perhaps, the problem which might be associated with the introduction of such a measure would be the difficulty which the predominantly illiterate natives would face in going through the bureaucratic procedures and satisfying the conditions which would enable them obtain the prescribed licences.[626] This difficulty might lead to the results which the Governor, Mr. Coghill and Mr. Justice Pennington feared. But this would not necessarily mean that the law was challenging the ownership rights of the natives. Most probably, it was the problem which would accompany the introduction of the measure that the Governor and the majority in the Commission had in contemplation when advancing their arguments, although this was not brought out clearly. Whatever might be the merits or demerits of the opposing views on the issue, this Commission's Report, the guidelines and the observations of H.M. Thompson, convinced the government that a large measure of governmental control over the forests was essential for its efficient administration. The need for the establishment of a forest department with the responsibility of organising forest administra-

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625 Ibid.

626 Secret Dispatch from Governor Rodger to Secretary of State, 14 July, 1908, C.O. 879/99.

tion became patently obvious. The duties which forest administration on the scale provided by Thompson's guidelines entailed made it imperative that government officials with the training and know-how be employed to perform the functions implied by the scheme. As will be seen in the discussion of the Forest Bill below, the recognition that increasing governmental control over the forests was a necessity made the basic principles upon which the new Forest Bill was premised, bear many of the features of Sir William Maxwell's Public Lands Bill of 1897.

C. The Forest Ordinance of 1911

The Ordinance reproduced what Sir Hugh Clifford referred to as "many of the objectionable features of the Public Lands Bill of 1897".[627] Its preamble declared that the Ordinance was to make provision for the establishment of forest reserves and their conservation and management, and to regulate dealing with forest produce. It stated its objectives as being to make provision for the beneficial working of the undeveloped lands of the colony and for the preservation of forest resources.

It was provided under Section 4(1) of the Ordinance that it should be lawful for the Governor to declare by an Order in Council, any land which appeared to be unoccupied shubject to forest reservation from the date specified in such Order. As long as any such Order was in force, it should not be lawful for any person without the consent of a Reserve Settlement Officer to be appointed by the Governor, to take timber, collect rubber, or make any new clearing within the areas specified in the Order.[628] Any person contravening this provision was to be made liable to a fine not exceeding twenty-five pounds, or to imprisonment not exceeding three months, and any timber collected in contravention of this Section should be forfeited.[629]

i. The Constitution of Forest Reserves and Restrictions as to Use

The Ordinance conferred power on the Governor in Council, by an Order, to constitute any land which was unoccupied from a date specified in the Order, a forest reserve.[630] Section 11(2) of the Ordinance carefully provided that:

> "The ownership of any such forest reserve shall not be altered by its constitution as a forest reserve".

It provided that every such forest reserve shall be managed by either:

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627 Secret Dispatch from Sir Hugh Clifford to the Secretary of State on the Land Question, 26 December, 1917, C.O. 96/583.

628 S.5

629 Ibid.

630 S.11(1)

a. the owner or owners under the direction of the Forest Department;

b. the government for the benefit of the owner or owners; or

c. the government under lease from the owner or owners.[631]

In the case of b. two-fifths of the gross receipts should be paid to the owners thereof. The Ordinance left at the option of the owner or owners, the method by which a forest reserve should be managed. But if within six months of the creation of the reserve the owner or owners did not opt for any particular method, then the Government could select any of the methods described above.[632]

The forest reserves when created under the Ordinance, were to be made subject to certain restrictions as to use. The Section imposing such restrictions provided:

"13(1) The Governor in Council may, by Order, prohibit the following acts, namely:

a. the clearing for cultivation of any land in any forest reserve which was not in cultivation or cleared for cultivation at the constitution of such reserve;

b. the taking and collecting of any forest produce specified in the Order in any forest reserve;

c. the sale, offering for sale, purchase, possession and export of any forest produce specified in the Order from any forest reserve;

d. the sale, purchase, possession and export of any forest produce specified in the Order, taken, collected, or prepared in contravention of this Ordinance or any rule or order thereunder;

e. the sale, offering for sale, purchase and export of any forest produce specified in the Order, taken, collected, prepared, possessed, sold or purchased in Ashanti or the Northern Territories in contravention of the law for the time being in force therein respectively".

Any person violating any of these provisions should be liable on conviction to a fine not exceeding fifty pounds, and in default, to imprisonment for a term not exceeding six months.[633] In what would appear to be a restriction on the rights of traditional authorities to concede timber concessions in reserved areas, the Ordinance provided that no concession should be granted and no lease should be made with respect

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631 S.11(3).

632 S.11(2).

633 S.13(3).

to any forest reserve without the consent of the Governor.[634] Similarly, no licence to take forest produce from a reserve should be granted except in accordance with the rules made under the Ordinance.[635]

It will be observed that some of the main features of the Ordinance had a lot in common with Sir William Maxwell's 1897 abortive Public Lands Bill. Like the latter Bill, the present Ordinance revived what Sir Hugh Clifford would call "the old heresy" of recognising the existence of unoccupied lands in the Gold Coast and declaring them to be lands which were not used for permanent cultivation.[636] The restrictions imposed under Sections 11, 13 and 14 to the effect that natives were not to exercise their inherent rights of collecting forest produce in forest reserves without the consent of the Settlement Officer, and that the land authorities were not to exercise their dispositive rights in respect of such reserves except by the permission of the Governor, reopened the old arguments about the rights of the Government to legislate on lands. As will become clear from this discussion, the so-called "objectionable features" of the Ordinance formed the basis for native opposition to the Bill. European firms and merchants who also feared that governmental controls on the felling of timber might affect their profit margin, as was the normal practice on such occasions, joined the native lawyers and traditional authorities in opposing the Bill.

ii. Opposition to the Bill

Even before the Bill had been published, it attracted criticism from several quarters. When the draft was made, its features reflected the changing attitude of the Government towards greater controls over land and its resources. It did not, for example, make provision for the possible participation by chiefs in the organisation of forest administration. By the time the draft was ready, William Brandford Griffith, Junior, had returned from Jamaica as Chief Justice of the Gold Coast. Upon seeing the draft, he addresed a letter to the Government criticising the measure in such strong terms that the draft was immediately withdrawn.[637]

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634 S.14(1).

635 S.14(2).

636 Clifford's Statement on the Land Question, op.cit. See Section 2(iv) of the Ordinance under which "unoccupied land" was defined as land which was not used for permanent habitation, or had not been cultivated for ten years.

637 Sir Hugh Clifford's Statement on the Land Question, op.cit. The Chief Justice was obviously influenced by the unexpected objections in the past to the Crown Lands Ordinance, in which he had a hand, and Sir William Maxwell's Public Lands Bill.

This was just a prelude to the serious objections which were to be raised later against the Bill.

The final draft which was brought before the Legislative Council in 1911 did not contain some of the original features about which Chief Justice Brandford Griffith had complained. For instance, as we have seen, the 1911 Ordinance carefully provided that the constitution of a forest into a reserve did not affect ownership rights and gave chiefs the option of choosing the method by which the forest reserves should be managed. These concessions did not satisfy the opponents of the Ordinance. The Forest Ordinance thus reopened the whole question about the Government's right to legislate over lands in the colony.

An article in the 14th October, 1904, edition of the West African Mail, foreshadowed European merchants' objections to the Ordinance. In fact, before the Forest Bill of the Gold Coast had been passed, H. N. Thompson was preparing a working plan for a proposed Forestry Department for British West Africa. This plan was to follow a scheme of supervision planned for Southern Nigeria in order to enforce regulations concerning the exploitation of forest resources. In an address to the Liverpool Chamber of Commerce in London in 1904, Thompson explained the objectives of the plan and outlined the sort of rules which might be introduced so as to protect the West African forests.[638] The measures outlined by Thompson were similar to his guidelines and recommendations to the Gold Coast Government, the main principles of which were embodied in the Gold Coast Ordinance.

Mr. Hazzledine, as a representative of the African Section of the Liverpool Chamber of Commerce, criticised the plan in the above mentioned paper. Objecting to the plan, Hazzeldine accused Thompson of having, like most Indian servicemen, made the palpable mistake of applying Indian conditions to those of West Africa, which were quite dissimilar. Hazzledine argued that what Thompson saw as the dangers of denudation, the perils of the encroaching desert and desert fires, while sound in Upper Burma, "may be quite wrongly applied to the conditions prevailing in the dense tropical West African forest belt, which is gifted with the proverbial thousand and one differences, mostly unascertained".[639]

European merchants' view of the matter was what Mr. Hazzledine expressed

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638 Address delivered to Liverpool Chamber of Commerce, 19 September, 1904. See a lengthy discussion of this by J. E. Casely Hayford in his book, The Truth about the West African Land Question, London, 1917, 43-48.

639 The West African Mail, 14 October, 1904.

in the paper that it was not the duty of the government to look so far ahead. No human foresight was strong enough to "pierce the veil of years like that". The duty of the government as regarding existing timber rights, he said, was to assist the natives and the traders by every possible means in converting into national wealth whatever timber existed. For the natives, this meant civilisation, for the traders, it meant prosperity, and as a consequence of both, it meant revenue for the Government.

Mr. Hazzledine's reaction to the proposed measures for the control and preservation of forests in British West Africa was reflective of European merchants' attitude to business enterprise in the Gold Coast. As Governor Sir William Brandford Griffith had pointed out, European and British subjects regarded the Gold Coast as a country "to make money in, and to escape from as soon as their object is accomplished".[640] With such an attitude, their primary objective in the Gold Coast was profit maximisation. To them, what happened in the forests in the future did not seem to matter much.

Unlike the Colonial Government European entrepreneurs were not accountable to anyone. But the former, while it was undoubtedly in the colony to protect British economic interests, was playing socio-economic and political roles. This imposed an obligation on it to protect and preserve the economic resources of the colony, and therefore the long-term political and economic interests of the Imperial Government. It was for such reasons that the Government ought to, and in fact did look so far ahead in projecting forest policy into the future. As Mr. E. D. Morel, the editor of the West African Mail, had urged the Government in the paper when making a case for the introduction of the Forest Ordinance:

> "The duty of the British overlord is an obvious one. From the highest standpoint, he is bound to protect those over whom he exercises trusteeship from the consequences of European speculation on the one hand and native folly on the other".[641]

Leaders of the native community did not, however, appreciate the distinction between objectives of the government and those of European entrepreneurs in the colony. They thus supported the views of the latter

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640 See Brandford Griffith to Ripon, 31 October, 1892, C.O. 879/39, No. 453.

641 See the 14 October, 1910, edition of the paper quoted by J. E. Casely Hayford in his book, Gold Coast Land Tenure and the Forest Bill, A Review of the Situation, London, 1911, 12.

and opposed the introduction of the Forest Ordinance. J. E. Casely Hayford who had succeeded J. M. Surbah as the President of the A.R.P.S., lent his support to the view of Hazzledine on what forest policy in West Africa ought to be. In his objections to the introduction of the Forest Ordinance, he agreed with the views expressed by the latter that it was not the duty of the government "to look so far ahead", and that there was no need for forest reservation and the protection of some species of plants in West Africa.[642]

Casely Hayford argued that for many years, a good trade in forest produce in the colony had been induced by and depended on the energetic co-operation of the indigenous people. It was therefore a questionable policy for the Government to place restrictions and burdens upon their use by the creation of forest reserves.[643] It may well be that Casely Hayford was genuinely suspicious about the Government's intentions in assuming some measure of controls over land and forest management. He could not understand why the Government should adopt policies which would "prevent the possibility of a landlord class, black or white ever arising in a Crown Colony" like the Gold Coast while the concept of landlord and tenant relationship was firmly established in the British system of tenure.

He expressed his concern about Government's land policy in the following words:

> "A three-fold danger would seem for the moment to threaten the people of the Gold Coast in the enjoyment of their immemorial rights to their lands. There is the speculator, fresh from the goldfields of South Africa, who, used to a different system of land tenure, and impatient of the long-established rights of the people based upon their recognised laws and customs, is eager to see such rights swept away with a stroke of the pen, and urges the Government to declare Gold Coast lands, Crown Lands. There is also the philanthropist, who, as the heaven-born guardian of native interests, would restrict the poeple from directly and freely dealing with their lands by placing all business negotiations under government control or management. There is again, the native landowner who, it is alleged, has given cause for government interference, by recklessly dealing with interests in his lands. Between these diverging sentiments and interests it is possible that the ultimate result to the proprietary rights of the aboriginals / sic / may be overlooked, and trouble unintentionally caused". [644]

It should be pointed out that there were three other dangers which

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642 J. E. Casely Hayford, The Truth about the West African Land Question, op.cit., 45.

643 Ibid.

644 J. E. Casely Hayford, Gold Coast Land Tenure and the Forest Bill: A Review of the Situation, op.cit., 1.

Casely Hayford overlooked. The fourth danger was the selfish financial and economic interests of most of the native middle class of lawyers, merchants and elite which motivated them to ally themselves with European entrepreneurs to oppose measures devised to cure some of the ills of the land tenure system. The fifth danger was the ignorance and cupidity of the traditional authorities which led them to alienate communal lands on unreasonable terms. The sixth was the illiteracy and ignorance of the ordinary citizen, disabilities which prevented them from challenging the activities of their leaders in the community.

The fifth and sixth dangers were illustrated by an article in a local paper, The Gold Coast Leader, part of which reads:

> "With their present reckless bartering away of their rights in their ancestral lands by the alluring offers of fat options, the natives do not seem to realise when and where to put a stop to the dangers they are unconcsciously courting for their prosperity. What provision have they made to reserve lands for their own working and profit, or those of their children's children, whose civilisation may be far ahead of our own some day and who may be disposed to shift for themselves in mining and agricultural development and improvements? Are we going to suffer ourselves to be reduced to the miserable status of the proletarian for exploitation purposes by foreign settlers to enrich themselves and make us landless people in the land of our own birth? . . . Let us not preach only the gospel of development, but let us also practise the lessons of combination and co-operation that we be not lost in the struggle for existence. We do not by the foregoing remarks imply that we are opposed to the development of our country by the foreign capitalists. Far from it. What we desire is protection from exploitation and confiscation".[645]

The kind of protection called for by the paper could only be accorded to the natives by the Government, even if not to the extent that one would have liked. For the native leaders of the community, the middle class and the traditional authorities as a result of their ignorance and selfish interests as we have pointed out,[646] could not afford such protection which would have been inconsistent with their financial and economic interests. If Casely Hayford was genuinely seeking the interest of the native population, then he made the serious error of overlooking the last three dangers mentioned above and which must be regarded as the most serious threat to the enjoyment by the natives of their land rights.

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[645] Ibid. My emphasis, pp.9-10, quoted by Casely Hayford.

[646] See pp. 85-89 and 120.

Casely Hayford and his A.R.P.S.' role in the campaign against the Forest Bill could thus be seen as due to either:

a. the desire to protect the vested interests of the native middle class and the traditional authorities;

b. inability to identify the dangers posed by the activities of the latter; or

c. inability to appreciate the essential dichotomy between the objectives of the Colonial Government and those of private European industrialists and entrepreneurs.

Whichever was the case, the A.R.P.S. and the chiefs mounted a campaign against the Forest Ordinance. To discuss the nature and content of the protests would mean repeating much of the arguments advanced against the Crown and the Public Lands Bills of the 1890s. The same theoretical, historical, traditional, political and legal arguments against the previous Ordinances were reopened. It would be sufficient for our purposes to summarise the main arguments and the reasons given for objecting to the introduction of the measure. The protest which began in 1911, culminated in a meeting between the A.R.P.S. and the chiefs of Central and Western Provinces at the beginning of January 1912.

After sending several petitions similar to those sent against the 1897 Public Land Bill to the Imperial Government, Casely Hayford was despatched to London in January 1912, in order to engage the services of solicitors and to lobby the support of some Parliamentarians.[647] The gist of what was contained in the petitions of protest was the familiar assertion that from time immemorial, the control and management of the lands had been vested in the people themselves, that the Ordinance was in effect an endeavour to attain the same object as was attempted by the Lands Bill of 1897. It was contended that there was no deterioration of forest land, and under the conditions prevailing at the time, no advantage to be derived from forest land administration by an official department could justify the Government in assuming an authority which belonged to the natives alone.[648]

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647 Casely Hayford engaged the solicitors Messrs. Ashurst, Morris, Crisp and Co., and lobbied the support of Mr. Tim Healey, K.C., M.P. See Casely Hasyford, The Truth about the West African Land Question, op.cit., 71.

648 See Sir H. Conway Belfield, Report on the Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti with some Observations on the Forest Ordinance, London, 1912, 38.

It was further argued that if the Ordinance became law, the Government might assume possession of their lands on the pleas of establishing a system of forest conservancy and then put them to other uses, such as alienating the lands to third parties for commercial purposes and thus arrogating to itself the right and privileges of ownership which were vested only in the tribe.[649] Making a case for entrusting the protection and reservation of forests to traditional authorities, it was argued that:

> "The principle of conserving forests is not unknown to the people of this country. The chiefs now and again set certain parts of the forest for the preservation of game, the collection of forest produce, and as sacred groves. This had been done from time immemorial to the present day, so that apart from the timber industry and the extensive dealings /sic/ made by the mining companies for fuel and timbering their mines, the forest of the country would be in a state of good preservation".[650]

It will be observed that this assertion was inconsistent with the claim that there was no need for forest reservation and the protection of species in the country. The truth of the matter was that the native chiefs just could not appreciate the importance of forest preservation and the risk to the forests, and therefore to the climate of the country. As Belfield has pointed out in his Report:

> "No one of all the persons who gave evidence before me could be induced to show the smallest interest in the preservation of forests, or to admit, when the system was explained to him, that the country would be any better for its introduction".[651]

Under these circumstances where the native chiefs had no interest in forest reservation and without the know-how and adequate staff, which we have already argued would be necessary for any meaningful scientific organisation of forest administration, it would have been proper for the Imperial Government to take a firm stand on the issue. However, it did not. Instead, it avoided the issue conveniently by sending Conway Belfield to the Gold Coast to enquire into the system of land tenure prevailing in the colony and to look into the question of the Forest Ordinance, the wording of which had caused fears in the minds of the community lest action on the level taken against the Land Bill of 1897 was taken again.

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649 Ibid.

650 Quoted by Casely Hayford in The Truth About the West African Land Question, op.cit., 73.

651 Belfield, op.cit., 38.

From his enquiry, Belfield discovered that objection was taken to the wording of Sections 2 and 4 of the Ordinance, which referred to "unoccupied land". This, it was argued, implied the existence of land over which no right of ownership was claimed or practised. It was claimed that the use of the term was inconsistent with the fact that there was no land without an owner in the Gold Coast. These were familiar objections which Belfield regarded as not of much value, but suggested that in order to allay the fears of the natives, the term should be changed.[652] He also found that the chiefs objected to Section 11(3)(c) of the Ordinance under which it was provided that if the Government administered a forest reserve for the benefit of a native community, two-fifths of the gross receipts should be paid to the owner or owners. The natives could not see why three-fifths of the amount should go to the credit of the government. The cause of the misunderstanding here was that the Ordinance did not specify the use to which the remaining three-fifths of the gross receipts were to be put. It was obvious that such monies were to be used to meet administration costs.

However, as Belfield has pointed out, it was unwise to specify the proportion of receipts which should go to the administration or the natives before costs and expenses were determined.[653] He thus recommended the introduction of a clause which would make it possible to pay the net annual revenue, after deduction of administrative costs, to those entitled. Referring to Sections 14, 15 and 16 under which various powers were conferred on the government to grant leases, licences for timber cutting and to make regulations concerning the collection, exploitation and enjoyment of forest resources and produce, Belfield noted that while laws should be enacted upon lines which would empower the Government to effect the conservation of forest land by rules and methods similar to those which were being successfully employed elsewhere, it was necessary that attention should be paid to the extreme jealousy with which the natives would view any provisions which might bear the construction or interference with their ancestral rights. He thus recommended that the Forest Ordinance should be so altered as to limit its scope to the selection, demarcation, constitution and mainenance of reserves, and no terms should be incorporated

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652 Ibid., p. 39.

653 Ibid.

in its provisions which by expression or implication would confer upon the Government the power of dealing with reserved areas in a manner not essential to the formation of an effective system of conservancy.[654]

It should be noted that although he recommended the repeal of Section 14, 15 and 16 and the abrogation of the power of the Government to grant concessions or licences in reserved areas, Belfield recognised the fact that the natives had neither the desire nor the know-how to create reserves or administer them if created. For this reason, his recommendations fell short of suggesting that the Government should leave the matter of forest reserves and their administration to the natives as was demanded by them. What was noteworthy of Belfield's recommendations and observations was that he recognised the fact that left to themselves, the traditional authorities would do nothing by way of creating forest reserves or their protection. What he recommended was the assumption by the Government of these responsibilities with assurances that the things about which the natives had apprehension would not occur.

Action on these recommendations and bringing into force a new law on these lines became the responsibility of Sir Hugh Clifford, who assumed the Governorship of the Gold Coast in 1912. But as we have seen earlier, the new Governor was committed to a policy of indirect rule.[655] He was thus strongly opposed to any policy which might antagonise traditional authorities, through whom he wished to rule. Therefore, instead of finding a way of convincing the people that such measures as forest conservation were necessary in their best interest, he put his weight behind the critics of the Forest Bill and did nothing to bring it into force, even in an amended form. In his 84-page apologia in defence of the stand taken by A.R.P.S. and traditional authorities on the land question, he strongly criticised what he regarded as the mistaken assumptions upon which the Forest Ordinance and Ordinances of similar nature were based in the past.[656]

He contended that the Forest Bill was introduced because the Legislators fell into the old error of regarding the Gold Coast as a single political entity. It ignored alike the individuality of the mutually independent political fragments of which the colony was composed. He accused the framers of the law of having failed to assess accurately,

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654 Ibid., p. 39.

655 See pp. 221-223.

656 See Sir Hugh Clifford, The Land Question, op.cit.

the extent to which the peculiar and immediate interest of each of the small native states transcended in importance, in the eyes of the people, any collective interest which they might also have as inhabitants of one and the same British possession. Forest administration, he argued, might be regarded by the Government as essentially necessary in the interest of the Colony as a whole, but this general interest should not be allowed to overshadow the fact that the "sacrifices" which conservation would entail, would have to be made, not by the general population of the Gold Coast, but by members of certain individual tribes, whose "immemorial rights of use, as aginst all the rest of the world, will forthwith be taken from them or curtailed". [657]

It will be noted that Clifford's reasoning was in sharp contrast to Sir William Maxwell's views on the relationship of the government in respect to lands of the colony, lands which the latter regarded as common community assets and resources, and therefore public lands. While Brandford Griffith and particularly Maxwell, recognised the communal principles in native tenure as a common factor which might be used, not only to harmonise the systems of tenure, but to unite the people under the paramount power to share in the community resources as a common asset, Clifford was keen to stress the factors and differences that divided the people.

What could be deduced from the views expressed by him was that minerals such as gold and diamonds in one native community or tribe belonged to it, and therefore revenue derived from it should go to the benefit of that particular state. To apply its revenue to the development of the whole territory under British rule would amount to "sacrifices" on the part of the people of the native community in question. Arguing that such a situation would be unjust, he wrote:

> "The injustice of devoting monies derived from the sale and lease of lands in Wassaw, for example, to the development of Accra or of the Central Province, should none the less, I think, have been patent to him". [658]

It should be pointed out that Sir Hugh Clifford's policy was divisive and had little to commend it. In the first place, it should have been

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657 Ibid.

658 Ibid. Clifford was referring here to Brandford Griffith, Junior, who had advised his father in 1894 on the Crown Lands Bill arguing that revenue from "waste lands" would be used for the general advantage of the colony as a whole. See pp. 106-108.

patent to him that despite the differences which he sought to emphasise, he was not a Governor over "Negro republics", as he called the tribes individually, but Governor of the Gold Coast in which the Imperial Government had brought those native polities under its political authority. As Sir H. S. Read commenting on Clifford's views has pointed out, after 1901 the native authorities no longer possessed exclusive jurisdiction within the territory occupied by them.[659] Their people and chiefs were all amenable to His Majesty's Supreme Court. They had no legislative bodies except such as had been created for them by His Majesty's Legislature.[660]

Sir H. S. Read pointed out that Native Councils were empowered under the Native Jurisdiction Ordinance to make bye-laws and the territory occupied by them was a British colony. Under these circumstances the claim to sovereign rights of natives states, as was implied in Clifford's thesis, was unfounded. Sir H. S. Read argued, and in our opinion rightly, that if such claims of sovereignty were negated, then much of Clifford's argument would crumble and the position would be that all the rights of natives of the Gold Coast had as to land and minerals would flow, not from sovereignty but either from their native law and custom so far as they had been recognised by and continued by the Gold Coast Legislature or else from laws passed by the Legislature directly dealing with tribal lands or minerals.

These arguments did not seem to have convinced the Governor, Sir Hugh Clifford, who proceeded to lay down certain policy guidelines as the basis upon which any future Forest Bill or any legislation affecting lands should be framed. In doing so, he failed to give serious thoughts to the policies of Maxwell and the Belfield recommendations concerning these matters. Outlining the considerations which must guide future legislation on the question, he made the following propositions, namely that:

a. it was neither reasonable nor equitable to expect the natives of any one native state in the Gold Coast to submit without compensation, to substantial sacrifices alike of a practical and of a sentimental character, because such an act of tribal altruism will prove to be of advantage to the Gold Coast as a whole;

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659 Minutes of 2 April, 1918, C.O. 96/583.

660 Ibid.

b. the government should formally and publicly renounce any right arbitrarily to deal with the forest and "unoccupied land" lying within the boundaries of any native state and indeed that the terms "unoccupied" land or "waste" lands could not be accurately applied to any land in the Gold Coast and should once and for all be discarded as inapplicable to local conditions;

c. if it became necessary in the interest of the colony as a whole to declare an area as reserves, the loss which the native will incur as a result should be recognised frankly and generously;

d. as forest reserves would serve the general interest of the colony, compensation should be paid to the tribes affected from the general revenue of the colony to which all classes of its population contributed, so as to compensate for the sacrifices demanded of them;

e. the settlement of these issues on the lines stated above, should be accomplished through negotiation with the tribal authorities concerned and possibly by reference to a court which may determine the granting of compensation;

f. any costs involved in referring the matter to the court for settlement should be borne by the court from the general revenue of the colony; and

g. if an area declared as a reserve be so large as to deprive the tribe of arable land, then the Government as a precondition for such declaration must by negotiation, obtain allocation of land from an adjoining tribal authority for the use of those to be deprived, compensation being paid to the latter.[661]

In what Clifford regarded as a precedent for the last suggestion above, he referred to an action taken by Alfred Maloney in 1882 when he was Administrator of the Gold Coast. An examination of the action referred to would, however, disclose some inconsistency in Clifford's views about the sharing of resources in the Gold Coast. The action referred to was a case of 1882 where land for New Jaubeng Settlements, of which Koforidua is now the centre, was obtained from native chiefs of Akim Abuakwa to settle a portion of the Juabeng tribe which had broken off from the rest of Juabeng in Ashanti and had migrated to settle in the Gold Coast Colony. Difficulties arose as a result of ill-defined boundaries between the Juabengs and the Krobos. Additional areas were acquired from Akim Abuakwa to compensate the Juabengs for the loss of land subsequent upon the adjustment of the boundary. For these additional areas the Government paid a sum of £400 to and received a deed of conveyance from the chiefs

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661 Loc.cit.

and elders of the section of ~~Akim~~ Akim Abuakwa, to which the land in question belonged.

It would be noted that if, as Clifford had insisted all along, one tribe should not be made to submit without compensation to sacrifices by reason only that such sacrifices would prove to be advantageous to the Gold Coast Colony as a whole, then the payment of compensation by the Government out of public funds to which all the various tribes contributed, to pay for land acquired for the use of one particular tribe which on its own volition migrated from one area to another, would contradict the very principle which Clifford sought to establish as the basis upon which the land and its resources should be treated in the colony.

In the precedent referred to, there was no obvious direct benefit to the Gold Coast as a whole as a result of migration by that portion of the Juabeng tribe from Ashanti to the colony. Within the context of Clifford's arguments therefore, there was even little justification for the payment out of public funds a sum of £400 to pay for land to be utilised by one particular tribe with which many other tribes had nothing in common, except that they were all natives of the Gold Coast. It should be pointed out that the difficulties and the inconsistencies demonstrably attending Clifford's proffered example, was an indication that it would not be a wise policy to employ the divisive elements in a complex heterogenous society like the Gold Coast as the basis of policy formulation on such important matters as land and its resources. The Governor fell into the serious error of not recognising the effect of British rule on the soveriegn rights of the native polities within His Majesty's possessions. He ignored the fact, as Sir H. S. Read had pointed out that as a result of British rule, the "conglomeration of small Negro Republica" had lost their sovereign rights and no longer had exclusive jurisdiction over the territories occupied by them, and were now under British sovereignty in one country, the Gold Coast, of which he was Governor.

His views were not only founded on mistaken premises, but were rather insular and did nothing to promote national unity. His policy would do nothing to solve land tenure problems of the colony, but would rather exacerbate them. If the Governor and those who thought like him had given serious consideration to past policies of Sir William Brandford Griffith and Sir William Maxwell, which they so often attacked, it would have become evident to them that the basic policy of the Public Lands Bill of 1897 which sought to harmonise the land tenure systems of the colony by establishing land enjoyment rights on the basis of Gold Coast

nativity, as opposed to tribal community membership, would not only have had the effect of removing many of the troublesome questions about title security, but could have been one of the ways in which the various ethnic groups comprised in the Gold Coast could be welded together.

Failing to recognise the advantage of this kind of policy, Clifford concluded his policy statement on the Forest Bill by stating emphatically that:

> "If forest reserves are to be made, justice demands that compensation for sacrifices which they must inevitably entail should be paid to the communities from which in the interest of the colony as a whole they are demanded; and further, the claim of Government to exercise any sovereign rights over lands situated in any of the Native States of the Gold Coast cannot be maintained on any grounds of equity, justice or even policy." [662]

No one would deny the fact that in creating reserves in the interest of the whole Colony, account ought to be taken of the needs of communities which might be affected. But to insist that the Imperial Government had no power to exercise sovereign rights over lands in the Colony, was to dispute the very basis of British rule in the country. Questionable though his policies might be, Clifford was one of the best-loved Governors of the native authorities and the native middle class. This was probably the reason why, unlike previous governors, he remained long enough in the Gold Coast to prevent the passage of the Forest Ordinance, and it was not until 1927 that the first legislation on forests was passed. [663]

Unhappily, Clifford had during his long governorship established land and forest policies on these lines which almost became a blueprint for successive administrators, until after the Second World War when there was a change in direction of policy towards more governmental control of land and its resources. [664] The Forest Ordinance which came into force in 1927 reflected much of Clifford's idea and policies.

The principles of "unoccupied", "waste" or "public land" disappeared in the literature of land law legislation, and with it the idea of all lands of the colony being "public" or common assets and resources of the Gold Coast as a whole. Section 4 of the Forest Ordinance 1927, empowered the Governor to constitute reserves, but the Ordinance as a whole did not provide for the kind of elaborate and scientific organisation and administration of forests by government officials, as was envisaged by the Thompson Scheme. Even after more than two decades of independence,

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662 Loc.cit.

663 Ordinance No. 13 of 1927.

664 See Circular Dispatch from the Secretary of State, Mr. A. Creech Jones, 17 October, 1946, Colonial office, P. & S. file (12). See the discussion of this at pp. 113 - 114

land and forest policy has never changed much, with the result that no national land policy, the framework within which land administration and development can be organised, has as yet emerged.

It is submitted that a national land policy framed on the basis of those pursued in the north of Ghana, would be able to take care of the major land problems including forest conservation and the twin problems of uncertainty of title and costly litigation.

P A R T I I I

LAND TITLES REGISTRATION IN GHANA

CHAPTER I

THE HISTORY OF LAND TITLES REGISTRATION IN GHANA 1880-1960

A. Introductory

The history of land titles registration in Ghana may be seen as an account of governmental attempts over the years to find a solution to the intractable problems of title insecurity and its incidental costly litigation. Beginning from 1883, various legislative measures were adopted with a view to establishing a machinery for the storage of information concerning land titles.[665] The introduction of such a scheme on the lines of the system established in Australia on the basis of Sir Robert Torrens' Bill[666] was considered to be the best way of dealing with these problems.[667]

As will be shown in this discussion, however, the system introduced by means of legislation for recording titles to or rights in land fell short of inaugurating a system of title registration, properly so called. An arrangement for recording rights in land, if it should succeed as a means of making titles secure and certain, requires, as a prerequisite for its success, an accurate survey of the land areas subject to recording or registration. Boundaries have to be clearly demarcated and defined by means of accurate surveys. During the process of such demarcation and definition of boundaries, a competent adjudication tribunal, created for that purpose, ought to determine and settle conclusively titles to or rights in land. Such conclusions, if recorded in the register, should be guaranteed by the State as indefeasible.

An examination of the enactments establishing the system of recording land titles in the past and at present discloses that the foundations neces-

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665 The first attempt to establish a system of land registration in the Gold Coast was made in 1883, with the passage of the Registration Ordinance, No. 8 of 1883.

666 Sir Robert Torrens introduced a Private Member's Bill in the South Australian Parliament on 2 June, 1857, the object of which was to "simplify the laws relating to the transfer and encumbrance of freehold and other interests in land". The passage of the Bill led to the establishment of a system of land registration knwon as the "Torrens system of title registration". See E. A. Francis, The Law and Practice Relating to Torrens Title in Australia, Vol. 1, Sydney, 1972, 5.

667 See Dispatch from Marquess of Ripon to Sir W. B. Griffith, 10 October, 1894, CO 879/46.

sary for a successful working and operation of the scheme were neither laid as a preliminary to their passage, nor provided for as part of the measure. There were conspicuously absent from their provisions, the establishment of a competent adjudication tribunal for the settlement of titles, and including a guarantee by the government of the indefeasibility of registered interests. In societies where the concept of land ownership as understood in Anglo-American law was so nebulous, one would have expected that provision for the definition of rights subject to registration would have been made, but this was not done. What was more, surveyors were not appointed specifically for the purpose of surveying the areas subject to registration. In a country where the overwhelming majority of the people were illiterate and ignorant in such matters, the success of a scheme of this kind would necessarily require some arrangements for public education on the subject. However, none of these things were provided for in the ordinances creating the system of recording land titles in the Gold Coast.

As matters turned, the laws that were enacted proved defective in many respects and ineffectual to deal with the problems that they were designed to solve. The colonial government, throughout the period, appeared to be so obsessed with the idea that a system of title registration provided the only panacea for the problem of insecurity of title that it overlooked the obvious alternative solution, viz., governmental control and administration of lands. Not even the relative certainty concerning those lands held under Crown grants and those areas administered in the Northern Territories drew its attention to this alternative measure. This attitude was greatly influenced by the erroneous belief, as we have argued,[668] that the creation of freehold titles in the Colony was a necessary condition for the acquisition of agricultural credit from financial institutions, easy alienability and maximum productive use of land. The independent governments of Ghana and land law reform bodies also hold similar views at present.[669]

The objective of this part of our discussion is to examine the way in which the schemes of land registration had worked in the past, and to demonstrate the respects in which the provisions of the Acts establishing such systems were defective. In the process, the objectives which we consider should guide those concerned with policy formulation and decision-making in regard to lands, their management and administration in Ghana will be outline and discussed. To suggest ways in which the systems might be improved does not necessarily mean acceptance of the view that the introduction of a system of title registration provides the only solution for

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668 See the discussion of this point at pp. 72-73

669 See the Law Reform Commission Report on the Reform of Land Law, November, 1973, p. 2 and pp. 13-16.

land problems in Ghana. The intended final aim of the thesis is to demonstrate that a system of land titles registration need not be introduced in modern Ghana at all, and that a better alternative is provided by the introduction of the principle of administration by governmental bodies of all lands in Ghana.

B. Title Registration and its Objectives

For a proper insight into the history of land titles registration in Ghana, it is deemed necessary to describe in broad terms the essential features of the system and the ends which it is normally designed to attain. The first preliminary point to be made is a rather obvious one, that land is a vital asset to man, since it supports many of his basic needs, such as shelter, food, industry and raw materials. It is hard to visualise any economic venture which does not require the use of land or an interest in land. The ownership, possession or the acquisition of an interest in land is thus an essential prerequisite for any economic activity or venture. For this reason, the demand for titles to, interests in, and rights over land frequently occurs in society. The more complex and economically active the Society, the greater these demands will be. A potential transferee of an interest in land would thus wish to be sure that no one else can claim any rights adverse to his own during the subsistence of his title.

The indigenous schemes of tenure had their own inbuilt systems of title security. The way in which exclusive rights were established over land was by effective occupation and development of the land. In close communities where economic activity was basically subsistence agriculture, everydody knew which farm belonged to which person or family. On inter-tribal levels, physical features, such as rivers, valleys, rocks or large trees were used for identification and determination of boundaries between adjoining polities. Since land was abundant claims of rights over boundaries were not keenly contested. Problems of title insecurity thus did not constitute an important feature of the traditional systems of tenure.

However, as we have seen earlier,[670] the introduction of permanent agriculture and the concession boom that accompanied the development of the mining and timber industries during the last two decades of the nineteenth century changed people's attitude to land. Land values appreciated consider-

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[670] See pp. 68-74.

ably and rights to them were keenly contested. The acquisition of land by strangers on a large scale made serious inroads into the inbuilt traditional systems of title security. Effective occupation and development of land were no longer the only means by which exclusive individual rights could be established over land. Acquisition of land on speculative basis implied that although a land might be unoccupied and undeveloped, it might not necessarily be free for occupation by the subject. Exclusive individual rights might have been established over it by a purchaser of an interest in it.

The acquisition of rights in this way over large tracts of land, cutting across natural and physical featues which were traditionally employed to define and distinguish boundaries made the indigenous methods of boundary identification no longer adequate within the context of the new developments. It became necessary to replace such traditional modes of boundary identification with modern systems of survey and land demarcation if insecurity of title and disputed claims over land rights were to be avoided. The introduction of a system of land titles registration in the Gold Coast was thus in response to the need for accommodating the new developments in the land tenure system with a more reliable and sophisticated mode of securing land titles. The primary objective for introducing the system was to ensure certainty and security concerning land titles and to provide the means by which interested persons can ascertain with reasonable certainty the title situaiton with regard to any given piece or parcel of land. This is in fact, the main objective of any land titles registration system, although its consequences may produce other effects, such as individualisation of interests and the concentration of land in the hands of the wealthy.

The registration of title to land simply means an entry or entries into the record books, established for that purpose, or various interests in land to which a person may be entitled or hold. In this sense, the use of the term may be misleading, for by reference to the records one does not necessarily ascertain title itself as of fact, but only some evidence thereof. When employed in terms of what has become known as the "Torrens system" of title registration, however, it imports the recording of conclusions reached by a competent body or tribunal set up for the purpose of determining conclusively titles to land. The registration of such conclusions becomes state or government guaranteed as valid and unassailable. Dowson and Sheppard, for instance, describe the system as "an authoritative record kept in a public office of the rights to units of land as vested in some particular person(s) or body for the time being and of limitation of such right.

It is more comprehensively called registration of rights to land or even briefly, land registration".[671]

In this sense, title registration must be distinguished from deeds registration. In the case of the latter, any document by means of which an interest in land is transferred or any instrument affecting land is recorded in a public register established for that purpose. The basic principle in its simplest form, as S. R. Simpson points out, is that registered deeds take priority over unregistered deeds, or deeds registered subsequently.[672] Furthermore, under a system of deeds registration, the recording in the public register of an instrument affecting land does not necessarily affect the validity of the land transaction of which such instrument constitutes written evidence. Under this scheme, what registration does generally is to determine, as between competing instruments, priority by reference to the date of registration and not the date of execution.

This last proposition may, however, be subject to the qualification that the courts may take the view that a later instrument can, by registration, acquire priority over an earlier one if it is obtained without fraud and without notice of the earlier unregistered instrument.[673] It will be seen, therefore, that in absence of any competing instrument, deeds registration confers no special advantage in so far as the validity of the transaction which is the subject matter of registration is concerned. It is in this respect that a system of title registration differs substantially from deeds registration.

Under a system of title registration, as Simpson points out, with certain unavoidable exceptions such as "overriding interests", all material particulars affecting title to land are fully revealed simply by perusal of the register which is maintained and warranted by the State. The register, as he points out, is at all times the final authority and the State accepts responsibility for the validity of transactions, which are effected by making an entry in the register, and only by this means. The guarantee by the State of the indefeasibility of registered titles or interests can thus be seen as an essential element in title registration that distinguishes it from deeds registration.

Nevertheless, it should be noted that a system of deeds registration

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671 Ernest Dowson and V. L. O. Sheppard, Registration of Title with Special Reference to its Introduction on the Gold Coast, London, 1946, Part 1, 2.

672 S. R. Simpson, Land Law and Registration, Cambridge, 1976, 15.

673 See Souhail Crayem v. Consolidated African Selection Trust (1949). 12 W.A.C.A. 443, and Anyidoho v. Markham (1905), 1 Renner, 592.

can be so arranged that it may approximate to a system of title registration in the sense that the register can be relied upon as giving accurate information concerning titles and giving the same kind of certainty and security that a system of title registration can provide. This is possible if an efficient system of survey that can guarantee the accuracy of maps or plans which must be attached to instruments subject to registration can be provided as part of the scheme. When the accuracy of the plans defining the land areas to which interests relate is assured, and the law makes the validity of instruments conditional upon registration with a provision that the courts shall not receive unregistered instruments as evidence of title, then the system may well achieve the objectives of certainty and security as would title registration, albeit a deed registration system. But this will depend largely on the efficiency of personnel and the elimination of human errors to the barest minimum.

The essential features of title registration and the ways in which it differs from deeds registration has been outlined because the appreciation of the nature of the schemes devised under the Statutes for the recording of land titles and rights to land would depend to a large extent on the understanding of the distinctions outlined above. An examination of the ordinances and statues establishing the system in the Gold Coast and modern Ghana would disclose that what we had in the past was a deeds registration system, and the current statutes have not as yet changed the system to that of title registration, as described above. In one legislation after the other, attempts were made to improve upon the previous laws so as to make more efficient the working of the system.

As can be gathered from the discussion so far, although title registration may differ from deeds registration in form, both systems seek to achieve similar objectives which are primarily, certainty and security of titles.

Sir Robert Torrens defined the objective of his pioneering South Australian Act to be the creation of "independent titles by cutting off the necessity for retrospective investigation of titles".[674] In Gibbs v. Messer,[675] the Privy Council, per Lord Watson, described the objectives in the following words:

> "The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's title, and to satisfy

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674 Quoted by Dowson and Sheppard, op.cit., p.3.

675 /1891/ A.C.248 at p. 254.

themselves of its validity. That end is accomplished by providing that everyone who purchases, bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title".

This means in effect that the system, if efficiently administered, does away with the repeated, imperfect and costly examination of bona fide mistakes as to the past titles or existing burdens affecting the land; and removes the ever-present possibility of fraud by duplication or supression of deeds.[676] If it is a system of title registration rather than deeds registration, it gives additional state guarantee safety and positive security against claims which a system of conveyancing by deeds can never give.

In order to attain these objectives, a system of land titles registration[677] must be designed to ensure the following:

a. the positive identification of the physical boundaries of the lands to which the interests, the subject matter of registration relate, both on the ground and on the map;

b. adjudication and the settlement of competing claims in respect of positively identified plots of land;

c. the registration of the adjudged interests, and

d. the guarantee by the State or government that such recorded interests shall be indefeasible.

An attempt will be made through this discussion an examination of the extent to which the Ordinances passed during the period under consideration had made provision for these essentail elements outlined above, and the extent to which the objectives of title security and certainty had been achieved through such legislation.

C. Background to Land Titles Registration Legislation in the Gold Coast

It has already been pointed out that, until the last two decades of the nineteenth century, there was no large-scale exploitation of land and its resources in the Gold Coast. The end of the Ashanti War of 1874 saw the beginning of direct involvement of Europeans in mining activities in

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676 Dowson and Sheppard, loc.cit.

677 The term "Land Titles Registration" is employed throughout in this work to refer to the recordings into an official register or registers provided for storing information concerning titles generally. Thus the term can be used to refer to both deeds or registration under any arrangement whereby land titles are registered, unless it becomes necessary to refer to a particular system of registration specifically, in which case the appropriate terms will be used.

the early 1880s, which led to acquisition of concessions on a large scale.[678] The story of these events need not be repeated here; it suffices to recall that the acquisition of land on such a large scale in communities whose boundaries were undefined and undemarcated led to overlapping and conflicting grants, causing considerable uncertainty of titles and the ensuing costly litigation.

Thus as early as 1876, the need to make arrangements for the registration of certain instruments affecting land was already recognised by the colonial administration. Thus Appendix B of the Rules of Court of the Supreme Court Ordinance,[679] made in 1876, provided for certain charges in connection with certifying signatures for which a fee of four shillings was paid. In this way, a judge could certify an instrument affecting land as valid or properly executed. When this was done, there was greater confidence about the authenticity of the document so certified. This device was employed for voluntary registration of any instrument by which any right or interest in land was acquired at a charge of five shillings. This scheme was devised under the Supreme Court Ordinance to meet the ordinary requirements of the day.[680]

But with the mushrooming of mining companies at the beginning of the last two decades of the nineteenth century in the Western and Central Provinces of the Colony, problems of title insecurity mounted. Early reports about conflicting grants of concessions brought home to the colonial government the need to adopt some legislative measures to deal with the problem. As early as 1897, Lieutenant-Governor Maloney sent a dispatch from Lagos to the Gold Coast Colony noting that there was a need for compulsory registration in the Colony; and he gave instructions to the Gold Coast administration that an early enactment on the subject should be considered.[681]

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678 See pp.

679 Ordinance No. 8 of 1876. See para. 4 of Appendix B of Rules of Court.

680 This seems to be an attempt to introduce notarisation into the judicial and legal system of the Gold Coast. This is a system whereby a notary Public, an official duly appointed, whose public office it is, amongst others to draw, or certify, usually under his official seal, deeds and other documents including conveyances of real and personal property and powers of attorney relating to real and personal property situate in England. See 28 Halsbury's Laws of England, 3rd ed. vol. 28, 114-115. C.F. authentication of documents by Justices of the Peace in England.

681 Enclosure No. 8 of 2 January, 1879, C.O. 96/140.

Another early warning of the problems caused by title insecurity in the mining centres came from Mr. Higgins, Commissioner for the Tarkwa District in 1882.[682] Mr. Higgins in his Report pointed out that there was a great need to arrange for an orderly control and management of the mines. He believed that one of the first steps towards this end would be the introduction of a system of registration of concessions. He noted that this requirement was so urgent that if it were not met,"confusion and probably disturbances would be the result".[683] The Queen's Advocate on his arrival at the Colony in September 1882, was required to take such steps as were necessary to put into effect Maloney's instructions of 1879 in respect of preparing an ordinance for the compulsory registration of instruments affecting "real estate or judicial declaration of title to land".[684]

Hardly had the Queen's Advocate begun his work than Lieutenant Governor Maloney sent another dispatch to the Gold Coast Colony urging the introduction of a scale of registration charges proportionate to such large and valuable concessions as were being acquired in the Colony.[685] It was the Lieutenant Governor's opinion that the introduction of such charges, yielding extra revenue to government, would not be felt locally, as this would fall legitimately on speculators who could well afford to pay from their "profitable gamble". He believed the payment of such registration charges was justifiable, having regard to the fact that mining companies bringing machinery into the Colony were exempt from the payment of custom duties. Stressing the need for an early legislation for the establishment of a system of land titles registration, he observed:

> "Boundaries of concessions are often, generally I may say, of the vaguest description and advantage is no doubt taken of the indifference of the Government and of the ignorance of the people."[686]

Maloney's dispatch shows that, in addition to wishing to secure titles, he had in contemplation the establishment of a system of registration as a means of ascertaining the extent of land acquisitions and making sure that revenue was collected as a form of property tax on landed interest,

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682 Higgins to Governor, 6 June, 1882, C.O. 96/114.

683 Ibid.

684 See Winfield, Minutes of 14 October, 1882, C.O. 96/144

685 Maloney to Sir Samuel Rowe, 2 November, 1882, No. 511, C.O. 96/144.

686 Ibid.

as some of the objectives of any legislative measure which might be considered. It was at the background of the events outlined above and the obejctives sought to be achieved that the Queen's Advocate was required to draft a Bill for introducing a land titles registration system for the Gold Coast Colony.[687]

D. The Registration Ordinance of 1883

i. General Provisions

The Queen's Advocate had as a guide, a draft Bill based on a Sierra Leonean Ordinance of 1872. He considered these provisions inadequate or too imperfect to be of any use as a precedent. He recommended instead, certain Ontario Acts, copies of which were sent to him to be used as a guide. Under Section 2 of the Ordinance, the registration of instruments affecting lands was provided for. The term "instrument" was defined as "any instrument in writing affecting land in the Gold Coast Colony including a will and including the power of an attorney under which any instrument affecting land may be executed". This would seem to be an inclusive definition which does not always prove useful. By including the term sought to be defined in the definition itself, its meaning could be obscured.

What could be deduced from this definition was that an "instrument" was generally any writing, memorandum, document or deed evidencing an interest in land or by which an interest in land was conveyed or transferred. All these types of documents were "instruments" affecting land which may be registered under the Ordinance. Among other documents which could be registered under the Ordinance, but which might not necessarily be instruments affecting land, were wills including a codicil with will annexed and any judgment including any Decree or Order of a Court of Justice.[688]

Section 1 of the Ordinance provided for the establishment of registries at Accra, Cape Coast and Lagos and such other place or places as the Governor might from time to time appoint in the Colony for the registration exercise.[689] Grants from the Crown executed after the coming into force of the Ordinance were declared void unless registered within 30 days from the date of their execution.[690] Every instrument executed after the coming into force of

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687 This idea would seem to have been influenced by the Indian experience where property tax was one major source of Imperial revenue.

688 S.2.

689 Lagos was then the administrative headquarters of Sierra Leone and the Gold Coast.

690 S.4

the Ordinance, except a will, so far as it affected any lands, took effect as against other instruments affecting the same land from the date of its registration, provided it was registered:

i. in the case of an instrument executed at the place where it was registered, the period of ten days from its date of execution;

ii. in the case of an instrument executed elsewhere in the Gold Coast Colony, the period of 60 days from its date of execution; and

iii. in the case of an instrument executed out of the Colony of the Gold Coast, the period of one year from its date of execution.[691]

In what would appear to be prescribing registration as a condition for the validity of land transactions, Section 7 of the Ordinance provided that every private ordinance, judgment and inquisition enacted, pronounced or held after the coming into effect of the Ordinance should become void so far as regards any land to be affected thereby, "unless a memorial thereof shall be registered within ten days from the enactment or date thereof".[692] As a condition for registration, Section 15 of the Ordinance provided that:

> No instrument other than a will, and no memorial of an Ordinance, Judgment or Inquisition shall be registered unless it shall have on the margin or back, a plan of the land affected by such instrument, Ordinance, Judgment or Inquisition, and either in the body of the instrument, or in the margin or back thereof, a description of such land.

Apart from the above provision no other section of the Ordinance dealt with questions relating to surveys, definition and demarcation of of boundaries or the preparation of site plans which might be attached to registrable instruments. It will be observed that the Ordinance provided for the registration of deeds and not of titles. No provision was made for settlement and adjudication of title. Nowhere in its provisions was it provided that registration guaranteed titles. These were obvious defects in the Ordinance which were to render the administration of the scheme established under it difficult.

ii. Problems of Administration

The immediate problem faced by the government after the coming into

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691 Sections 5(1), (2) and (3).

692 It will be observed that this provision did not take into account parol grants which were also valid modes of acquisition of interests in land under the customary law. For the discussion of this point see pp. 402-407.

force of the Ordinance, was how to get qualified personnel to administer the scheme. As we have indicated earlier, for a scheme of land titles registration of this kind to succeed, it would be of paramount importance the appointment of qualified surveyors with a supporting staff of cartographers, technical officers of various grades capable of reading and understanding maps and plans drawn to standard scales. A clerical staff with the responsibility of filing, recording and arranging documents would also be needed. But in 1883, the colonial administration did not have such qualified personnel. No one could be found with the experience in such matters, and who might train local staff to get the scheme off the ground.

Hence, the government was forced to entrust court registrars with the responsibility of registering instruments under the provisions of the Ordinance. But this was inconsistent with Section 1 of the Ordinance which required the establishment of registries at various places and the appointment by the Governor of registrars to administer the scheme. Mr. Turton, who had had some years of experience in the Lagos land registry, did not think it was a wise policy to make court registrars undertake this responsibility. He pointed out that deeds registration was technically different in form from court registry work.[693] The Governor agreed in this view and thought it might be better if the District Commissioners were asked to perform this duty. The Governor suggested that in Cape Coast, for example, where the District Commissioner was inundated with magisterial work, an assistant District Commissioner could be appointed to be solely in charge of deeds registration.[694]

There were many advantages in requiring District Commissioners to perform the functions of registrations. It was part of their duties to make tours and travel on visits to all parts of the District within their spheres of jurisdiction. They were therefore expected to be well acquainted with the peculiar problems of their localities. As men on the spot they could be in a better position than would a court registrar to check inaccuracies in site plans which might be attached to registrable instruments, both on the ground and on the plan or map.

What the government should have done therefore would have been to establish registries in or near the District Commissioners' offices, and provide the necessary staff for the work of the registries. But it seemed

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693 See Minutes by B. W. Winfield, 14 October, 1'''', C.O. 96/144.

694 Ibid.

the government did not consider the long-term benefits of the scheme as so important as to merit an undertaking which would involve it in expenditure. It was thus finally decided that the registration exercise should be combined with court registry work under the administration of court registrars. The Plan to bring the administration of the scheme under the office of the District Commissioner was accordingly abandoned.

One of the first court registrars involved in the administration of the scheme was Mr. Blankson, who was also the interpreter at the Cape Coast Court. The work of the registry was impeded not only because there was a lot of court duties to be combined with those of registration, but the registrars appeared to be "incompetent and indulgent". [695] Work piled up at the registry and many applications for registration remained unanswered. Files and records were never properly kept and searches were rendered cumbersome and difficult. [696] As a result, the Chief Justice informed the Governor that having regrd to the volume of work involved in court work and deeds registration under the Registration Ordinance, it was imperative that a more competent person be appointed to perform those functions.

The Chief Justice informed the Governor that despite his efforts to make Mr. Blankson execute his duties expeditiously, arrears continued to pile up largely due to the self-indulgence and incompetence of the latter. He therefore recommended not only the suspension of the Registrar, but also the repeal of the Registration Ordinance unless better provisions could be made for carrying into effect its provisions. [697] Following the Chief Justice's recommendations, the former was suspended. Finding a suitable person to replace the Registrar was not so easy as his suspension. In the search for a replacement, the lot fell on Mr. A. W. Thompson, the acting Post Master of Cape Coast. It should be noted here that his choice was based, not so much on any special knowledge about land registration, but upon the fact that he was literate. There was no evidence that he was in a position to understand, read and interpret maps and plans drawn to scale so as to be able to locate and identify land areas to which such plans relate both on the maps and on the ground; knowledge which was necessary if conflict-registrations were to be avoided. As we shall see later, this lack of qualifie personnel largely accounted for inefficient administration of the scheme and its failures.

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695 See Letter from Chief Justice to Governor, 24 April, 1884, C.O. 96/161.

696 Ibid.

697 Ibid.

Related to the administrative problems were the lack of transport and communication. The Ordinance enjoined the Governor to establish registries at specified places and such other places as he might deem fit, and had power to diminish, merge or expand such registries. This provision was meant to make it possible for registry offices to be located near those areas where land transactions took place on such scales as would make their establishment necessary. None of these offices was ever established. This meant that instruments could only be registered at those places where Court registries could be found. Consequently, persons desiring to have their instruments registered in accordance with the provisions of the Ordinance, would have to travel long distances to Cape Coast and Accra, and some few places where court registries were to be found in the Colony. Since the basic means of transport was by foot, it meant many days of travel, if not weeks in some cases. Under these conditions it would have required a great deal of public education and some compelling reasons for a man to embark upon the arduous task of getting his instrument registered out of his own volition.

Faced with these problems concerning the registration of instruments affecting land, the Secretary of State, the Marquess of Ripon, suggested that Clause 17 of the proposed Crown Lands Bill of 1894 under which concessionaires were required to register their grants within six months from the date of their acquisition, should be changed. He expressed the view that it would be better for the government to have such grants registered before the issue of certificates of validity. In such a case a moderate fee to cover the expenses of the registry could be charged "ad valorem".[698] This suggestion was obviously meant to compel those concessionaires who by reason of the difficulties involved in the registration exercise had refrained from doing so, to comply with the provisions of the Ordinance. The Secretary of State believed that if it were proposed to introduce a system of title registration similar to those in the Australian colonies in which registration, except in cases of fraud, was complete proof of title, then his proposal might be required as part of such a general scheme. In this regard he considered the 1883 Registration Ordinance as inadequate.

It was under these circumstances that eleven years after its operation,

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698 Dispatch from Ripon to Sir W . B. Griffith, 10 October, 1894, C.O. 879/46.

the latter Ordinance was repealed and replaced by the Land Registry Ordinance of 1895,[699] which we shall consider in due course.

E. The Land Registry Ordinance of 1895

i. General Provisions

The preamble stated that the new Ordinance was to make better provisions for the registration of instruments affecting land. A cursory glance at its provisions would, however, show that they were basically similar to the 1883 Ordinance with minor alterations and additions. Section 3(1) reproduced Section 1 of the latter Ordinance under which the Governor was empowered to establish registries with the minor alteration being that Lagos was no longer one of the places where such registry offices might be established. Section 3(2) provided that instruments affecting land in Ashanti should be registered only at Cape Coast and such other places as the Governor might direct.[700]

Section 6 of the new Ordinance replaced Section 15 of the 1883 Statute. Unlike the latter, which provided that for an instrument to be registered, it should have a plan describing the land attached to it, the former only provided that except a will or a probate, no instrument could be registered unless it contained a Statement describing the boundaries, extent and situation of the land affected. The question it would be necessary to answer was whether or not this meant that such a description could be made within the meaning of the Ordinance without reference to a plan. What appeared to be new in the present enactment was elaborate provisions which it contained on proof of documents.[701] These provisions were probably meant to ensure the authenticity of the instrument which would be subject to registration, but as we shall argue in due course, these would only make the registration procedure cumbersome without serving any useful purpose.

Sections 14, 15 and 16 dealt with the mode of registration. The nature of the records to be kept, how they should be kept and maintained, were all treated under the three provisions mentioned above, the rest of its provisions dealt with consequences of registration which did not differ

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699 No. 1 of 1895.

700 As amended by Ordinance No. 8 of 1902. The Registry office at Accra appointed a registry office for registering instruments affecting land in Ashanti as from 1 January, 1909. See Order in Council, 7 October, 1908.

701 See Sections 7-11 inclusive.

substantially from the sections of the 1883 Ordinance dealing with the question. It treated priorities between competing instruments in a similar manner. The only significant difference was the provision under Section 20 of the new Ordinance that:

> Registration shall not cure any defect in any instrument registered, or confer upon it any effect or validity which it would not otherwise have had.

This provision which obviously implied that registration did not guarantee title, was a clear indication that the system of registration established under the Ordinance was that of deeds and not title registration.

ii. Inherent Defects of the Ordinance

a. Among the essential freatures of a lands title registration system which we have pointed out were necessary for its successful operation, was positive identification of the physical boundaries of the lands to which interests subject to registration relate. The most efficient way in which this can be done is the definition of lands subject to registration by reference to accurate plans or maps drawn on the basis of nationally agreed scales or national grid co-ordinates. In this way, such lands can be identified both on the map and on the ground. Such plans, if attached to instruments by which rights affecting land are transferred, assigned or evidenced, can then be recorded in the official books or register as a source of information in respect of land titles. Such accurate surveys form the basis of any meaningful land titles registration system. Without them, the operation of the scheme would just be an exercise in futility. For if the instruments to be registered are unaccompanied by accurate site plans, recordings into the books of the land registry other material particulars of the interest or the land itself would simply amount to evidence of title without the proper means by which interested persons can identify the things about which such particulars are recorded. Under such conditions, registration of conflicting interests, duplication and conflicting transactions in respect of the same land cannot be avoided. This means that rather than solve problems of uncertainty, the registration system will complicate the issues and increase insecurity.

As Dowson and Sheppard pointed out, it is the primary function of cadastral surveys to lay the foundation and satisfy the initial requirements of the title register by defining the parcels of land which constitute the objects and units of the record.[702] The two authors stressed the fact

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[702] Op.cit., p. 10.

that by means of such methodical surveys within the setting of the appropriate administrative and economic subdivision of the territory concerned, it would provide the orderly and comprehensive basis which was necessary if the construction and conduct of the register was to be economically effected throughout the country within a reasonable period. This means that:

> It is the basic necessity in the construction of and making of any dependable land record that the units of land to which entries relate should be defined so that they can be located readily, surely, unambiguously at any time on the ground. [703]

The definition of such land units is that which has been referred to as cadastral surveys, a survey relating to boundaries and subdivision of land. It entails the survey of land depicting boundaries with accuracy and showing the exact measurements by which boundaries may be demarcated. In the Gold Coast, the law required that plans or maps made on the basis of such surveys and which might be attached to registrable instruments, should be carried out by an Official Surveyor and should be approved by the Director of Surveys or any competent person appointed by him for that purpose. [704]

Mr. Higgins, who was Commissioner for Tarquah in 1882, recognised the important role which this kind of survey should play as a necessary component of the land registration system which was being contemplated. While recommending the introduction of a scheme for the registration of concessions and other rights to land in the Tarquah District therefore, he stressed the necessity for a survey of the area as part of the measure. [705] He drew attention to the fact that various mining companies had some plans giving general ideas about their acquisitions, but those maps or plans were nothing near perfection in accuracy. He thus suggested the appointment of surveyors for the specific task of mapping out the areas which might be subjet to registration, noting that the Survey Division of the Public Works Department was so understaffed that they could not be depended upon for such an undertaking. [706]

It would appear, however, that no great importance was attached to the essential role which this sort of survey should play in the scheme of registration contemplated under the registration ordinances. Throughout

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703 Ibid.

704 See the Survey Ordinance, 1922 (Cap. 132) 1951 Rev.S.2. See also The Survey Act, 1962, Act. 127.

705 Higgins Report of 6 June, 1882, C.O. 96/144.

706 Ibid.

the correspondence preceding the 1883 and 1895 Ordinances, the question of surveys as part of the scheme was never seriously discussed or considered. Hence, Higgin's advice was ignored and no provisions were made for the general survey of the Colony as part of the scheme, or at least of the mining areas where the introduction of the scheme was considered to be urgently required.

The first indications as to the serious defects in the administration of the scheme of land titles registration established under the Registration Ordinance of 1883 and the Land Registry Ordinance of 1895, emerged in 1909. The Registrar of Instruments at Cape Coast was required to prepare a report on the extent of land alienations in the Colony since 1800. The Registrar replied that this information could not be supplied on the basis of recorded evidence available in the registry.[707] The only information the Registrar was able to give was that between 1889 and 1909, over 4,500 instruments affecting lands were registered in the Colony. He admitted that it would entail a great deal of work to determine accurately, on the basis of the number of registered instruments, the extent of land area involved, because surveys and plans attached to such documents, if any, were inaccurate.[708] This was an express admission on the part of the Registrar that plans attached to registered instruments could not be relied upon for the determination, location or identification of the land areas to which registered instruments related. But if this was the truth, then evidently the whole purpose of the scheme would be defeated and the objects of certainty and security could never be assured.

Although Section 15 of the 1883 Ordinance provided that for an instrument to be registered, it should have on the margin or back a plan describing the land affected by such instrument, Section 6 of the new 1895 Ordinance provided that no instrument, except a will or probate should be registered unless it contained a description which should include a statement of the boundaries, extent and situation of the land affected by it.

It will be observed that unlike its predecessors, the new provison did not require that such a description of the land should be made by reference to a plan. The question was whether it would be consistent with this provision to accept instruments for registration although unaccompanied with plans describing the land to which they related. Obviously, within

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707 Minutes of 6 January, 1909, C.O. 879/109.

708 Ibid.

the meaning of Section 6 of the Ordinance, a prospective grantee could describe in his document the boundaries and situation of the land by reference to physical features such as trees, rocks, rivers or anthills, without necessarily being in breach of the Section. Although such a description would not be by reference to a plan prepared on the basis of a scientifically agreed standard, it would nevertheless be a description. This was a serious defect in the law that its provisions were not formulated on the basis of the important role which accurate surveys and plans should play in the administration of the scheme.

The seriousness of this defect in the law could be appreciated if we turn to the successive returns which the Cold Coast Government furnished the West African Lands Committee [709] in response to requests made by the latter in the course of its inquiries between 1913 and 1915. The Committee wanted to know from the government the character and extent of land alienations under the Concessions Ordinance between the period 1900 and 1913. Concerning the nature of the information which the Committee received from the government, the Draft Report of 1916 contained certain observations which reflected vividly on the serious defects from which the registration system suffered due to inaccurate surveys. It is apposite to quote the relevant paragraphs which were as follows:

> . . . from 1900 to 1910, the native authorities of the Gold Coast alienated, according to notifications in the Gazette, 23,606 square miles of land (23,151 square miles for mining purposes and 455 square miles for agricultural and aboricultural purposes). Within the same period the Courts struck out concessions aggregating 8,673 square miles. From the end of 1910 to the end of 1913, a further 1,502 square miles have been alienated, a feature of these more recent alienations being that they are for the most part alienations of surface rights. It will thus be observed that of their own volition, and acting in ignorance - we must assume - of the character and extent of the public rights with which they were parting, in the vast majority of cases of one year only short of a century, the chiefs of the Gold Coast have in the past thirteen years alienated an area which actually exceed the total area of the Colony itself. This does not take into account the alienations to which they have consented in the last two or three years, and which have not been notified in the Government Gazettes . . . [710]

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709 This Committee was appointed in 1912 to investigate the land tenure systems of British West Africa. It sat until 1914 and its Draft Report was ready in 1916, but was never published.

710 Draft Report of the West African Lands Committee, 1916, Para. 157. Emphasis supplied.

The position at the close of 1913 was thus summed up by the Committee as follows:

"Total area of the Gold Coast	24,335 square miles
Total alienation of land by native authorities of the Gold Coast which have been notified in the Government Gazette from 1900 to 31st December 1913 (Telegram 22nd April 1914)	25,108 square miles
Total area of alienation struck out by the Courts from 1900 to the end of 1913 (Telegram 22nd April 1914)	10,279 square miles
Total area (being part of the last-mentioned area) whose alienation has been validated by the Courts up to 31st December 1913 (Despatch 6th 1914) (sic)	1,084 square miles.[711]

As the Committee observed, from the above figures the total area of land alienated, on the basis of the evidence contained in instruments affecting lands, amounted to some 36,000 square miles, thus exceeding the estimated total area of the Colony of 24,335 square miles by 12,136 square miles. It should be borne in mind that this calculation did not take into account large areas of land which would certainly have been affected by oral grants which were not officially recorded. These figures speak for themselves as showing that the instruments registered under the scheme were not accompanied by accurate plans depicting the land areas to which the interests described in the instrument related. It is also patently obvious that there was no proper system of checking the accuracy of site plans (on those occasions when they were attached to the documents) before accepting the instruments for registration. If there were an efficient system of checking the accuracy of plans against base maps drawn to nationally recognised scales or national grid co-ordinantes, such inaccuracies and mistakes would have been discovered in the land registry, preventing the absurd results which we have seen in the returns furnished to the Committee.

It was in these respects that the inherent defects of the Land Registry Ordinance were reflected. It should be remembered that before a concession was notified in the Gazette, it would first have been registered under the Ordinance. For section 15(1) of the Concessions Ordinance required that before the publication of a concession in the

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711 Ibid.

Gazette, the registrar of the court should register it at the expense of the person entitled to benefit from the concession grant.[712] As a condition for the issue of a certificate of validity, the law required that the certificate should state the boundaries, extent and situation of the land in respect of which the certificate was given.[713] It was required that the certificate shoud also briefly specify the nature of the concessions;[714] and should contain a complete statement of any limitations, modifications and conditions imposed by the court.[715] Like Section 6 of the Land Registry Ordinance, the weakness in these provisions was that they did not go far enough in prescribing as a condition for registration, an accurate description of the land area subject to registration by reference to a plan drawn on the basis of a national accepted scales. The root cause of the problem of overlapping grants, conflicting registration and double dealings in land which the figures above suggested, was the lack of accurate surveys without which the objectives of title security and certainty could not be achieved under the registration system.

In Concession Inquiry No. 1016 of 1911,[716] for example, the question for the determination of the court turned on the priorities between instruments containing two leases of the same land by the same grantor to two different persons. The second lessee took his grant for value and without notice of the first grant and registered his interest before the first grantee did. The case of Arkaah v. the Tarquah Mining Exploration Co. Ltd.,[717] also dealt with a similar issue of priority between two instruments of which the second in date was registered before the first. The case of Hockman v. Arkhurst[718] dealt with a similar problem of conflicting registration in which both parties were purchasers for value. The subsequent purchaser had no notice of the first grant and registered his interest prior in time to the first purchaser. All these cases need not have reached the courts

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712 Ordinance No. 14 of 1900.

713 Ibid., S.16(a), Emphasis supplied.

714 Ibid., S.16(b).

715 Ibid., S.16(c).

716 (1911) 2 Ren. 592

717 (1911) 2Ren. 604

718 (1920) I.F.C.102.

at all if the system of accurate surveys were made a basis of land transactions and for registration of instruments based on such transactions. Some writers on the subject of land registration in Ghana in the past and present have concentrated their attention on the conditions or the considerations which influence the courts in determining priority between conflicting instruments. They deal with questions relating to the operative effect of such doctrines as nemo dat quod non habet on such transactions; and the effect which fraud or notice, actual or constructive, have or should have on such transactions.[719] But while such treatment of the subject helps to illuminate the legal problems concerning the determination of priorities generally, they do not touch upon what we regard as lying at the root of all such problems, i.e. inaccurate surveys.

It is therefore not our primary concern here to deal with such problems in any detail. The reason for drawing attention to the cases referred to above is to show that the pith and marrow of the problems giving rise to the issues to be resolved in them lay in inaccurate survey of the land areas subject to registration. We are intent on demonstrating that such problems need not arise at all under a land registration system if, firstly, an accurate system of surveys which could be relied upon for locating and identifying positively the physical confines of the land area to which registered instruments related were available, and secondly, if an efficient and well-equipped staff capable of checking the accuracy of plans attached to registrable instruments against base maps prepared on the basis of a nationally agreed scale were maintained.

It cannot be denied the fact that the absurd figures on the character and extent of land alienations under the Concessions Ordinance within twelve years of its operation could be largely blamed on the failure to lay a solid foundation for the survey of all lands, or at least of the centres where land transactions were prevalent, as part of the scheme. The major lesson to be learnt from the failures of the scheme of land registration established under the 1895 Ordinance is that it will not be enough to make laws for the solution of social and economic problems in society if the means by which such laws can

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719 See Bentsi-Enchill G.L.L., London, 1964, 318-30. See also G. Woodman, "The Registration of Instruments Affecting Land", (1975), 7 R.G.L. 53

be implemented are not to be made available. In this respect, it should be regretted that the attention which the matter of land surveys should have received as part of the scheme of land registration was not forthcoming. This attitude of the government could be explained in terms of the state of land surveys in the Gold Coast generally; and that is what we should consider next in relation to its effect on land registration.

F. Surveys and Mapping in the Gold Coast

Until the 1920s, when the Survey Department was established, no serious attempts at mapping were made in the Gold Coast. Between 1900 and 1923, the Royal Air Force Engineers under the leadership of Mr. Watherstand, carried out some surveys in the Gold Coast. But these surveys were confined to mining and timber working areas and were carried out on individual bases only.[720] Indeed, the first map of the Gold Coast was produced as recently as 1911. Thus, although Section 6 of the Land Registry Ordinance of 1895 substantially reproduced Section 15 of the Registration Ordinance of 1883 which required that for an instrument to be registered, it should contain a description of the boundaries and the situation of the land affected, prior to 1911 most of the plans attached to instruments affecting lands contained only sketches or diagrams with the names of adjoining occupiers written on them. They described only the physical features such as rocks, trees or rivers on the boundaries without being drawn to scale or located on a proper plan.[721]

The establishment of the Survey Department in the early 1920s, however, saw the beginning of serious attempts to encourage surveying in the country. It was during this time that compass surveys and cadastral plans were begun and plans could be drawn showing direction of property boundaries in degrees, minutes and seconds in relation to true North by applying magnetic variation.[722] Between 1921 and 1939, extensive mapping of the Colony was undertaken by the Royal Air Force Engineers under the guidance of Major-General Sir Gordon Guggisburg. During this period cadastral plans of large towns such as Keta, Ada, Cape Coast, Accra, Elmina and Axim were prepared.

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720 See J. K. Dey, "Problems of Land Registration in Ghana Through the Eyes of a Surveyor or Map-maker", Paper presented at International Seminar on "Land and Economic Development in Ghana", 22-26 September, 1975, p.4.

721 Ibid.

722 Ibid., p.5.

After the Second World War map making in the Gold Coast progressed steadily, and the first air survey maps of Accra were published in 1954.[723] Such aerial surveys became great assets to the map-maker and the conveyancer because the revised maps showed contours, wood areas, and in some cases it was possible to identify traditional boundary marks such as trees and rivers, which were located by stereoscope and taken by the camera. Such air photographs enabled the positions of such natural boundary marks to be located and plotted on maps. It was during this period of improved map making and land survey methods that the inherent defects in the land titles registration system established under the Land Registry Ordinance of 1895 became patently obvious.

After the Second World War, particularly during the 1950s, the government embarked upon elaborate infrastructural development programmes of road construction, housing and other social services. This made it necessary for government to acquire lands compulsorily. Such acquisitions were followed by many claims for compensation. It thus became necessary to determine the extent to which individuals' interests were affected so as to compensate them. The responsibility for determining land areas affected and the value to be placed on such claims devolved on the Valuation Branch of the Lands Department. During the course of checking documents, some of which were registered or upon which judgment had been declared, against the revised base maps, it was discovered that the plots of land described in some of the instruments were as much as 2,000 or 3,000 feet out of their true positions.[724]

Referring to such inconsistencies, Dey wrote:

> It is our experience that a particular site which has been developed with a house may have been transferred by A to B and the same site might have been transferred in another instrument by X to Y and similarly by C to Z but there may not be any conflict on the ground.[725]

For instance, in a case referred to by Dey in his paper, as Re-Abeka and Mukose Lands,[726] in its review, the Privy Council referred to 900

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723 Ibid., p. 6. 724 Ibid., p. 7. 725 Ibid.

726 Ibid. The case was described as Asere and Nikoi Olai Family Suite No. 60/70, Tesano Concession Certificate of validity No. 814. The case was probably unreported.

acres as being the extent of land involved, but based its judgment on the "area edged green" (Exhibit No. 1). On the basis of the plan "edged green", however, the areas of land involved would have been 1,781 acres.[727]

Cases of this nature should be a cause of concern to the administrators of the land registration system, because it had been erroneously assumed that instruments affecting land in respect of which final judgment was pronounced accurately reflected what existed on the ground. It was thus provided under Section 9 of the 1895 Land Registry Ordinance that: "A probate of a Judge's certificate may be registered without proof upon production thereof to the registrar". In the light of the concrete evidence produced by the Valuation Branch of the Lands Department as to the unreliability of such documents, however, it would not be unsafe to conclude that the land registry records between 1883 and 1954 could not be relied upon as a source of information concerning land titles. We have tried to show the discrepancy between the land areas indicated on plans which were attached to registrable instruments and what they actually were on the ground in order to demonstrate that inaccurate plans or surveys lay at the root of the problems that beset the administration of the scheme of land titles registration in the Gold Coast, and to stress the point that inaccurate surveys constituted one of the most formidable obstacles to the accomplishment of the objectives of title certainty and security for which the system was designed.

G. Proof of Instruments

It would appear that the colonial government, having failed to provide the machinery for the survey of the land areas subject to registration, found a substitute in elaborate provisions on proof of instruments. Under Section 7(1) of the 1895 Ordinance, it was provided that:

> Every instrument presented for registration (except a will or an instrument which may be registered without proof under the provisions hereinafter contained), must be proved by the oath of the grantor or one of the grantors, or of the grantee or one of the grantees, or of one of the subscribing witnesses, to have been duly executed by the grantor.

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727 Ibid., p.9.

An original will presented for registration was also required to be proved by the oath of one of the subscribing witnesses in the manner provided by the Ordinance.[728] Under Section 7(3) such oath was required to state whether the grantor or testator could read and write, and if he could not read and write, it should state (except in case of a will where the deponent was not present at its execution) that the instrument was read over and interpreted to him at the time of its execution by him and that he appeared to understand its provisions.

The proof required was to be made in the following manner:

a. If the instrument was executed in the Colony, before the registrar at the office where it was presented for registration, or before a Judge, District Commissioner, or a registrar of a Divisional Court;

b. if the instrument was executed in any other part of Her Majesty's dominions, before any Judge of any court of law, or the mayor or chief magistrate of any city, or any police magistrate, or the person administering the government of any colony; and

c. if the instrument was executed in any foreign country, before any British Consul or other accredited British representative resident in such country.[729]

In respect of instruments affecting lands in Ashanti, it was provided that they might be proved before a District Commissioner of or the Chief Commissioner of Ashanti or before the registrar of Deeds, his deputy or a District Commissioner of the Colony.[730]

Unless all these conditions were fulfilled by way of proving the instrument, it would not be accepted for registration. The Ordinance, however, excluded from the requirements of proof by oath as as condition for registration, a probate or a Judge's certificate.[731] The will of a person who died before the date on which the Ordinance came into force in 1883, and any other instrument executed before that date were also excluded from the duty of proving instruments in the manner provided under the Statute.[732]

It is difficult to see the need for these elaborate provisions concerning proof of instruments by oath. It would seem unlikely that the part which such proofs could play in fostering certainty of title which was

728 S.7(2).

729 S.8(1).

730 S.8(2), as amended by Ordinance No. 1, of 1902, S.10.

731 S.9.

732 S.11. The date on which the Ordinance came into force was 24 March, 1883.

the main objective of the Ordinance would be so significant as to merit the emphasis which the legislator seemed to place upon them. It should be noted that proof of an instrument under oath that it was executed by the grantor would not be sufficient evidence that what was contained in the instrument necessarily represented the true state of affairs. The Ordinance did not provide that the persons before whom the instruments were to be executed should also have been present at the time of the transaction, or should depose that the facts contained in the instrument were accurate and true. Such witnesses before whom the grantor was required to execute the instruments were not enjoined to guarantee the validity of the instruments.

If the above observations are correct, then there is no doubt that proof of instruments in the manner provided in the Ordinance was not a good substitute for a machinery of land surveys as part of the system of land registration under the Ordinance. Yet this is the impression one gets from an examination of its provisions. While an instrument could not be accepted for registration unless it was proved in the manner described above, Section 12 of th Ordinance provided that:

> "If an instrument presented for registration has any map or plan drawn on it the registrar may require the person presenting it to deliver to him an exact copy of the map or plan to be posted or bound in the registry book with the copy of the instrument."

It can be seen that this provision presupposed that some instruments affecting land could be accepted for registration without plans being attached to them. Importance was thus placed on the proof of instruments by oath at the expense of provisions which should have made registration of instruments conditional upon accurate plans being attached to them. Ofall its 28 provisions, only Sections 6 and 12 dealt, in a casual manner, with the question of surveys and plans. It is submitted that the emphasis in this regard was misplaced.

H. Adjudication and Settlement of Title

Under any system of land registration where the objective is to use the scheme as an instrument for securing titles, a provision as part of the measure, for the definition of rights or interests in land and the determination of the land areas to which such rights or interests relate is of vital importance. The exercise under such a provision should be accompanied by conclusive determination and the settlement of issues relating to the persons, natural or artificial in whose names defined

rights and interests should be recorded. This implies a scheme for adjudication and settlement of titles to land.

It should not be erroneously assumed that adjudication and settlement of rights to land in the manner described is only necessary under a scheme of title registration under which the indefeasibility of registered titles are guaranteed by the State. Under a deeds registration system, such as the one established under the Land Registry Ordinance, 1895 where the objective was title security, the attainment of the ultimate goal of certainty of title would be impossible without any arrangements for the determination and settlement of rights to land.

It is clear from section 20 of the Ordinance that registration did not cure defects in title. It follows that the system did not guarantee absolute security of registered instruments. But this does not mean that the Statute permitted or encouraged the registration of defective titles. Indeed, elaborate provisions under the Act on proof of instruments as a condition for registration clearly demonstrates the intentions of the legislator that only good titles should be recorded. What is the purpose of recording titles, rights to which are not conclusively determined? There would seem to be none, in so far as security of title is concerned.

But the Ordinance did not make provision for conclusive determination of titles to land. It only provided for voluntary and sporadic registration of instruments affecting lands. Moreover, oral grants by which interests in land were transferred under the indigenous law were by implication excluded from the provisions of the Ordinance. In Crayem v C.A.S.T.[733] the West African Court of Appeal, considering section 17 of the Ordinance on priority between competing instruments, came to the conclusion that the section was for determining priority only as between written instruments. "Where therefore, the competition is between a written instrument and a parol grant under native custom, the Ordinance does not apply."[734]

This meant that even if adjudication and settlement of titles were contemplated, transactions under customary law might be excluded from the exercise. But undoubtedly, an orderly organisation of a system of land registration and the attainment of its goals of title security depend largely on conclusive and final settlement of rights to land. When this

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733 (1949) 12 W.A.C.A., 443

734 Ibid., at 446. For a fuller discussion of this point see pp. 402-403. below.

is done through a systematic adjudication of title by a competent tribunal set up for that purpose, the registration of the conclusions of such a tribunal accompanied by accurate site plans could achieve lasting results.

As Dowson and Sheppart pointed out in their recommendation for the establishment of a system of title registration in the Gold Coast, the essential working features of an effective register of title to land is the unambiguous definition of:

a. the parcels, which also form the units of the record;

b. the rights and interests; and

c. the persons, individual or corporate, entitled thereto.[735]

Rights to land would thus depend not upon the registration of the instruments which are only documentary evidence of title or judicial declaration of title to such documents, but upon the final and conclusive decision by such a tribunal that the evidence contained in the instruments reflects the true state of affairs both on the ground and in the instruments. Such final conclusions can only be reached, if during the course of such settlements, the exercise is accompanied by accurate survey, definition and demarcation of the boundaries and units of land to which defined interests relate.

When this is done, rights or titles to land would depend on recordings into the official register or registers, the "durable precisely defined units of land" affected rather than the "mobile mortal mistakable persons temporarily possessing or claiming rights over portions of the land".[736] These essential elements are necessary under both deeds and title registration systems if their objectives of title security are to be achieved. Evidently, these aspects of the scheme were never seriously considered under the Land Registry Ordinance and were thus unprovided for.[737] It is submitted that this failure to take account of the important role that adjudication and settlement of titles should play under the scheme constituted a serious defect in the Ordinance and was one of the key factors in the failures of the system.[738]

I. Impact of Uncertainty of Title and Costly Litigation

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735 Dowson and Sheppard, op.cit., p.7.

736 Ibid., p.8.

737 For a fuller discussion of adjudication see pp. 392-399.

738 See pp. 394-399.

As we have seen, the principal reason for introducing an Ordinance in 1883 for the establishment of a system of land registration in the Gold Coast was to make titles secure and to prevent litigation. An examination of Official Reports and Commissions of Inquiry on the extent of litigation over land titles and its disastrous consequences on peasant communities would disclose, however, that during the period of two decades short of a century since land titles registration was introduced to Ghana the system has had no significant impact on the insecurity of titles and its incidental costly litigation. There is no evidence that the law and the machinery proivded under it were effective against these problems or even minimised them.

For example, 29 years after its introduction, Belfield found during the course of his Inquiry that the chiefs who had had the best opportunity of raising money through concessions grants were those who plunged their stools most deeply into debt, and attributed such indebtedness, which he found to be widespread, to litigation over land titles.[739] Ten years after the Belfield Report was published, the problem of title insecurity and litigation became so acute that between 1922 and 1927 most of the dispatches and memoranda on land matters in the Gold Coast were devoted to the definition of policies designed to remedy the "exasperating uncertainty that has long existed in respect of titles in the Gold Coast".[740] In one of the memoranda to the Commission appointed in 1923 to consider the question of registration of title to land in the Gold Coast Colony, Mr. Rowe presented a paper in which he made a strong case for cadastral surveys as a framework for the introduction of the scheme.[741]

These calls for the introduction of a new system and the volume of litigation which steadily increased with the years were clear indications that the existing law and the system which it supported were proving inadequte to solve the problems of title insecurity and the costly litigation that was associated with it. When we turn to scrutinise the C. R. Havers Report on Indebtedness[742] in the Gold Coast, the magnitude of the problems of insecurity and its incidental costly litigation would fur-

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739 H. C. Belfield, Report on the Legislation Governing the Alienation of Native Lands in the Gold Coast Colony and Ashanti, London, 1912, 3.

740 See Proposed Reforms in Respect of Land Legislation of the Gold Coast, Primarily in Order to Promote Security of Title, Vol. I, Accra, 1927; Vol. II

741 R. H. Rowe, "Cadastral Survey Framework of the Gold Coast Colony and Registration of Title to Land", Memorandum of 15 December, 1922.

742 C. R. Havers, K.C., Report of Commission of Inquiry into Expenses incurred by Litigants in the Courts of the Gold Coast and Indebtedness caused thereby, 1945.

nish evidence of the failures of the scheme.

J. Boundary Disputes

A distinctive feature of the Havers Report on Agricultural Indebtedness was the light which it shed on the extent and magnitude of the problems relating to boundary disputes. The following quotation from the Report indicated the main source of such disputes. It said:

> It is abundantly clear from the evidence that the majority of states in the Colony and Ashanti have been, and many still are, in debt. Though there are other contributing factors, litigation is undoubtedly the main cause of the indebtedness. Stool debts caused by litigation generally arise out of litigation over land and particularly out of boundary disputes. [743]

Some of the evidence upon which the above conclusions were reached must now be examined in order to show that, notwithstanding the institution of a system of land titles registration in the country for more than 60 years, the problems which the laws were introduced to solve have persisted and even become worse.

The Havers Report showed that the most expensive cases concerned boundary disputes between two paramount chiefs of adjoining polities or traditional states. More often than not, other paramount and divisional chiefs became involved. In some cases whole communities were pitched against one another in litigation over boundaries. Such disputes were normally protracted and almost inevitably went through a chain of appellate courts to the West African Court of Appeal, and in certain cases, as far as the Privy Council in London. One of the cases providing the locus classicus of such protracted and expensive disputes was that between the Paramount Chief of Akim-Abuakwa and the Sub Chief of Asamankese. Havers found that Oferi Atta representing the Akim-Abuakwa stool spent over £100,000 apart form other expenses which were not on record.[744]

There was also the series of disputes over the stool lands between the Chief of Hieman and the Chief of Mokwa. Hieman was a small village of a population, according to the 1931 Census, of 900 people. The dispute began as far back as 1872 over a parcel of land and the right to ferry over the river Prah. The dispute culminated in litigation in 1894. The litigation resulted in the whole of the stool lands of Hieman being

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743 Ibid., p. 31

744 Ibid. It is believed that the total amount spent ~~of~~ on both sides might well exceed a quarter of a million pounds. See pp. The result of this protracted litigation was the passage of the Asamankese Division Regulation Ordinance (Cap.78) in order to protect, control and regulate the property, revenues and expenditure of stools in the Asamankese Division.

sold in execution to purchasers. Later, the purchasers who were related to the stool family of Hieman, entered into an agreement with the chief of Hieman under which the latter was appointed a bailiff-tenant of the stool lands with a right to share in the receipts. A further agreement was entered into with the Ohene of Mokwa under which the receipts from the ferries were shared. Thereafter, there had been a constant stream of actions between the parties to the agreement, or their successors in title.

An attempt was made to settle this dispute in 1931 (59 years after it had started) with the assistance of Sir John Yates, and an agreement was concluded. On that occasion, the chief of Hieman told Sir John Yates that he and his people desired to abandon this meaningless litigation in respect of which they had paid £12,000 to one legal practitioner, and £8,000 to another.[745] When the chief died, however, his successor challenged the agreement and further litigation ensued, and was only terminated by a compromise in 1942. At the time of this compromise, the accounts of the receiver and manager of the land showed that the total receipts between 1911 and 1942 amounted to £9,264. This amount included the proceeds of the sale of the land in dispute itself. Having regard to the amount of expenditure involved, the loss to the stools and their subjects concerned could be appreciated. Yet at the time of the Havers Commission in 1945, two actions were still pending between persons claiming to be entitled to thsoe lands.[746] This meant that over 73 years after the dispute had begun, litigation over title and right to the land had not been conclusively decided.

Similar evidence of protracted litigation over stool boundaries was found in Sefwi-Bekwai where the latter stool had borrowed over £2,000 towards the cost of litigation which commenced in 1926. The chief imposed a levy on his subjects in 1932 in order to liquidate the debt but some of it was still outstanding in 1945 when the Havers Commission was sitting.[747] In Edubia there was a protracted boundary dispute between the Edubia stool and the neighbouring stools of Ochereso and Gydim.. The litigation which ensued made the Edubia stool fall into debts which notwithstanding substantial payments still amounted to £1,994 in 1945.[748]

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745 Ibid.

746 Ibid., p. 32.

747 Loc.cit.

748 Loc.cit.

Further evidence of boundary disputes in which large sums of money were spent was provided by the litigation between the poeple at Donyina and the poeple of Nyamiani. Although this dispute was settled in 1907, it was reopened in 1935. Donyina eventually won the case in the Privy Council, but only after it had spent £1,700. In order to pay this amount, the stool raised a loan at an interest rate of 50 per cent. The village thus gained nothing from the 28 years of dispute.[749] There was also the interesting 1936 case of Nsoatre v. Besekum.[750] The dispute concerned a piece of land named Kotofa, of about one square mile in area. It was virgin land described by the Havers Report as having no minerals of any kind or anything of value upon it. The case went through the Asantehen's Court and proceeded to the Chief Commissioner's Court before it was amicably settled, but not before the parties on each side had spent over £1,500.

In a dispute of similar nature, the Adansi stool spent £8,000, of which £4,150 was spent on lawyers' fees.[751] In another case, for more than half a century, a piece of land called Hini was claimed and counter-claimed by the people of Kuntu and Nkusukum on the one hand, and the people of Suprudu in Ekunfi on the other. About 760 perople were interested on the one side and about 740 on the other. Hundreds of pounds were spent before the conclusion of the case.[752]

As the Havers Report had shown, a problem hardly less acute was in repect of boundaries between divisional stools. For example, no boundary was ever settled between the various stools to whom the Ahafo lands, a total area of some 720 square miles, were presented by the Asantehene Nana Opoku Ware after the Abimburo War.[753] This failure to demarcate the boundaries between the divisional chiefs gave rise to disputes between the chiefs concerned lasting for many years which were not settled until 1939 by the Asantehene Prempeh II. Similar problems existed in the Wenchi District where the boundaries between several divisions remained uncertain. For instance, at the time of the Havers Commission in 1945 the boundaries between Abease, Badu, Banda, Drobo, Mo, Nkoranza, Nswakan, Seketia, Seikwa, Suma Techiman and Wenchi remained undefined and uncertain.[754] This meant

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749 Loc.cit.

750 Ibid., p. 33, unreported.

751 Loc.cit.

752 Loc.cit.

753 Loc.cit.

754 Ibid., p. 35.

that the disputes were not limited to traditional state boundaries alone but involved internal subdivisional stool boundaries as well.

We have highlighted those aspects of the Havers Report which drew attention to boundary disputes in order to focus attention on three main points. Firstly, that over half a century after its introduction, except the Kumasi Town lands,[755] the system of land titles registration established under the Land Registry Ordinances of 1883 and 1895 had proved ineffective against uncertainty of title and costly litigation. Secondly, we want to focus attention on the fact that most of the disputes concerned undefined, undemarcated and unsettled boundaries. Thirdly, the way in which communities and stools were affected by large-scale expenditure having serious economic and social consequences on the societies involved.

The magnitude of the problem portrayed in the Havers Report was a clear indication that the scheme was a failure. As we have stressed throughout this discussion, the main cause of the problem was the lack of an adequate machinery of surveys and settlement of boundaries as part of the scheme. These views were confirmed and reflected in the recommendations of the Commission. The Commission recommended as a solution to the problem a plan by which boundaries between native polities could be conclusively determined and fixed within the framework of a land titles registration system.[756]

It recommended the appointment of a boundary commision which should be empowered under an ordinance to determine conclusively and fix boundaries in the Colony and Ashanti. Provision should be made under such an Ordinance enjoining the boundary commission to record its findings in a "boundary book by reference to a plan" prepared or approved by the Survey Department as accurate. Boundaries should be fixed on the ground in some permanent manner under the direction of the commission. It concluded its recommendations by suggesting that the ordinance establishing the boundary commission should contain provisions making the decisions of the commission on boundary settlements final and conclusive, binding and good for all purposes against all persons with no right to appeal.[757]

These recommendations were significant in several respects. They touched upon almost all the essential elements which a system of land titles registration should consist of in order to achieve its objectives

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755 Those areas of Kumasi township which were taken by government under the Administration (Ashanti) Ordinance, 1902, (Cap.110) 1951 Rev. See pp. 369-373.

756 Ibid., p.34

757 Ibid., p. 35

of title security and certainty. The role of the boundary commission could, for instance, be seen as that of an adjudication committee or tribunal, which we have argued, should play an important role in any successful scheme for the registration of land titles. In a similar way, the recording in the boundary book of the conclusions reached by the commission, describing such conclusions by reference to a plan drawn by the Survey Department or approved by it as accurate, could be seen as taking into account the indispensable role which a reliable system of surveys would have to play in the administration of the scheme. Similarly, the Commission's recommendation that the findings of the boundary commission should be conclusive and final indicates a recognition of the need for excluding defective and disputed titles from being recorded in the register.

In terms of establishing a land titles registration system, these were sound recommendations, but to carry them out would require the expenditure of large sums of money on equipment and qualified personnel. It would also involve initial increase in litigation, the evil at which the scheme would be directed, with consequential financial losses to the communities concerned. Realising that the decision of such a commission would be final and conclusive, the people would be prepared more than before to spend money to defend their claims to the lands. It may well be that in the long term, titles would become certain and secure, but the initial economic and social consequences could be devastating. Perhaps because of such reasons and the government's disinclination towards expenditure on projects which would not pay themselves instantly, these recommendations were not put into effect and no change in the law ever occurred until 1962. Lord Hailey, commenting on this attitude of the government, rightly observed that:

> Whatever may be felt as to the necessity for the introduction of a system of registration of titles in some other African territories, there can be no question that it is now required in the Gold Coast Colony. It is understood that the Government has had under its consideration proposals for legislation on the subject, but that it has hesitated to adopt them in view of the complicated nature of the problems involved, the expenditure which must be incurred, and the possibility of political opposition. [758]

Twelve years after the Havers Report was published, the problems which gave rise to the setting up of the Commission of Inquiry under

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758 Native Administration in the British African Territories, Part III, (1951), p. 225.

the chairmanship of Havers persisted and even increased so much that another Commission of Inquiry was set up once more to find out the causes of indebtedness.[759] One would have thought that this Commission of Inquiry should have been unncessary, having regard to the available evidence provided by past Inquiries. As should be expected, the 1957 Committee having exhaustively considered the history of past inquiries and the new evidence available, reached the conclusion that widespread agricultural indebtedness in peasant ocmmunities was attributable to litigation over land titles. The cause of such litigation was once again found to be uncertainty of boundaries between adjoining stools, communities and families. Like previous Commissions of Inquiry, the 1957 Committee of Inquiry recommended the introduction of a system of land titles registration as a lasting solution for these problems. What stands out clearly from these accounts of the history of land titles registration in Ghana is that since its establishment in 1883, until the Land Registry Ordinance of 1895 was repealed in 1962, the system of deeds registration has not had the effect of reducing significantly, the problems which it was devised to solve. In contrast, a relatively successful system of deeds registration was operated under the Kumasi Lands Ordinance of 1943 which we must now consider.

K. Land Registration under the Kumasi Lands Ordinance

At the time when the Registration Ordinance of 1883 was passed and re-enacted under the Land Registry Ordinance of 1895, Ashanti was not part of the Gold Coast Colony. However, following the publication of the Ashanti Order in Council of 1901 under which Ashanti was annexed as a conquered territory and formally brought under British jurisdiction, the provisions of the 1895 Land Registry Ordinance were made operative throughout Ashanti. This was done under the Administration (Ashanti) Ordinance of 1902.[760] This latter Ordinance declared that all lands, premises and buildings occupied as government property vested absolutely in the Crown.[761] The Crown also appropriated an area of land lying

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759 See the Report of the Committee on Agricultural Indebtedness, Accra, 1957.

760 Cap.110, 1951, Rev. S.22.

761 S.4(1).

within the limits of the town of Kumasi "free from all encumbrances, titles, interests, liens, charges and claims whatsoever alleged to be claimed".[762]

The Ordinance enjoined the Chief Commissioner to prepare, with all convenient despatch, a schedule of all the lands so acquired together with proper plans thereof.[763] The Ordinance imposed a duty on the Chief Commissioner to cause the originals of such plans and schedules duly certified under his hand and official seal to be deposited at the office of the Commissioner for lands in Accra. Any of such plans or documents was for all purposes and without proof of signature to be deemed to constitute conclusive evidence of the facts as to the Crown's ownership of which they purported to be a record.[764]

It should be noted that the duties which the proivsions of the Ordinance imposed on the Chief Commissioner could be seen as the first real attempt to institute a system of title registration on the basis of cadastral surveys in the country. Land registration by this arrangement was, however, limited to the areas acquired or controlled by the Crown within the Kumasi area.

When the Gold Coast became independent in 1957, and later a Republic in 1960, the Statute laws of Ghana were streamlined so as to conform to the Republican status of the State. Hence all lands previously vested in the Crown or in the Governor-General, were either vested in the state or in the President of the Republic in trust for the people of Ghana.[765] Though the administration of Kumasi Town Lands had been changing hands over the years, the Administration (Ashanti) Ordinance of 1902, under which they were originally acquired by the Crown remained unchanged.[766]

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762 Ibid.

763 S.4(2).

764 Ibid.

765 See the State Property and Contracts Act, 1960 (C.A.6).

766 On 25 September, 1941, in the course of his address at a durbar held in Kumasi, His Excellency Sir Arnold Hodson announced the Government's intention to give the freehold of the Kumasi Town Lands to the "Golden Stool" "in view of the steadfast loyalty of the Ashanti people and their chiefs and their devotion to the British Crown which has since become so manifest . . ." As a gesture of reconciliation with traditional rulers of Ashanti, therefore, these areas of land which were hitherto absolutely vested in the Crown were revested in the Asantehene and his successors in office in trust for the Golden Stool. See the Kumasi Lands Ordinance (Cap.145) 1951, Rev., S.2. Following the Sarkodi-Addo Commission Report, however, the trusteeship of the Kumasi Town Lands was transferred from the Asantehene to the Governor-General as a trustee for the Golden Stool under the Ashanti Stool Lands Act of 1958 (No. 28). See the Sarkodie-Addo Report of a Commission of Inquiry into the Affairs of the Kumasi State Council and the Asanteman Council, Accra. 10 February, 1958.

Registers were established for land registration purposes under the Kumais Lands Ordinance of 1945.[767]

A remarkable feature of the scheme of land registration established in Kumasi since the advent of the Administration (Ashanti) Ordinance, 1902 was that cadastral plans of Kumasi town lands were prepared. The key maps and plans purported to show boundaries of the lands surveyed with accuracy in accordance with Section 4(2) of the Ordinance. These maps were required to give the exact measurement by which the boundaries were to be demarcated on the ground. Such maps or plans were thus made in conformity with the result of a survey carried out by official surveyors and approved by the Director of Surveys or persons appointed by him for that purpose.[768]

The relative accuracy of such key maps and plans accounted for the degree of success which attended land titles registration in those areas of Kumasi under government administration and control. Titles were free of the uncertainties that bedevilled those areas lying just outside government-controlled areas and other places under traditional authority administration in the whole country. Noting the contrast between land registration under the Land Registration Ordinance, 1895, and the arrangements under which rights to lands were registered in Kumasi, the Havers Report observed:

> An interesting contrast is provided by the lands within the boundaries of the Town of Kumasi, which by an historical accident became vested in the Crown and are now vested in the Asantehene and his successors in office in trust for the Golden Stool and the Kumasi Division under the Kumasi Lands Ordinance, 1943. Persons holding leases from the Asantehene, which are duly registered in accordance with the Ordinance, enjoy security of title, and litigation with regard to such land seldom, if ever arises.[769]

It is important to note that this degree of certainty was achieved although no settlement or adjudication of title or demarcation and settlement of boundaries were undertaken. Several reasons could be found for this. In the first place, the question of title was not in dispute. Section 4(2) of the Ordinance made it clear that any original of the plans relating to the acquired lands and the documents thereof should for "all purposes and without proof of signature be deemed to constitute conclusive evidence of the facts as to the Crown's ownership" of which they purported to be a record. This provision removed any doubts as

767 (Cap.145) 1951 Rev. S.23.

768 S.4(2)

769 C. R. Havers, op.cit., p. 37

to the root of title.

As root of title was certain, the only thing which might give rise to uncertainty would be inaccurate survey of the areas to which titles related. But this was prevented by the maintenance of qualified staff in the Survey Department under the supervision of the Director of Surveys. The fact of government administration and control, which removed doubts about root of title and the fact of an adequate system of surveys, were thus the two crucial factors in the success of the land registration system in Kumasi. The registration or recording in the register of title in Kumasi therefore amounted only to a statement of fact as to the existence of these states of affairs, namely that a grantee had acquired an interest of a certain duration relating to a specific area of the land held or controlled by the government.

When these facts are appreciated, then the alternative measure of state control of all lands as a means of ensuring certainty without necessarily resorting to the establishment of an elaborate and expensive system of title registration can be recognised as feasible. As we have pointed out earlier,[770] the fact of government control which had the effect of eliminating boundaries betweeen stools, substools and families and establishing a recognisable and easily identifiable body with the legal capacity to deal with lands accounted for the degree of certainty of title in Kumasi and not necessarily because of the registration system. It is our contention that even if there were no system of land registration in the Kumasi town lands areas, with accurate surveys, the same degree of certainty could still have been achieved.

One fact is certain. In the Northern Territories where the government was in control, titles were and are still certain. In the whole of the North, the majority of the people never registered their interests nor even knew about the existence of the facility at all. In those areas of the country where government was not in control of lands there was a high degree of title uncertainty, the existence of a facility of land title registration notwithstanding.[771] These facts lend support to the view which we seek to urge, namely that the cheaper and quickest alternative of state administration of all lands be adopted in place of title registration.

To conclude these historical accounts of land titles registration, it would be appropriate to draw attention to two enactments, the Land

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770 See p. 371

771 It may well be that lack of knowledge about the existing facilities for registration accounted for the degree of uncertainty. But it is a fact that where government is in control the problem of uncertainty does not exist.

Development (Protection of Purchasers) Act, [772] 1960, and the Farm Lands Protection Act, 1962. [773] These Acts were passed not as land titles registration statutes, but as reactions to increasing problems of title insecurity with which land registration under the Land Registry Ordinance of 1895 was unable to cope.

L. The Land Development (Protection of Purchasers Act

We have seen from the conclusions of the Havers Report of 1945 and the Report of the Commission on Agricultural Indebtednesss of 1957, the way in which uncertainty of title and costly litigation over land titles had caused social and economic problems for stools and peasant communities. We have also drawn attention to the post-war infrastructural development programmes of the government in the 1950s. These events led to the influx of people from the countryside to the urban and city areas in search of jobs.

During this time, private individuals saw the economic potential of investing in housing and estate development. This led to increasing demands for land for building houses in the urban and city areas. But insecurity of titles increased correspondingly with such increases in land transactions attendant upon housing and estate development. This brought home to the independent government, even more than before, the ineffectiveness of the land registration system. The problems were underlined in a memorandum of a United Nations housing mission to the Gold Coast in 1954, which said:

> It has long been acknowledged that a serious need exists for clearing titles to land in certain areas of the Gold Coast and for instituting a system of land registration. These reforms are essential to record the rights of people to land, to secure those who have purchased property against eviction and to assure people who build their homes that they can do so without fear or uncertainty. It has been iterated and reiterated that only when a sound system for buying and selling property exists will the fundamental wealth represented by the country's land be brought into use for the benefit of the people. All too often, though no one may be disputing ownership to land, the imputed owner is unable to establish his ownership, cannot borrow money with which to develop his land, nor sell it to those able to develop it . . .
>
> The evils and mischiefs of the current situation are known. They rise to obstruct important programmes involved with the country's

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772 Act 2.

773 Act 107.

> growth. They loom in the conflicts between stools in some of the rural areas and between owners and tenants in the burgeoning uncertainty as to their rights. Almost every phase of the housing problem which the team of United Nations experts has explored has brought forth the uncertainties of land tenure as a primary obstacle. It has been emphasised in conferences with architects and builders who have been obstructed in their operation; by such folk seeking to build a roof over their heads; by Government officials who have the duty of making housing loans or carrying out legislative policy; by those concerned with advancing the building and loan movement; and by local government officials. [774]

The provisions of the Land Development (Protection of Purchasers) Act, 1960, had thus been designed as an ad hoc measure to deal with pressing problems of the kind described in the above memorandum. The Act is not a land titles registration statute, but its objectives are, like the latter, the security of titles and to make land transactions free of litigation. Accordingly, it may be seen not only as a reaction to the ineffectiveness of the registration system under the Land Registry Ordinance of 1895, but as a supplement to it. The subtitle of the Act makes it clear that it is intended to "protect purchasers of land and their successors whose titles are found to be defective after a building has been erected on the land".

The Act is not of general application in Ghana. It apples only to those areas of the country which the Minister of Lands, by legislative instrument, has declared as prescribed areas under the provisions of the ACt. In the Statutory Development area of Accra, for instance, where the Act applies, for a purchaser of land to have protection under the Act, the following conditions must be fulfilled:

a. the purchaser should have taken a "conveyance" [775] of land at any time after 31 December, 1944, [776] whether before or after the date on which Accra became a prescribed area;

b. the purchaser or a person claiming through him should have erected a building on the land in good faith, [777] and

c. proceedings for a possession order against the purchaser or a person claiming through him should have been brought before the Courts on the grounds that a person other than the purchaser is entitled to the land. [778]

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774 Memorandum on the Clearing of Clouded and Unmarketable Titles in Land in the Gold Coast and for the Institution of a System of Land Registration, November, 1954. Quoted in Kwamena Bentsi-Enchill in his article, "Do African Systems of Land Tenure Require a Special Terminology?", (1965) J.A.L. Vol. 9, No. 2, 114, at 135-6.

775 Conveyance is defined as including a transfer of land by customary law, showing that oral grants are also covered by the Act.

776 S.1(1) (a). The Act takes retrospective effect from 31 December, 1944.

777 S.1(1) (b).

778 S.1(1) (c).

If, under these conditions, the Court comes to the conclusion that but for the provisions of the Act, the conveyance would not operate to confer title to the land on the purchaser, but to make an order of possession against him would cause "hardship and injustice" to him, then the Court may make make an order providing that the conveyance taken by the purchaser shall be deemed for all purposes to have operated to confer on him title to the land.[779] But this is not the end of the matter. If the Court finds on the other hand, that its refusal to make an order for possession in favour of the person entitled to the land would in itself cause "hardship" and "injustice" to the latter, the Court may make a further order requiring the purchaser or a person claiming through him to pay to the former, compensation in a sum not exceeding the aggregate of any sums equal to twice the value of the land at the date of the purported conveyance to the purchaser.[780]

It should be noted that unlike the Land Registry Ordinance of 1895 which did not provide for registration of parol dealings in land, the present Act, by defining "conveyance" as including a transfer of land by customary law, caters for this need. It is in this respect in which the Act is in a way, a supplement to the Land Registry Ordinance of 1895, although it does not deal directly with land registration as such. As we have indicated already, like the Land Registry Ordinance, the main purpose of this Act is to ensure certainty of title and to curb litigation over land titles which had been increasing with land transactions in the 1950s.

Bentsi-Enchill is, however, very critical of the present legislative measure on several grounds. The most relevant of his criticisms is that rather than secure titles, it is possible for the Act to increase insecurity and encourage fraud. Expressing these views he comments thus:

> It could, perhaps, be urged on behalf of the Act that it was intended to make titles more secure and thus to encourage investment in buildings, and foreign capital generally. The answer to this appears to be irresistible. In the first place, one does not make titles more secure by providing machinery whereby an unscrupulous person can be assisted to take land away from its true owner against his will. If the quest is for increased security of titles, then it is paradoxical to enable defective titles to be validated as against existing good titles. That way rather lies an increase in the insecurity of titles, and

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779 Ibid.

780 S.1(2).

> the encouragement of fraud. The very subtitle of the Act, which suggests that it is intended 'to protect purchasers of land and their successors whose titles are found to be defective after a building has been erected on the land', carries more than a hint of the possibility that the innocent owner of land whose property is sold through the fraudulent act of some third person is being ignored. But he too needs protection . . . [781]

It may not add anything to the understanding of the main theme of our work to enter the debate on the merits or demerits of the Act. The main purpose of discussing it and drawing attention to it is to use it as a further demonstration that the problems of uncertainty and costly litigation persisted even long after land registration was introduced in the Gold Coast; and to indicate other legislative measures such as the present Act, which were being adopted to solve them. We should, however, remark that whatever the merits of Bentsi-Enchill's criticisms, it will be difficult to see under what circumstances a person who sits down until a building has been erected on his land before beginning an action for possession can be described as an "innocent land owner". It would appear that the fears expressed by Bentsi-Enchill have been taken care of by the provision in the Act that, for a purchaser to benefit under the Act, he should have erected his building on the land in "good faith". If the bona fide of the purchaser and the person claiming through him is the condition for the exercise by the Courts of the powers conferred on them then the situations and occasions on which the events which the author fears might possibly occur will be rare indeed.

M. The Farm Lands (Protection) Act, 1962

The Farm Lands (Protection) Act [782] like the one discussed above, is a further legislative measure to deal with the problem of the uncertainty. It is, in fact, an extension of the policy of the Land Development (Protection of Purchasers) Act. The difference between the two Acts is that the former is of wider application than the latter. The Act applies only to those areas prescribed by the Minister responsible for stool lands under a legislative instrument. [783] The Minister has exercised this power in such a way that it now applies in most farming areas of the country. [784]

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781 K. Bentsi-Enchill, Ghana Land Law, London, 1964, 272.

782 Act 107.

783 S.4.

784 The Act now applies in the whole of Ashanti, Brong Ahafo, Southern Ghana comprising the Western, Central Eastern and Volta Regions. But the city and urban areas of Accra, Kumasi, Cape Coast, Sekondi-Takoradi, including local council areas of Ada, Anlo North, Anlo South and Tongu, have been excluded from its provisions. See L.I., 23 March, 1962.

The objectives of the Act are clearly stated in its memorandum. It says that:

> Several occasions have arisen where a number of farmers have bought land from a stool holder, and after cultivating the land for six, seven, or eight years have been presented with documents of title by another person claiming title to the same piece of land from the former stool holder who did not develop the land. This situation invariably leads to prolonged litigation, waste of time and money and stultifies essential agricultural production. This Bill is thus designed, with retrospective effect, to make it possible for the second lot of purchasers who have developed the land to obtain good title to the land which they have developed. It also provides for compensation to be paid, in appropriate cases, where the Court considers it equitable.

Within the context of these objectives, it is provided under Section 2(1) of the Act that any farmer who acquires any land within the areas to which the Act applies for farming purposes any time after 1940 and before the commencement of the Act may have valid title conferred on him notwithstanding any defect in his title, if:

a. he has acquired it in good faith;

b. he has begun farming on it within eight years of the date of acquisition, and

c. no one had farmed on the land for a period of eight years prior to its acquisition by the farmer.

But any defect in the farmer's title could not be cured under certain conditions. Section 2(2) empowers the Court not to grant a possession order against the farmer, but should instead declare his title valid if it finds that but for this Act, it would have to do so by reason of defects in the farmer's title. But this power should be exercised only when the Court finds that to make a possession order against the farmer will cause "hardship" and injustice to him. Under Section 2(3) of the Act, where the Court declares valid the defective title of the farmer, thereby effectively extinguishing the valid claims of the person entitled thereto, and the Court considers that this would cause hardship and injustice to the claimant, then it should make a further order requiring the farmer to pay to the former, compensation in an amount not exceeding twice the value of the consideration paid at the time of the acquisition.

Undoubtedly, these provisions like those of the Land Development (Protection of Purchasers) Act, were designed as an ad hoc measure to deal with title insecurity and as a supplement to the Land Registry Ordinance and the land registration system established under it. However, like the latter Ordinance, the present measures were insufficient to deal with

the problems in their totality. The need for a more comprehensive legislation on a new land titles registration system was thought to be overdue. The Land Registry Ordinance, 1895 was thus repealed by the Land Registry Act, 1962 (Act 22) which replaced it, thus bringing to an end the colonial phase of 80 years of land titles registration in Ghana.

CHAPTER II

THE CURRENT MACHINERY OF LAND TITLES REGISTRATION

A. Introductory

In the discussion of the history of land titles registration in Ghana, an attempt was made to dmeonstrate that the enactments under which the scheme of land registration was established proved inadequate for the solution of the problems of title insecurity and litigation. Although a belated attempt was made to supplement the provisions of the Land Registry Ordinance, 1895, with the Land Development (Protection of Puchasers) Act, 1960, and the Farm Lands Protection Act, 1962, these statutes had no significant impact on the effectiveness of the system.

Attention was drawn to the fact that the failures of the system were due to:

a. inattention to the crucial role that an efficient system of surveys should play as part of the measure;

b. lack of qualified personnel to administer the scheme;

c. the sporadic nature of the registration programme whereby oral grants under the traditional systems were excluded from its purview;

d. the lack of any machinery for the definition, settlement and determination of rights to land and

e. the failure to settle boundaries between traditional states or polities.

The main task in this part of the discussion will be an attempt to examine the changes which have taken place in the registration system since 1962 when the Land Registry Ordinance, 1895, was repealed.[785]

As will be seen from the analysis of the provisions of the Land Registry Act, 1962[786] under which the present system works, most of the pre-colonial problems still persist. It will be seen that the new Act contains provisions which are capable of dealing with the problems for which they were designed. But for unexplained reasons some of these important provisions have not been brought into force as yet.[787] It will be shown that like the previous

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785 The Land Registry Act, 1962, (Act 122) repealed Ordinance No. 1 of 1895. See Section 35(1) of the former Act.

786 Act 122.

787 Sections 20(a) and 20(b) of Act 122 from which the power of adjudication and settlement of title could be inferred were not brought into force. For the discussion of this point, see pp. 392-398.

enactments the present Act excludes the registration of oral grants from its purview. What is more, none of the facilities, such as the establishment of registries and the appointment of a Chief Registrar are provided in accordance with the provisions of the Act. The present statute like its predecessors, provides no machinery for the definition of rights in land, the demarcation and settlement of boundaries and a systematic survey of the land areas subject to registration. The tedious, cumbersome, complex, time-consuming and the unnecessarily expensive nature of the procedure for registration will be highlighted.[788]

B. The Land Registry Act of 1962

i. Registry Offices

Having recognised some of the shortcomings of enactments on land titles registration in the past, the independent government of Ghana found it necessary to introduce a more comprehensive legislation to provide for a better arrangement for recording titles and rights to land. R. J. H. Pogucki, the first Commissioner of lands and the brain behind the Land Registry Act, was well acquainted with problems associated with instruments registration under the previous law. He believed that the time was still not ripe for the inauguration of a real system of title registration. This belief was founded on the knowlege that administrative and financial constraints would make its introduction unworkable.[789]

Accordingly, as Draftsman of the Act, Pogucki made provisions for the establishment and continuation of the deeds registration system of the past. The Act repeals the Land Registry Ordinance of 1895. Yet as its title suggests, it is an "Act to consolidate with amendments the law

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788 The discussion of the current arrangements existing for registration of instruments affecting land under the Land Registry Act, 1962, is based on the data and information obtained from the Lands Departments of the Regional capitals of Ashanti, Greater Accra, Northern, Upper and Volta. The data and information were obtained between July 1975 and August 1977 through personal interviews of Regional Lands officers, District Chief Executives, Regional representatives of the Sub-Committee of the Lands Commission and from the examination of files and records. Some legal practioners dealing with land questions and some prominent traditional elders were also interviewed. The opinions expressed on the facts are my own and my responsibility.

789 R. J. H. Pogucki, Memorandum to the Committee on Agricultural Indebtedness, Accra 1957. See Appndix III A of the Report.

relating to the registration of instruments affecting land." The Act thus substantially contains the main provisions of its predecessor, with some important additions, modifications and alterations.

Part I of the Act provides for the establishment of a land registry office at Accra and at such other places as the minister may appoint. The minister may remove any office from one place to another and may increase or diminish the number of offices.[790] Power is conferred on the President to appoint a Chief Registrar of lands with the responsibility of supervising registry offices, and a registrar at each office.[791] Remarkably, these provisions had been on the Statute books since 1883 when the Registration Ordinance was passed; and although it might be inconceivable that a scheme of land titles registration could be successfully implimented without the provision of such basic facilities as offices, equipment and the appointment of a competent administrative head, none of such facilities were ever provided.

Certainly, Pogucki who was the Draftsman of the Act, envisaged and had in contemplation, the establishment of registry offices independent of the Lands Department. If this had not been the intention of the Draftsman, the provisions for their establishment would have been superfluous, since the Lands Department was already in existence. The role of the Lands Department, if any, was intended to be one of servicing the land registries.[792] Yet it would appear that the necessary foundations which should be laid for the administration of the scheme through the establishment of well equipped independent land registries and the appointment of qualified personnel have been neglected. Like past governments since 1883, the independent governments of Ghana have not considered it necessary to establish land registries and appoint registrars with the expertise to supervise the implimentation of the programme.

Before Pogucki could begin implimenting the scheme he was replaced in 1960. That was two years ahead of the coming into force of the Act in 1962. When the Act came into force, contrary to Pogucki's intention and the provisions of the Act, neither were the registries established nor the Chief Register or a registrar appointed. Instead, the functions of the land registry were absorbed into the main stream of the Lands Department's work. Until 1974, there were no registration facilities in the

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790 S.1.

791 S.2.

792 I am indebted to Mr. B. T. Acromond, Senior State Attorney and Registrar of Lands, Kumasi, for the information on Pogucki's work in the Lands Department and his role in the framing of the present Act.

Brong Ahafo, Northern and Upper Regions of the country. This meant that any grantee of an interest in land from the two regions who was desirous of getting his instrument registered would have to travel to the Department in Kumusi for this purpose. The expense in time and money which such an exercise involved was enough to prevent even a willing interest holder to undertake this task. At present, although Northern, Upper, Volta and Brong Ahafo Regional Lands Departments have got land registries, they are inadequately equipped for the registration exercise.[793]

At the time of Pogucki's departure, the most senior man in the Lands Department was a Valuer. He succeeded Pogucki as Chief Lands officer. Since then, there had been successive Chief Lands officers all of whom were valuers by profession.[794] As the administrative head of the Lands Department, the Chief Lands Officer combines many functions. They include matters relating to the administration of stool lands,[795] lands compulsorily acquired by the state, lands generally controlled by the government and all questions concerning valuation of property. The registration of instruments affecting lands thus became just one of the additional functions in the main stream of the Lands Department's work.

This failure to establish independent land registries and to appoint registrars to administer the scheme in accordance with the provisions of the Act underlines the lack of appreciation on the part of past and present governments, of the real nature of the scheme, what it involves and what it will take to make it work successfully. As will be seen presently, this is the starting point of the failures of the present system. We shall examine next, the effects of the lack of such registries and registrars. on the administration of the scheme.

ii. Problems of Administration.

As has been pointed out already, the government has failed to establish land registries and has not appointed a chief Registrar and registrars for the administration of the scheme of land titles registrations according to the provisions of the Land Registry Ordinance of 1962. This has created

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793 There was for example, as at August, 1977, no embossment machine in any of the places mentioned above for the stamping of documents, and all instruments had to be sent to Kumas or Accra for that purpose.

794 I was informed that all three successive Chief Lands Officers were replaced because of the inefficient manner in which they administered the Lands Department.

795 Section 8(1) of the Land Administration Act, 1962, (Act 123).

certain problems for the registration programme. Although the function of land registration has been absorbed into the main stream of the duties of the Lands Department, land registration and its administration came to be regarded as a function for trained lawyers. Yet no service conditions comparable to what obtains in the Attorney General's Department or other comparable institutions exist for lawyers at the Lands Department.

For this reason, there are no permanent legal officer-employees of the Lands Department. Instead, the Attorney General's Department is requested to second some of its legal staff to the Lands Department. The legal officers, when assigned to the latter, remain subject to the service conditions of the former. Their promotion, welfare and discipline are the responsibility of the Attorney General. They are responsible and answerable to the latter and not to the administrative head of the Lands Department. Such legal officers can be called upon by the Attorney General to perform other duties apart form those of the Lands Department. At the Lands Department, the legal officers perform most of the functions relating to the registration of instruments affecting lands.

In the Kumasi office of the Lands Department, for example, there is a Senior State Attorney who is the registrar of instruments affecting lands and assisted by a state attorney in the performance of his duties. In addition to duties pertaining to registration of rights to land, they perform other functions relating to the administration of stool and government lands and all legal issues incidental thereto, on behalf of the Lands Department. As the legal staff is subject to the control of the Attorney General and its Department, and not answerable to the head of the Lands Department, the Registrar has no supervisory powers over the clerical and other staff of the Lands Department.

Similarly, the registrar has no right to enforce discipline directly or initiate policy towards efficiency and improvement in the registration procedure. All the clerical and technical staff, including those concerned with registration of instruments for which the senior State Attorney or the registrar is responsible are under the senior Lands Officer. The land registers, documents, files and all other records relating to land registration belong to the Lands Department. Most records are designed for valuation purposes and not for registration of instruments as such. As a result, the registrar has no control over entries into the record books. Yet on many occasions the legal staff has to be called upon to answer in court, questions in respect of certain anomalies arising out of inaccurate entries into the record books and reports submitted from the Lands Department of which the registrar may be the signatory.

In all the Lands Departments of those regional capitals investigated, the situation seems to be the same. A solution of the problem could be found in cooperation between the senior lands officers of the Lands Department and the registrars, but this cooperation does not appear to exist. At least, in the Kumasi office, no evidence of such cooperation was found to be existing. The administrative arrangements are in themselves inherently fertile for disagreements. The senior lands officer is the administrative head of the Lands Department. But the registrar who is a senior State Attorney earns much higher salary than the senior lands officer. The former, as we have seen, is not answerable to the latter. The registrar too has no control over junior and clerical staff although his work with regard to registration is supposed to be directly under his control. These conditions are not conducive to any co-ordinated action between the legal staff and the senior lands officer.[796] In this way, the land registry is viewed by most lands officers as an appendage of the Attorney General's Department and thus pay no particular attention to the working of the system.

In addition to these problems, there is an acute shortage of staff in the Lands Department. There is no staff directly responsible for lands titles registration. That function is combined with other duties of the Lands Department. The number of junior staff responsible for making entries into the record books, checking the accuracy of site plans attached to instruments for registration against base maps and other duties is too small to cope with the volume of work involved. In the Kumasi Lands Department for instance, the main office in which the duties of land registration is performed is very small and overcrowded. This small office is staffed by a senior Technical Officer, a Technical Officer, a Senior Technical Assistant, a Higher Executive Officer, and a typist. These officers combine the duties of registration with attending to valuation records, court attendance, preparation and keeping of plans and record sheets.

The office is so small and so overcrowded with staff, records, documents, plans, maps and files that the arrangement and filing of records in the

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796 It should be noted that even in those places where the relationship between the registrar and the lands officer responsible for the Department may be cordial, the registration functions are so regarded as falling within the spheres of the legal officers' administration that the latter does not pay any particular attention to the administration of the scheme. This situation was evident in the Lands Department at Tamale in 1977. Most of the Regional Lands Officers interviewed seemed to know very little about the technical details of the registration, under the provisions of the Land Registry Act, 1962.

order in which they can be found and respond to searches has become difficult.[797] Under such conditions it is obvious that land registration cannot be given the serious attention it actually deserves. These conditions are in a large measure responsible for the inefficiency in the working of the system. At the Lands Department in Ho, for example, for lack of office accommodation, no legal officer was assigned to the Department when records were being examined in July, 1977. At Tamale, the senior State Attorney who is the registrar of lands for both Northern and Upper Regions has no other staff assisting him other than one technical officer who combines such functions with other duties of the Lands Department.

It is submitted that if the system of land registration should be used as an instrument for securing certainty of title and to bring to an end the costly litigation that is associated with it, then the establishment of independent land registries in accordance with the provisions of the Land Registry Act 1962 is inevitable. It is only when a Chief Land Registrar is appointed as the administrative head of the scheme and registrars are appointed at each office to supervise the registration that a principle of accountability can be established for the organisation of the scheme. As things stand now, when something goes wrong, it will be difficult to aportion blame, since neither the lands officer responsible for the Lands Department, nor the Land Registrar who is usually a lawyer subject to the rules of the Attorney General's Department, will be ready to accept responsibility for any mistake.

At present, registration facilities exist in the Lands Departments of the regional capitals only. This means that people have to travel long distances from the country side at great expense to get their instruments registered. Needless to say, it will require a great deal of urgency and necessity for the ordinary man to embark upon this task, particularly when this means years of delay.[798] If the government believes that the

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797 At Kumasi, one can often see people hovering around this office; people from far beyond the city. These are people wishing to enquire about delayed actions on their applications for the registration of leases, timber and charcoal concessions and other rights to land. There was evidence that some people went to the extent of complaining to the Regional Commissioner about delays in processing their documents and the latter would send a note requesting quick action on the document concerned. Such conditions create room for redtapism, corruption and favouritism.

798 Evidence of applications for registration which had been pending for more than two years without being answered were found at Kumasi. These were those applications which had not been followed up by the applicants or got mixed up in the filing system. For delays in registration procedure see pp.432-434 below.

only way by which it can solve problems of uncertainty is by registration of instruments affecting land, then the system should be brought near to the people by establishing registries in every district of the country. The financial resources should have to be made available for staff recruitment and the purchase of equipment necessary for a successful operation and organisation of the system.

iii. Surveys and Registration of Instruments

Modern techniques of survey introduced during and after the Second World War carried with it considerable improvement in survey works in the country. By the time the Land Registry Act came into force in 1962, the country had many more qualified surveyors, technicians, cartographers and draughtsmen than in the past. Since the establishment of the Survey Department, facilities were provided for in-service training for draughtsmen, technicians and sub-professionsals. Today, some personnel of the Survey Department are so well trained that they are capable of doing any type of survey work independently or under the supervision of professionals Apart from government surveyors there are those professionals licensed under the Survey Act, 1962.[800]

But this improvement in the system of land surveys has not eliminated altogether the problems relating to inaccurate surveys in the current land titles registration system. The Land Registry Act, goes further than previous enactments in providing for accurate description of the land areas subject to registration by reference to a plan, but not far enough to make this requirement obligatory. The relevant provisions are to be found in Section 4 and 16 of the Act, the former providing that:

> "No instrument, except a will or probate, shall be registered unless it contains a description (which may be[801] by reference to a plan) which, in the opinion of the registrar, is sufficient to enable the location and boundaries of the land to which it relates to be identified or a sufficient reference to the date and particulars of registration of an instrument affecting the same land and already registered."

This provision, but for the unfortunate use of the word "may", would certainly

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799 I am indebted to the Regional Surveyors of Ashanti, Northern and Volta for most of the information concerning the Survey Department.

800 Act 127. See Part II of the Act.

801 Emphasis supplied.

have made the description of the land areas subject to registration by means of an accurate plan a conditio sine qua non for accepting an instrument for registration. Another obvious defect in this provision is the exception from the requirement of the description of registrable instruments by reference to a plan, a will or probate. The exception made in respect of a will and a probate is based on the erroneous assumption that instruments affecting lands upon which the courts have declared judgment are necessarily free of doubts as to the accuracy of the plans attached to them. As we have seen earlier, this is hardly the case.[802]

Like the above provision Section 16 of the Act is so framed that it presupposes that some instruments can be accepted for registration without plans being attached to them. It provides:

> "16. Where a map or plan is comprised in or annexed to an instrument, a true copy of the map or plan must accompany the instrument when brought for registration, and shall be filed in the register."

Both Sections 4 and 16 of the Act suggest that some instruments may be accepted for registration without having plans describing the land areas to which they relate attached to them. But it will be difficult to see how the requirements of Section 4 that the description on the land area should be sufficient to enable the location and boundaries of the land to which the instrument relates to be identified can be met without a description by reference to an accurate plan. For this reason, the normal practice under the current registration system is that the land registry would not accept an instrument for registration unless there is attached to it a plan describing the land area in the manner prescribed by Section 4 of the Act. This means tht provided there are adequate means of checking the accuracy of such plans in the Lands Department, barring human errors, the registration of conflicting grants can be eliminated in the system altogether. This will have the effect of reducing overlapping grants to the bearest minimum and thus reduce land litigation considerably.

However, the lands Department does not have qualified surveyors in the regional capitals where the registration is carried on to carry out or supervise the kind of meticulous checking necessary to avoid mistakes. The few trained government surveyors are concentrated at the Accra office of the Lands Department. The result is that under the present system of deeds registration, registrable instruments are accepted for registration on some occasions although the plans annexed thereto might be inaccurate.

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802 See pp.352-356 above.

For instance, in 1964 certain lands including Osu stool lands were vested in the President under an Executive Instrument.[803] The stool, however, continued disposing of interests in parts of the affected lands and were given approval by the Minister of Lands under the provisions of the Administration of Lands Act, 1962.[804] Later when the Survey Department carried out an accurate survey of the area, it was discovered that on the basis of the plans on which the transaction was concluded, some of the purported grants fell into the Achimota Forest Reserves. Some of the plots were as much as 400 feet out of their true positions on the ground.[805]

A research in the Lands Department at Kumasi disclosed similar problems in the registration system. A lease in respect of a plot[806] was recommended for the Minister's concurrence by the Senior Lands Officer in Kumasi after it had been approved by the latter. On rechecking at the Lands Department at Accra, it was found to have fallen on another plot in respect of which an earlier lease was filed and registered.[807] What is important about this case is that the instrument sought to be registered went through all the processes of checking at the Kumasi Department. The conflicting interest could easily have been registered if the Minister had given his concurrence on the faith of the Senior Lands Officer's recommendation without further check in the Accra office of the Lands Department. It is difficult to determine how often defective instruments of the kind go through, but having regard to the lack of qualified surveyors in the Department and the frequency by which inaccurate plans are annexed to registrable instruments, the system cannot be relied upon as giving the true state of title on the face of the records.

There was a similar case involving a plot of land situate at Adankwame, four miles from the Kumasi city centre on the Kumasi-Sunyani road. The Lands Department being in doubt, referred the plan attached to the instrument to the Survey Department for further checking. The officials of the latter Department found that upon the basis of the plan annexed to the instruments for registration, the plot of land in question was lying and situate 90 miles away from Kumasi. Several letters were found on the files of the

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803 No. 108.

804 Act 123, S. 8(1). As will be seen later, this is one of the last Acts in the process of registration. In fact, before the Minister's approval the instrument should have gone through all the checks that are necessary for registration. See pp.400-401 below.

805 See J. K. Dey, op.cit., p. 14

806 No. 1A, Block 'N', Asukwa Amakom Extension.

807 The earlier lease was registered and numbered L.S. No. S.462/70

Lands Department in Kumasi in which queries about conflicting registration of interests were raised by the head office of the Lands Department in Accra. It is not easy to determine with precision, the extent of conflicting registration and the extent to which the lands records can be relied upon as giving accurate information on the extent of lands under registration. It is, however, clear that inaccurate surveys still pose a formidable problem for achieving certainty of title through the present system of land registration.

There are several reasons why despite considerable improvements in techniques of surveys and the availability of more qualified surveyors these problems still persist. Our investigations reveal that in the majority of cases, non-professionals do the work and the professionals, without actually checking their accuracy authenticate them as accurate while they may not be so.[808] This practice seems to be widespread in the country. This is mainly due to the fact that apart from the Survey Department where there are relatively a reasonble number of qualified surveyrs, draughtsmen, and subprofessionals, in the private sector, there are only a handful of professional or licensed surveyors. By May 1977, there were not more than 12 licensed surveyors serving the Kumasi city area. During the same period, only four licensed surveyors were operating in the whole of the Volta Region. There was only one in the Northern Region and none at all was to be found in the Upper Region during the same period.[809]

In spite of the scarcity of licensed surveyors in private practice, the Lands Department would not accept any instrument for registration unless the plan attached thereto is certified as accurate by a licensed surveyor. This was one of the measures adopted by the Lands Department in 1971 in order to prevent the registration of instruments to which inaccurate plans may be attached so as to enable it to begin the compilation of more accurate records. In order to introduce this procedural requirement into the registration process, the Lands Department had to rely, not on the provisions of the Land Registry Act, but on certain provisions of the Survey Act, 1962[810] which deal with the qualification and registration of surveyors. The relevant provision of Section 6 prescribes that:

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808 Information obtained from Regional Surveyors of Volta, Ashanti, and the North. See also J. K. Dey, op.cit. p. 12

809 Information from the Regional Surveyors as above.

810 Act 127.

"1. No person other than an official surveyor, a licensed surveyor, or any public officer making or preparing any plan in the course of his duties as such shall survey any land for the purpose of preparing any plan for attchment to an instrument of conveyance, leases, assignment, charge, or transfer.[811]

2. No person other than an official surveyor or a licensed surveyor shall certify a plan.

3. Any person contravening the provisions of this section shall be liable to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months."

The effect of adopting these provisions for land titles registration purposes is to make government and licensed surveyors, the only persons that can prepare or certify plans which may be attached to instruments for registration. Government policy towards its civil service employees with regard to private occupation has the effect of reducing even further, the category of surveyors who may certify or prepare plans for the purposes mentioned in the above provisions. Government surveyors of the Lands Department are regarded as civil servants and are therefore, not permitted to offer their services for sale outside their scope of employment. This leaves only the handful of licensed surveyors in the country to cope with the preparation and certification of the large number of plans to be annexed to registrable instruments.

This will certainly go far beyond the capability of such few licensed surveyors in the country. In order to comply with the law and at the same time to exploit the high demand for their services, many licensed surveyors simply employ apprentices to whom they often leave the work of survey and preparation of plans. When the work is completed, the licensed surveyor invariably certifies it as accurate without necessarily having taken the trouble to verify its accuracy. There are also sub-professionals and quacks who often take advantage of the scarcity of professional surveyors by undertaking survey work and do prepare site plans for conveyancers and grantees of interests in land. Obviously the Lands Department does not accept work done by such non-professionals and quacks. But where they are certified in accordance with the provisions of the Survey Act, they become acceptable. Such non-professionals therefore, present their work to the licensed surveyor who certifies them as authentic and accurate, although in the majority of cases their accuracy would not have been verified against base maps supplied by the Survey Department or agreed scales or

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811 Emphasis supplied.

co-ordinates.

This state of affairs can obviously not aid efforts to build up reliable records on the basis of which interested persons can be assured of the certainty of land transactions which may be conducted on the faith of the land registry record. This is more so because the normal practice in the Lands Department is to accept plans certified by licensed surveyors as accurate. Unles there are obvious defects in the face of the work which may raise doubts as to its authenticity or accuracy, no further checks are conducted. This makes possibility of conflicting registration very high indeed.

One of the most effective ways of preventing this from happening will be the appointment of competent personnel with the special responsibility of checking the accuracy of every plan which may be attached to a registrable instrument, whether it be certified by a licensed surveyor or not. Yet at the present, it does not appear that the Lands Department is in a position to do this. It is submitted, however, that this problem does not appear to be insurmountable. It could be solved by getting the Survey Department directly involved in the registration exercise. Whether or not independent land registries will be established in the near future, such participation by the latter Department in the programme of registration would seem to be inevitable, if the problems relating to inaccurate surveys in the registration system should be found a lasting solution.

At present, the survey Department, as part of its general responsibilities, supplies base maps to other Departments such as the Town and Country Planning, including the Lands Department. On certain occasions officials of the Survey Department may upon request, check the accuracy of plans and maps on behalf of the Lands Department. But such duties are not regarded by the former as essentially part of its primary functions. It considers its main functions as being the making and production of maps. Hence, such detail works as the demarcation of boundaries, marking, plotting and pegging out land areas on the ground will be undertaken on behalf of the Lands Department only upon special requests. As such duties are regarded as secondary to its main functions, even though some work required of it may be urgently needed, the main duties of the Survey Department may be given priority over those of the former. In such situations the expeditious execution of such "secondary" duties will depend largely on the good will and the degree of corporation between the administrative heads of either Department. If the relationship between the senior staffs of the two Departments is not good enough, there could be unnecessary dalays in the execution of such work.

For reasons such as these, it becomes imperative that the Survey Department, or at least a branch of it, should become formally and directly involved in the scheme of land titles registration. It is the Survey Department which has the men with the necessary expertise adequate for the ground work required for the implementation of an effective and efficient system of land registration. We have it on competent advice from the Director of Surveys and senior officials of the Survey Department that much of the field work involved in land surveys, such as the demarcation of boundaries, plotting, marking and pegging out land areas on the ground, do not required a large number of professional surveyors. With only one or two professional surveyors assisted by few semi-skilled and a good number of unskilled workers, a lot of work can be done in a reasonable time. This means that by getting the trained personnel of the Survey Department involved in the scheme, much of the staffing problems affecting the registration programme can be reduced if not eliminated completely.

Physical examination and identification of plots to which instruments subject to registration relate can be undertaken where doubts exist and qualified personnel will be at hand to offer competent advice. If the government still believes that the best way of solving the problems of title insecurity is the institution of an effective system of land titles registration and is keen on supporting such a programme, then the suggested involvement of the Survey Department or at least a section of it would seem to be imperative. Such a step would become even more desirable if a programme of compulsory and systematic registration should become necessary in the programme. In such a case, the adjudication and settlement of title will become an inescapable part of the programme where qualified and official surveyors would be expected to play a key role. In this regard it will be apposite to consider next, the extent to which the present law, the Land Registry Act, makes provision for the adjudication and settlement of title under the present system of land registration.

iv. Adjudication and Settlement of Title

It is one of the defects of the present system of land titles registration that the Act under which it operates does not make positive provisions for the adjudication and settlement of titles to land. For the current system to achieve its primary objective of security of title, a machinery for the settlement of claims to land as part of the scheme would seem to be necessary. Under the present Act there is no comparable provision of section 20 of the 1895 Land Registry Ordinance to the effect that registration

does not cure defects in title. But the former does not guarantee the unassailability of registered instruments. What the present Act does is to make land transactions ineffective until registered in the manner prescribed by the Statute.[812] This does not imply that defective titles will be cured of their defects by reason only that they are registered.

The most obvious way in which the present registration system can be employed to achieve title security is to make it a condition for registration that only lands in respect of which titles have been conclusively and finally determined should be accepted for registration. But this can only be done through a machinery for the adjudication and settlement of titles as part of the programme. Although the Act does not make positive provisions for the establishment of an adjudication committee or tribunal for the settlement of titles to land, the power to perform such functions can be inferred from the powers conferred on the Chief Registrar under Part IV of the Act.

Under Section 20 of the Act, it is provided that:

"A registrar may, subject to the provisions of this part of the Act, refuse to register an instrument affecting any particular land if:

a. he is satisfied that the instrument deals with the land or part of it in a manner inconsistent with an instrument previously executed whether by the same grantor or some predecessor in title or by any other person; or

b. on the face of the records the grantor does not appear to him to be entitled to deal with the land as the instrument purports to do; or

c. the instrument is made in contravention of, or is null and void by virtue of, any enactment; or

d. it contains any interlineation, blank, erasure or alteration not verified by the signatures or initials of the persons executing the instrument."

In refusing to accept an instrument for registration on any of the grounds stated above, the Act imposes a legal obligation on the registrar to notify the prospective grantee of his opinion and the grounds thereof giving him three months within which he is to reply and to satisfy the Chief Registrar as to the grantor's title or legal capacity to deal with the land in the manner proposed by the instruments.[813] Where the grantor is unable to satisfy the Chief Registrar as to his title or right to execute

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812 See Section 24.

813 S.21

the document within the three months prescribed by the Act, the latter may extend the period, not longer than three months as he may for good cause allow, within which time the former should prove his title or withdraw the application for registration.[814] If at the expiration of such extended period, the grantor is unable to prove his title and the grantee has not withdrawn his application, the Chief Registrar is enjoined to serve on the grantor and the grantee and upon every person whose interest in the land appears to him to be affected by the instrument, notice of the time and place at which he will proceed to hear and determine the question whether registration of the instrument should be refused.[815] In that event, he is enjoined to publish notice of the hearing in the Gazette and in some newspaper circulating in the area in which the land is situated and may cause notice thereof to be published in such other manner as he thinks fit.[816]

The duty imposed on the Chief Registrar to publish the hearing and the time and place where it is to take place is intended to make all persons whose interests might be affected by the transaction to become aware of it and thus make their claims before the Chierf Registrar. Such publication of the hearing is important in Ghanaian communities where the communal holding and beneficial enjoyment of property is the predominant feature of the land tenure systems. After the necessary publication of the impending enquiry into the case, the Chief Registrar is empowered to proceed to hear and determine the question at the time and place appointed or at any other time or place to which he may adjourn the hearing. In doing so, he is bound to hear every person claiming to be entitled to an interest in the land.[817]

After the determination of the issues relating to the claims of the parties, the Chief Registrar is enjoined to communicate his decision in writing to the grantor and to every person represented at the hearing, and shall publish it in the same manner as the publication of the hearing notice.[818] The right of appeal from the decision of the Chief Registrar is available to the grantor, the grantee and any other person represented at the hearing under Section 22(5) of the Act. Under this provision,

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814 S.22(1).

815 S.22(2).

816 Ibid.

817 S.22(3).

818 S.22(4).

any other person who may not be a party to the hearing can also, by leave of the court, appeal to the High Court from the decision of the Chief Registrar. The rules governing appeals from a Circuit Court to the High Court in civil matters applies to all such appeals, subject to the rules of Court.[819]

It can be observed that the power conferred on the registrar to refuse registration under certain conditions, and the duty imposed on the Chief Registrar to resolve doubts as to the validity of land transactions and title thereto imply adjudication and settlement of titles as part of the registration exercise. It is clear that the underlying assumptions of section 20(a) of the Act which empowers the registrar to refuse registration where he is in doubt about the validity of the transaction is that, before the registration of every instrument, a check on the accuracy of the site plan annexed to it should have to be made.

It is clear that the Chief Registrar cannot perform the duties of adjudication and settlement of title imposed on him under the Act without the services of qualified surveyors. The only way he will be able to discover that an instrument presented for registration is inconsistent with an already registered instrument is by checking the site plans of the land to which the instrument relates against base maps of the area where the land concerned is located. Similarly, the settlement of competing claims in respect of a given piece of land will also involve the demarcation of boundaries, pegging out the areas and the preparation of site plans. All these functions will require the skill and ~~epxertise~~ expertise of surveyors, draughtsmen and cartographers.

Surely for these functions to be efficiently performed, it would require many more staff and qualified personnel than are available at the Lands Department at present. When the independent land registries required to be set up under the Act is established, it is the sort of personnel mentioned earlier that the registry will have to depend upon for its function. It is probably due to the lack of such qualified personnel to administer this aspect of the scheme that sections 20(a) and 20(b) of the Act have not been brought into force.

It is suggested that the already existing machinery at the Survey Department for survey works is adequte enough to cope with the tasks involved

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819 S.22(b)

in the adjudication and settlement of title under the provisions in question. The duties of adjudication and settlement of title can be performed by the Chief Registrar expeditiously if the human and material resources of the Survey Department can be called in aid of the programme. The co-operation of the personnel of the Survey Department can be obtained by involving officialy and formally the latter Department in the works of the land registry. This will be the best way for the land registry to obtain fast, efficient and cheap services of qualified personnel which it lacks at present.

Bentsi-Enchill does not share the views expressed above. He takes the view that the function of adjudication is precisely the type for which the regular courts are best suited.[820] Commenting on the arrangements for adjudication under section 22 of the Act, Bentsi-Enchill suggests that if this side of the functions of registration is left for the courts to handle, they will be operating in familiar territory.[821] Criticising section 22 of the Act under which the Chief Registrar is required to exercise the powers of adjudication, he writes:

> "But while the principles behind the new arrangement are commendable, the wisdom of constituting the Chief Registrar as a solitary new court of first instance for this purpose is open to question. The work of adjudication can conveniently remain with the courts of which there are many all over the country. . . The Chief Registrar should be enable to cause disputed issues, after they crystalise, to be resolved through the Lands Division of the High Court of the appropriate region . . . The work that they have been doing for decades under the concessions legislation is closely analogous."[822]

Several considerations seem to influence the learned author to adopt this view. He thinks that adjudication by the Chief Registrar, by contrast with the courts, the former will either have to travel all over the country for the purpose of deciding on disputed issues concerning titles; or parties will have to appear before him at Accra from all corners of the different regions of the country. Either way, he argues, such an exercise appears unnecessary when account is taken of the present distribution of judicial machinery and personnel.[823] It is open to question whether the views expressed by Bentsi-Enchill can be supported by the available evidence.

In terms of distribution of the judicial machinery and personnel,

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820 K. Bentsi-Enchill, Ghana Land Law, London, 1964, 332.

821 Ibid.

822 Ibid. pp. 331-332.

823 Ibid. p. 332

it should be pointed out that the Land Division of the High Court which he suggests must be called upon to handle matters concerning adjudication may be found at the regional capitals only. It will thus create a wrong impression to suggest that the distribution of such judicial machinery is so widespread across the length and breadth of the country so as to bring justice closer to the people through judicial determination of issues concerning adjudication and settlement of title. Concerning the case of the Chief Registrar travelling to the regions to perform adjudicative functions, it should be noted that the judges of the Land Court would, like the Chief Registrar, have to travel to all the regional capitals of the country in order to decide land cases. In fact, the Land Division of the High Court is not a separate institution from the High Court itself. What it means is that certain judges will become specialised in the adjudication of such matters, and the judges will have to travel to the High Courts where resolution of issues concerning lands is to be undertaken.

Thus in terms of savings in time and costs, there will be no special advantage in leaving the functions of adjudication for the regular courts to handle.

The most serious objection to Bentsi-Entchil's suggestion is that it does not take into account the delays in the regular judicial processes of the courts. One need only recall and reflect on the evidence produced by the C. R. Havers Report on agricultural indebtedness in 1945 in order to appreciate the expensive and protracted nature of land litigation through the ordinary processes of the courts.[824] If land litigation can last for half a century and still not be conclusively decided through the judicial processes, and many cases can be found where on the average, such litigation can last for five or ten years,[825] then one cannot see how a meaningful system of land registraiton can rely upon such a judicial system for adjudication and settlement of titles to lands subject to registration.

It seems that the learned author is misled by certain provisions of the Concessions Ordinance, 1939[826] under which to obtain a certificate of validity one had to file in the appropriate court, a notice giving particulars of the concession including boundaries, situation, and extent of the land concerned, together with a plan and copies of documents supporting the grantee's claim to the concession. He relied on these provisions to conclude erroneously that "the work that the courts have been doing

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824 See pp. 364-369.

825 Ibid.

826 Cap. 136. See sections 8(5) and 13.

for decades under the Concessions Ordinance is closely analogous" to the sort of adjudication contemplated under the ~~Ladn~~ Land Registry Act. The fact which Bentsi-Enchill seems to overlook is that similar provisions have been on the statute books since the introduction of the Concessions Ordinance in 1900, yet enquiries into the validity of concessions and the issue of certificates of validity thereof by the courts have not brought about the certainty of title as the learned author would suggest ~~it~~ they have. Despite the fact that the issue of certificates of validity preceded the registration of concessions, it was later discovered that the findings of the courts could not be relied upon as reflecting accurately, the true state of affairs. The wide discrepancy found to exist between the extent of the land area affected by concession grants between 1900 and 1913, whereupon the total land area alienated exceeded by far, the total area of the Gold coast itself underlines the shortcomings of the procedures under the concessions Ordinance.[827]

In the light of these facts it is open to doubt if Bentsi-Enchill's claims that " /a/ certificate of validity obtained from the court in accordance with the procedure laid down confers on the grantee of a concession a security of title which is unassailable on any ground save that of fraud to which the grantee is proved to be a party"[828] can be sustained. What must be borne in mind when considering the adjudication and settlement of title for the purpose of land registration by the ordinary courts, against the assumption of such functions by a Chief Registrar is that, the former do not have the personnel of surveyors, draughtsmen and technicians without which such functions cannot be thoroughly performed. The failures of the system under the concessions courts are due to the lack of such personnel.

It is submitted that a programme of adjudication and settlement of title within the context of a scheme of land registration must be designed to make final and conclusive determination of titles within reasonable time as speedily and as cheaply as possible. Land is immovable. The determination of titles thereto will involve the physical examination of the boundaries of the land which will require bringing members of an

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827 See pp.352-4. The recent survey work of the valuation branch of the Lands Department in which it was discovered wide discrepancies in the Court's decisions in respect of instruments affecting lands and what exist in fact on the ground constitutes further proof of this point. See p. 356.

828 Op.cit. p. 336.

adjudicating committee to the loco situo. It seems that an adjudication committee consisting of surveyors, the Chief Registrar and possibly, individuals and local community leaders with special knowledge of local conditions will be better suited for such functions than the regular courts. The establishment of land registries and the appointment of a Chief Registrar, registrars, and qualified personnel of surveyors are therefore called for. Failing this, the involvement of the personnel of the Survey Department formally and officially must be considered without delay. If this is done the need for the regular courts to perform the functions of adjudication will not arise. What the courts may do, however, is the determination of issues relating to questions of law which may arise from the finding of facts by the adjudication committee and which the Chief Registrar may consider the courts best suited for resolution.

In view of the fact that adjudication and settlement of title is essential for the attainment of the objectives of security of title and preventing land litigation, it is unfortunate that sections 20(a) and 20(b), two of the most important provisions upon which the Chief Registrar should stand and put into operation the machinery of adjudication have still not been brought into force.[829] It is suggested that if it is intended that the present registration machinery should be employed to solve problems of uncertainty, then they should be brought into force without further delay.

v. Registrable Instruments

Like past enactments on land titles registration in Ghana, the present Land Registry Act, 1962, provides for the registration of any instrument subject to the conditions imposed by its provisions.[830] An instrument is defined in the usual manner as any writing affecting land situate in Ghana including a judge's certificate and a memorandum of deposit of title deeds. A judge's certificate is defined as a certificate of purchase

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829 In exercise of the powers conferred on the Minister by Legislative Instrument to bring the Act into force on such a day as he may appoint, the Minister brought into force the whole Act by the Land Registry Act, 1962, (Commencement) Instrument (L.I.124) except Part IV. The Lands (Miscellaneous Provisions) Act, 1963, (Act 161) S.4 confirmed the authority of the Minister to bring only part of the Act into force. Thus when the Land Registry (Commencement) Instrument, 1965, (L.I.45) brought into force Part IV of the Act on 1 May, 1965, sections 20(a) and 20(b) were excluded.

830 S.3.

of land sold in execution signed by a judge or a District Magistrate, and a certificate of title signed by a judge under the State Property and Contracts Act, 1960 (C.A.6.) [831]

It may be observed from this definition that apart from other conditions prescribed by the Act, only land transactions evidenced in writing can be registered. It is also assumed that a certificate of purchase of land sold in execution signed by a Judge or a District Magistrate and a Certificate of Title signed by a Judge will necessarily be free of doubts as to their validity and thus qualify for automatic registration. [832] The most important effect of the way in which an instrument is defined is that it excludes from registration under the Act oral transactions by which valid dispostion of an interest in land is conducted under the customary law. This will in itself render any systematic adjudication and settlement of title difficult and registration can only be sporadic and unsystematic.

Bentsi-Enchill in a justifiable criticism of the provisions of the Act writes:

> "This machinery has, among other weaknesses, the serious defect that, in a country whose indigenous law requires no writing for valid transactions concerning interests in land, it makes, and perhaps can make, no provision for the recording of parol dealings in land carried out in accordance with the requirements of the indigenous law." [833]

It should be pointed out, however, that whatever adverse effect this omission to include oral grants may have on the registration programme have been minimised by certain provisions of the Land Administration Act, 1962, [834] and completely eliminated by Part I of the Conveyancing Decree, 1973. [835]

Under Section 8(1) of the Land Administration Act, it is provided that:

> "Any disposal of any land which involves the payment of any valuable consideration or which would, by reason of it being to a person not entitled by costomary law to the free use of land, involve the payment of any such consideration, and which is made,
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> a. by a stool;
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> b. by any person who, by reason of his being so entitled under customary law, has acquired possession of such land either without payment

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831 S.36.

832 See Section 7 under which it is porvided that a probate or a judge's certificate may be registered without proof upon production thereof to the registrar.

833 K. Bentsi-Enchill, op.cit., p. 310.

834 Act 123, S. 8(1).

835 N.R.C.D. 175.

> 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."

The effect of these provisions is that a large proportion of parol dealings in land in communities where lands are held by stools should have to be reduced into writing in order to fulfil the requirements of the Act.

It will be impossible to inform the Minister orally that a land transaction has been concluded under the indigenous law and that he should give his concurrence without producing any evidence of the transaction in writing. The normal practice which has developed in compliance with these provisions is that a grantee of an interest in land from the stool attaches a site plan of the land in question to documents of transfer prepared in English conveyancing forms before sending them to the Lands Department for the Minister's approval. In this way, although the transaction may be oral from the beginning, it ends up by satisfying the conditions of writing required for registration under the Land Registry Act, 1962.

In a similar way, all lands under state control and administration cannot be acquired without any evidence of the transaction in writing, for the Minister or the Lands Commission's concurrence is required for the validity of the acquisition in all cases. This means that land transactions in the whole of the Northern and Upper Regions of Ghana, transsactions affecting lands acquired under the Land Administration Act, 1962 [836] and the State Lands Act, 1962 [837] can all be subject to registration under the Land Registry Act, and no problems of the lack of writing should in principle be experienced in these areas.

Thus apart from some patrilineal communities such as the Ewe or the Ga-Adangbe where the paramount title in land is held by families, land transactions under the customary law are invariably evidenced in writing in most parts of the country. Even in such communities where the law does not compel one to reduce his parol dealings in land under the customary law into writing, the tendency nowadays is to prefer some evidence of the transactions to be in writing. Thus any limitations which the definition of "instrument" under the Act may place on the range of land transactions which can be registered pales into insignificance. But any such limitations as may still exist on the registration of land transaction because of the omission to include oral grants in the programme

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836 Act 123, Sections 7 and 10.

837 Act 124.

of registration has been eliminated by the Conveyancing Decree, 1973, which will be the next subject of discussion.

C. The Conveyancing Decree, 1973.

The Conveyancing Decree, 1973, does not deal with land titles registration as such. But it contains certain provisions which can fill some of the gaps left in the Land Registry Act, 1962. The objectives of the Decree are clearly set out in its memorandum. The first paragraph of the memorandum states that for land transactions such as "buying, selling and leasing, a need exists to develop methods and machinery which are reliable, simple, cheap, speedy and suited to the present-day needs of our country".

It can be discerned from the above statements that the Decree which follows the recommendations of the Ghana Law Reform Commission seeks as its main goals, the bringing up to date of the law relating conveyancing and the simplification of coveyancing forms. However, Bentsi- Enchill, an avid advocate of a system of title registration, seized the opportunity, as the draftsman of the Decree, to include provisions which may have the effect of making for some of the defects in the current system of land registration under the relevant enactments. Part I of the Decree thus deals with the recording of land transactions concluded orally under the traditional law, the omission to include in the registration system which Bentsi-Enchill is justifiably critical.[838]

In the memorandum to the Decree, it is observed that such parol dealings in land do not at present, have to be in writing although the practice of customary transfers being reduced into writing is now very widespread. In order to supplement the provisions of the Land Registry Act, provisions are made for the recording of customary grants under a scheme to be administered by court registrars. The reasons and objectives of the provisions are set out in the memorandum as follows:

> "In response to the national need for methods of transfer that are reliable, simple, cheap, speedy and suited to the circumstances of our country, provision is made for an imaginative development of the registries of our court system to handle the recording of customary transfers of interests in land. The intention is to require a recording in the Register of a District Court of transfers of interests in land, and to make such a recording a condition for validity in the same way as the tradtional quaha was essential."

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838 K. Bentsi-Enchill, op.cit., p. 310

An examination of the relevant provisions which are designed to attain the stated goals outlined above will disclose that they have the effect of rendering invalid parol dealings in land unless they are evidenced in writing and recorded in the manner prescribed by the relevant provisions of the Decree. Under Part I of the Decree, it is provided that a transfer of an interest in land shall be by a writing signed by the person making the transfer or by his agent duly authorised in writing, unless the transaction falls within the class of exceptions specified under Section 3 of the Decree.[839] It is made impossible for a transfer of an interest in land made in a manner other than as provided under this part of the Decree to operate and confer any title on the transferee.[840] This in effect, means that the requirement of writing is now a condition without which no land transaction can be valid in the country.[841]

Section 2 of the Decree contains similar provisions in respect of a contract for the transfer of any interest in land and renders it unenforceable unless it is evidenced in writing by the person against whom the contract is to be proved or by a person who was authorised to sign on behalf of such a person or relieved against the need for such a writing by the provisions of section 3. The memorandum to the Decree states that the end to which the requirement of writing is directed is the making of fraudulent conveyances difficult. But it has created the inconvenient situation of rendering oral grants invalid unless the requirement of writing is met in largely illiterate communities while not providing for any accompanying programme of public education on the effect of the new provisions.

Section 3 of the Decree purports to exclude parol dealings in land under the traditional law from the requirement of writing.[842] But as will be shown presently, construed in conjunction with the operative effect of sections 4, 5 and 7, it becomes patently obvious that such transactions under the indigenous law cannot be said to fall within the class of exceptions mentioned under this provision.

i. Registration of Oral Grants Under the Decree

Sections 4 and 5 make provisions for the recording of land transactions

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839 S. 1(1).

840 S.1(2).

841 See similar provisions in the Statutes of Frauds 1776, S.4 (29 cha. 2, C.3), now section 40 of L.P.A., 1925 which is applicable in Ghana by virtue of section 111 (2) of the Courts Act, 1971, Act 372). Section 40 of the L.P.A. makes the transaction unenforceable, the present Decree makes it invalid.

842 S.3 (1) (h).

conducted under the customary law. The Land Reform Commission deems it important that comprehensive records of such transfers be kept. This will be "a significant step in developing permanent records of transfers of interest in land while preserving the customary mode of transfer."[843] Under Section 4, such customary transfers are to be recorded in the form contained in the First Schedule designed for the purposes of this particular section.[844] It is required to be recorded in the Schedule, the essential features of the transaction, whether it be a pledge, a sale, a gift, lease, an assignment, "abusa", "abunu", sowing tenure or any other. The names of persons whose consent is required and who have given their consent, the consideration given for the trasnsfer, whether it be monetary or in kind such as drinks, must all be specified and recorded in the manner designed under the First Schedule.

Also required to be specified and recorded in a like manner, is the extent of the land area to which the transfer relates and such land should be clearly described so that it can be readily identified.[845] Such questions as the duration of the interest, whether it be permanent or a term of years and any other matter relating to the transaction must be indicated in writing and recorded in a like manner.[846] In conclusion, the parties to the transaction must append their signatures and if a party is illiterate, must affix his mark after the document has been explained to him in such a way that he can understand the substance and effect of what he has done.

It should be noted that the procedures laid down to be followed under the Schedule to section 4 for the recordings required to be made are the sort of things that one usually finds in instruments subject to registration under the Land Registry Act, 1962. The procedures laid down for recording customary transfers of interest in land ought to be followed in order to make an effective disposition of interests in land under the customary law. This position is made clear by Section 4 of the Decree itself. The requirements of writing is mandatory and not permissive. The key phrase in the provision is "shall be recorded in the form contained in the first Schedule."

To remove any doubts as to the peremptory nature of these procedural

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843 See the Memorandum to the Decree.

844 S.4(1).

845 See the First Schedule to section 4 of the Decree.

846 Ibid.

requirements and to ensure the recording of customary transfers under the Decree, it is provided under Section 7(1) that:

> "An oral grant made under customary law shall be of no effect until it is recorded under Section 4". [847]

In view of the mandatory requirements of recording customary grants in the manner provided by the Decree as a condition for their validity, it will be difficult to see how they can really be proved to be excluded from the requirements of writing by Section 3(1) (h) of the Decree. It will be impossible to comply with the provisions of the Decree without having to reduce the transaction into writing which may be regarded as an instrument affecting land. Thus like section 8(1) of the Land Administration Act, 1962, [848] the requirement of writing has been imposed on land transactions under the customary law through the back door.

The importance of this provision dealing with customary transfer of interest in land is that it can fill the gap left by the Land Registry Act which does not provide for the registration of interests orally transferred under the traditional law. If these provisions are incorporated into the Land Registry Act, it will be an improvement in enactments relating to land titles registration in Ghana. Another important contribution which Part I of the Decree seems to have made to the scheme of land registration is the recognition of the crucial role that qualified surveyors will have to play in any system of land registration. The mandatory duty imposed on the chief justice to appoint an official surveyor for each District Court and such other staff as the business of such courts will require for the administration of the scheme underscores the importance attached to the role of such skilled personnel in the registration exercise. [849] In addition to appointing official surveyors, it is provided that an adequate plan to which the transfer of an interest relates, if available, should be incorporated in the record referred to under sub section 1 of section 4. [850]

Unhappily, the wording of section 4(2) seems to weaken the force of the requirement that an adequate plan be attached to the land subject to registration. Making compliance with the provision contingent upon the availability of such an adequate plan creates the impression that some customary grants can be recorded in the manner described by the law without necessarily attaching plans to them. It is hoped however, that should the scheme ever be implemented, the procedure followed under

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847 Emphasis supplied.
848 Act 123.
849 See S.6(3)
850 S.4(2)

the Land Registry Act, whereby no instrument is accepted for registration unles a plan describing the situation and extent of the land is annexed, will be adopted.[851]

Another significant aspect of the Decree is what may be regarded as a provision for the adjudication and settlement of title. A duty is imposed on the registrar to refer to a magistrate for determination any doubt concerning issues arising under the recording exercise.[852] No elaborate rules of procedure for settlement and adjudication of title have been provided for under the Decree. But this is understandable if account is taken of the fact that the draftsman of the Decree, Bentsi-Enchill does not consider as necessary, the establishment of an independent adjudication committee or a tribunal for such purposes. It is his opinion that such disputed issues of title are best suited for the regular courts to resolve.[853]

It is for this reason that the Decree provides for the administration of the scheme of recording customary transfers by District Court registrars. Although the Chief Justice has power under section 6(2) of the Decree to appoint any person to be a registrar of customary transfers, and has power to specify the area within which such registrar shall exercise his functions, the records of the districts courts will constitute the registers into which recordings will have to be made. We have already pointed out the reasons why it may not be advisable to burden the regular courts with the sort of adjudication and settlement of title associated with land titles registration.[854] The failures of the concessions courts provide striking examples already.

The appointment of official surveyors to the district courts may help to reduce the ineffectiveness of the courts in the administration of such schemes. Yet such courts cannot be better substitutes for independent land registries or the already existing machinery available at the Lands Department, if the survey department can be formally involved in the scheme as already suggested. It will be a better policy to concentrate resources at the Lands Department by making the already existing machinery efficient and effective. The resources which may be provided for the district courts for this purpose can be applied to improve the present registration system so as to make it possible for it to absorb

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851 A comparable provision is S.16 of the Land Registry Act, 1962, from which it can be implied that some instruments can be registered without plans being attached to them.

852 S.4(2).

853 K. Bentsi-Enchill, op.cit., p. 332

854 See pp. 349-358.

the functions which the Decree sets out for the registration of customary grants. To this end, it is suggested that the relevant provisions of the Decree should be incorporated into the Land Registry Act, 1962.

D. Consequences of Registration

The Land Registry Act, 1962, bears many of the features of its predecessor, the Land Registry Ordinance of 1895. But the former differs from the latter in some significant respects, one of the most important of which is the effect of registration or lack of it on land transactions in Ghana. Part V of the Act dealing with the question has assumed even greater importance because of the requirements of writing which the Conveyancing Decree, 1973, as we have seen, virtually imposes as a sine qua non for the validity of land transactions, including those conducted under the customary law. It will be seen presently that the Land Registry Act makes registration a prerequisite requirement for the validity of instruments affecting land. The requirements of writing which will compel land transactions under the customary law to be evidenced in writing means that they must also be registered in accordance with the provisions of the Act in order to be valid.

Section 24(1) of the Act provides:

> "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". [855]

It seems clear from the above provisions that for the purposes of the Act, no instrument relating to an interest in land shall be effective or valid to confer any legal rights on the person for whose benefit the instrument is prepared unless it is registered. This means that no legal consequences can flow from a non-registered instrument.

However, there is at present certain Appeal Court decisions rendering uncertain what the relevant phrase "shall be of no effect" means. In the Court of Appeal case of Odoi v Hammond [856] a case involving conflicting instruments made by the same grantor to two different transferees, Azu Crabbe J. A ., in his judgment said, and in our opinion rightly,

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855 Emphasis supplied.

856 [1971] 1 G.L.R. 375

that "section 24 of the Act makes registration a sine qua non for the validity of an instrument other than a will or a judge's certificate".[857] The learned judge proceeded to declare that the first instrument was "void and of no effect" for lack of registration.[858] But the question of the effect of registration was not seriously argued and exhaustively discussed in the present case and the observations of Azu Crabbe did not necessarily form the basis of the decision. His statements can thus be regarded as constituting dicta only although they must be given great weight.

In the Court of Appeal case of Asare v Brobbey[859] the question was seriously considered and argued. This case concerned a mortgage deed in which the mortgagor obtained a loan from the mortgagee on the security of a house with a power vested in the latter to sell the house in the event of default in payment of the loan. The mortgagor defaulted. The mortgagee exercised his power of sale under the mortgage deed by authorising an auctioneer to sell the property. It was at such an auction sale that a third part bought the house in dispute.

The mortgagor sued to set aside the sale on several grounds without success. But the issue of non-registration was raised belatedly on behalf of the mortgagor to the effect that since the morgagee did not register the mortgage deed in accordance with section 24 of the Land Registry Act, 1962, the deed was ineffective to confer the power of sale on the mortgagee. The Court of Appeal accepted the view that the fact of non-registration was sufficient to render the mortgage deed ineffective to confer the power exercised by the mortgagee. The Court said that:

> " . . . when section 24(1) of the Land Registry Act, 1962, provides that a document shall be of no effect until it is registered, it means that the document and its contents cannot have any legal effect until it is registered, it means the document and its contents cannot have any effect until registration has been completed. This also means that the document is not valid for all purposes because the formality of registration is necessary to complete its validity . . . In the present appeal, the mortgage deed was not registered at the time the power of sale was exercised and therefore the document itself was ineffective and invalid to confer the rights and to impose the obligations stipulated in the mortgage deed".[860]

If these propositions were left to rest here, the above judicial pronouncements would have tallied with those of Azu Crabbe in Odio v Hammond

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857 Ibid., **at p. 391,**
858 Ibid. Emphasis supplied.
859 / 1971 / 2 G.L.R. 331
860 Ibid., at p. 337, Per Archer J. A.

and would have confirmed the effect of Section 24 of the Act as rendering unregistered instruments void. But this was not to be. The court of appeal proceeded to qualify its statements that an unregistered instrument was not rendered void for want of registration. What it did was to render such an instrument ineffective until it was registered.[861]

This is a bizzare conclusion to reach, having regard to the fact that the court had itself made it clear in its judgement that an unregistered instrument was invalid for all purposes. Will it be realistic to distinguish between ineffective or invalid and void instruments within the meaning of the Act and for its purposes? It is submitted that it will not. Hamlyn's Encyclopedic World Dictionary makes the meaning of invalid clear enough. It defines invalid as "without legal force, or void, as a contract". It is obvious from this definition and the cases that whether or not one takes the view that an unregistered instrument is void, or ineffective or invalid, non-registration will have the same effect that no legal rights can flow from a land transaction to which a non-registered instrument relates.

This would seem to be the view of the court of appeal in Amefinu v Odametey[862] also. This was a case in which both the appellant and respondent derived their title to the land from the same vendor. The appellant claimed that the land was conveyed to her on 5 May, 1967 and that although she presented her deed of conveyance to the land registry for registration in Accra, it had not been completed when she withdrew it for the purpose of the present action. The respondent on the other hand claimed that he acquired his grant on 25 March, 1968. He claimed that before executing the deed, he carried out a search of the land registry which search confirmed that the vendor was the owner of the property and that no other transaction affecting the land in question was disclosed on the face of the register. After the execution of the deed he proceeded to register his acquisition on 17 April, 1968 in accordance with the requirements of the land Registry Act, 1962.

It was argued on behalf of the appellant that Allotey, the vendor, having divested himself of title in May 1967 had no title to convey to the respondent in March 1968. The court of appeal rejected this argument on the gorunds that it was based on the nemo dat quod non habet rule which implied the existence of a prior valid transaction. But

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861 Ibid.

862 /1977/ 2.G.L.R. 135. The case was decided in July, 1973 but was not reported until 1977.

in the present case the document relied upon was squarely caught by section 24 of the Land Registry Act.[863] The view of the court of appeal was that the deed not having been registered was ineffective or invalid to divest the vendor of title in the land, the subject matter of the transaction in 1967.

In reaching this conclusion, the court of appeal quoted with approval Azu Crabbe's proposition in Odoi v Hammond that section 24 of the Act makes registration a sine qua non for the validity of an instrument other than a will or a judge's certificate. But the court did not go on to say whether this meant that the transaction itself or the instrument was void. It would seem that the court found it unnecessary to consider the issue, since there would seem to be no obvious dichotomy between void and invalid instruments in this case.

Another argument raised on behalf of the appellant was that since it was no fault of hers that she did not register her instrument, the rigours of the law ought not to be made to operate unfavourably against her.[864] The court rejected this plea in no uncertain terms making it clear that the language of the Act was clear. The court pointed out that an attempt to register or the presentation of an instrument for registration could not be equated with registration. "Either an instrument is registered or it is not registered".[865]

The court of appeal referred to Asare v Brobbey also, and quoted, at length, that portion of Archer's judgment in which he declared the unregistered mortgage deed to be invalid and ineffective to confer the rights and to impose the obligations stipulated in the mortgage deed. However, the court did not consider the interpretation placed on the phrase "until it is registered" by Archer J. A. in Asare v Brobbey in which he concluded that the unregistered document was not in itself void but only ineffective until registered. Here again, it would appear that the court did not regard such a qualification important and as its consideration was not germane to the issues before it made no pronouncement on it.

It can thus be deduced from the dictum of Azu Crabbe J. A. in Odoi v Hammond, and the decisions in Amefinu v Odametey and Asare v Brobbey that the courts take section 24 of the Act to mean that an unregistered

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863 Ibid at p. 143

864 Ibid.

865 Ibid., at p. 143

instrument is invalid and of no legal effect and that no legal consequences flow from it. Whether or not it can be said to be void or ineffective has no practical importance on the results of the cases.

However, in Ussher v Darko[866] and Ntem v Ankwandah[867] the Court of Appeal would seem to have taken the view that Archer J. A.'s interpretation of the phrase "until it is registered" implied that an unregistered instrument was not void. In this view, exceptions can be made in respect of some unregistered instruments so that rights could be acquired through them under certain circumstances. In Ussher v Darko, the legal title in the property, as found by the court, was vested in Matilda on trust for Edward, the real purchaser of the property. The latter let the premises to the defendants as tenants. Matilda who held the legal title to the land and in whose possession was the title deeds, alienated the legal title in the property to the respondents who failed to register the deed of conveyance, the respondent sued to eject the appellants as his tenants.

The court of appeal held that the deed by which title was conveyed to the respondent did not operate to confer title on him because the deed was invalid on account of its non-registration under the Land Registry Act. In reaching this conclusion, the court of appeal found support in Asare v Brobbey and Amefinu v Odametey although Odoi v Hammond was not referred to in the case. However, the court said that despite the fact that the instrument in question was not registered, under the special circumstances of this case, it satisfied the requirements of writing under Section 4 of the Statutes of Frand 1677,[868] as preserved by section 14 of the Contracts Act, 1960.[869]

For this reason, although such conveyance as Matilda executed in favour of the respondent did not validly convey legal title, it was one in respect of which specific performance could be granted at the suit of the respondent. "It therefore operated to confer an equitable title in the property to him",[870] So that in this case, but for the operative effect of the qui prior est tempore, prior est jure rule which gave Edward's equitable interest priority over the respondent's, the latter would have acquired an equitable interest under the transaction

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866 [1977] 1 G.L.R. 476

867 [1977] 2 G.L.R. 452

868 29 Cha. 2, C., 3.

869 Act 25

870 Ussher v Darko [1977] 1 G.L.R. 476 at p. 489. Per Apaloo J. A.

although it was not registered in accordance with the provisions of the Land Registry Act, 1962.

The logical import of this decision is that an unregistered instrument may under certain circumstances be effective to confer legal title on a person in whose favour it is prepared notwithstanding the fact that it is not registered. In support of this decision, the court of appeal said:

"The decision in Asare v Brobbey (Supra) implied that there is nothing intrinsically wrong about an unregistered instrument, section 24(1) of the Land Registry Act, 1962, does no more than deny it legal efficacy until it has been registered."[871] As will be argued below, this interpretation of the decision in Asare v Brobbey is inconsistent, not only with the decision in the Asare case itself, the dictum of Azu Crabbe in Odoi v Hammond and the decision in Amefinu v Odametey upon which the court of appeal relied, but with its own declaration that "such conveyance as Matilda executed in favour of the plaintiff did not validly convey the legal title" to him.[872] A thing is what it is. It cannot be otherwise. It is a contradiction in terms to say that a document is invalid and in the same breadth to say that it confers some right, legal or equitable on some person.

It is not only the logical inconsistency in the reasoning that is worrying, but the effect which this decision will have on the system of land titles registration in Ghana. Before demonstrating the respects in which such a decision can undermine the registration system, it will be necessary to consider the Appeal Court decision of Ntem v Ankwandah[873] in which the reasoning of the court was based on the assumption that the Land Registry Act makes provision in certain circumstances for unregistered instruments to be effective and to confer rights.

In the present case under consideration, the respondent bought a piece of land from a stool. The alienation was concurred in by the stool occupant who was not then gazetted. The respondent stamped the instrument and presented it for registration. The registrar refused to accept it for registration on the grounds that Nii Ayikai III, the chief who executed the document with a number of his councillors was not gazetted. This would appear to be the purported exercise of the powers conferred

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871 Ibid. at p. 493

872 Ibid. at p. 489.

873 [1977] 2 G.L.R. 452

on the registrar under section 20 (a) and (b) of the Land Registry Act to refuse registration where on the face of the record it appears to him that the person executing the instrument has no power to do so.

It was argued unsuccessfully at the court below that the document was void for want of registration. The Court of Appeal considering the issue said that in refusing to accept the isntrument for registration, the registrar was wrongfully exercising supposed powers under sections 20(a) and 20(b) of the Land Registry Act, 1962 which had not been brought into force. The court observed that if the respondent had taken a writ of Mandamus to compel the registrar to perform his public duty, i.e., the registration of the instrument presented to him, the former would have succeeded in such an action. For this reason, it was no fault of the respondent that she did not register her instrument.

In its judgment the court said:

> "Registration of a deed under Act 122 does not constitute a state guaranteed title. As the deed was stamped, it was admissible in evidence in proof of title and that title was adjudged, registration aside, to be good. I think the only way in which justice can be done as between the parties, is to hold that the plaintiff's title was constructively registered. Equity regards as done, that which ought to have been done. True, the records of the registrar may speak a different language. But if the land registrar had carried out his public duty, the record and what I hold to be deemed to have been done would have harmonised". [874]

The court of appeal proceeded to state further that the view expressed by Azu Crabbe J. A., in Odoi v Hammond that an unregistered instrument was void, was by necessary implication rejected in Asare v Brobbey which was followed in Amefinu v Odametey and Ussher v Darko. The court concluded that the better judicial view would seem to be that failure to register an instrument did not render it void. This implied that exceptions could be made in favour of some unregistered instruments as the Court of Appeal actually did in both Ntem v Ankwandah and Ussher v Darko.

It should, however, be pointed out that the two latter cases are directly in conflict with the Amefinu case and arguably, with Asare v Brobbey which the court of appeal purported to have relied upon for its decision. In fact in Amefinu v Odametey, the underlying assumptions upon which the court based its decision not to apply the nemo det quod non habet rule in favour of the appellant was that the first instrument by which the latter purported to acquire his interest was void or invalid

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[874] Ibid., at p. 459, per Apaloo C. J. Emphasis supplied.

for want of registration. As pointed out earlier, there is no practical significance in the distinction between a void and an invalid instrument. If the instrument is void, invalid or ineffective, then no legal consequences can flow from it. This is what Asare v Brobe, Odoi v Hammond and Amefinu v Odametey have decided on the basis of section 24 of the Land Registry Act, 1962.

The decisions in Ussher v Darko and Ntem v Amkwandah are very difficult to justify in the face of previous case law and the provisions and purposes of the Land Registry Act, 1962. The decisions in Ussher v Darko and Ntem v Ankwandah might have worked justice between the parties but via judicial legislation which can have serious implications for land titles registration in the country. Justice might have been done but on a principle which is likely to defeat the whole purpose of the establishment of the scheme for land registration. It is the discussion of the consequences of the two decisions that attention will now be directed.

i. Implications of "Constructive Registration"

Driven by the desire to do justice, the court of appeal interpreted section 24(1) of the Land Registry Act in Ussher v Darko and Ntem v Ankwandah in such a way as to weaken, if not destroy the credibility of the land registry as a source of information concerning land titles. The reasons why the Court of Appeal held that despite non-registration of the instrument by the plaintiff in the former case, the document operated to confer an equitable interest on the latter were that:

a. the instrument satisfied the requirements of writing under the existing laws and

b. it was an instrument in respect of which specific performance could be granted at the plaintiff's suit.

But these cannot be sufficient reason for coming to that conclusion. As Woodman points out, this decision is clearly contrary to section 24 of the Act. The statute says that an unregistered instrument shall be of no effect. "To hold that an unregistered instrument passes an interest in the land, even if only an equitable interest is to give it an effect."[875] This decision

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875 Gordon Woodman, "The Land Registry Act Bites (Somewhat)", to be published in 1979, Review of Ghana Law.

by the Court of Appeal implies that under section 24(1) of the Act, an unregistered instrument can operate to confer an equitable interest on a person provided the requirements of writing have been met under the existing laws, the instrument has been stamped under the Stamp Act and where circumstances exist to warrant a decree for specific performance. If this is the case, then no compelling reasons might exist any longer for persons to get their instruments registered. This would be the case where some people might prefer to accept equitable interests rather than take the trouble to go through the tedious, complex, time-consuming and the expensive procedures to get their instruments registered.

The more serious objection to the decision is that prospective grantees of interest in land will no longer be sure, even after a proper search at the land registry whether or not an unregistered equitable interest still affects the land he wishes to buy. This is because although on the face of the records no encumbrances may be seen to affect the land in question, a person may still hold an unregistered equitable interest in it. As Woodman points out:

> "If Ussher v Darko is followed in this respect, the grantee claiming an unregistered instrument who finds that S.24 has locked the front door against him, will frequently be able to slip in through the equitable back door". 876

The decision in Ntem v Ankwandah leaves the equitable back door open wider. It says that under those circumstances where a person can rely on the equitable rule which says that equity regards as done that which ought to have been done in order to acquire rights under a grant, notwithstanding the clear provisions of secion 24(1) of the Act to the contrary, an unregistered instrument acquired by that person can operate to confer an equitable rights on him, provided the instrument has been acquired for value and in good faith.

Thus Apaloo C. J., said:

> "As the deed was stamped, it was admissible in evidence in proof of title and that title was adjudged, registration aside, to be good. I think the only way in which justice can be done as between the parties, is to hold that the plaintiff's title was constructively registered. I share the view of the trial judge that on the special facts of this case, the plaintiff's title was enforceable at law as if it had been registered". 877

It should be borne in mind that in Amefinu v Odametey, a case to which the court of appeal referred in Ntem v Ankwandah, a similar

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876 Loc.cit.

877 Ntem v Ankwandah [1977] 2 G.L.R. 452 at p. 459. Emphasis supplied.

view was urged on the court but was rejected on the grounds that "either a document is registered or it is not registered and the Act does not take cognisance of an incomplete process of registration". [878] This statement was made in reply to a plea on behalf of the appellant that "in absence of any default on her part to account for the non-registration, the rigours of the Act ought not in fairness to be applied to her case." [898]

The Court of Appeal is thus saying in the Amefinu case that the requirement of registration under the Land Registry Act, 1962 is mandatory. There is no half-way measure about it. The basis for the development of the doctrine of constructive registration in opposition to this judicial view and the clear provisions of the Act seems to be the need, as Woodman points out, to avoid injustice to the plaintiff. She had made the effort to register and had been frustrated for no fault of her own. But there are several considerations for urging a different view. One such consideration, which was indicated in Amefinu v Odametey is that the Act does not provide for any situation other than registration or non-registration. [880] Woodman setting out what may be regarded as one of the strongest objections to the development of this doctrine writes:

> "A further objection might be that the doctrine could operate unfairly against a party who took a grant in good faith after inspecting the register, and was subsequently held bound by a constructively registered instrument. Thus the doctrine may damage the system of registration by introducing another category of enforceable but unregistered grants. [881]

It should be added that apart from working against the interest of the sort of persons referred to by Woodman, constructive registration runs counter to the fundamental objectives of the Land Registry Act itself. The success of the registration system as a means of securing titles depends upon the reliability of the register as a source of information concerning land titles. It cannot be over emphasised the fact that one of the main objectives of a system of land titles registration is to create "independent titles by cutting off the necessity for retrospective investigation of past titles." [882] The reason for doing so is to save persons dealing with those who have registered their interests affecting land, the trouble and expense of going behind the register in order to investigate the history of the interest holder's title and

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878 Amefinu v Odametey [1977] 2 G.L.R. 135 at p. 143.

879 Ibid.

880 G. Woodman, Loc.cit.

881 Ibid.

882 See Dowson and Sheppard, op.cit., p.2.

in order to satisfy themselves of its validity.

This end can only be accomplished if it is provided that anyone who, after a search at the land registry, acquired an interest in land bona fide and for value from a person who registered his interest and acquired his right on the basis of what the records say and proceeded to register his interest in accordance with the statute should acquire an indefeasible right.[883] If the doctrine of constructive registration is allowed to remain good law, then grantees of interests in land can no longer be sure if their title is secure. For despite the fact that the records may disclose no encumbrances on the land, an adverse right affecting the land which the courts may hold to be constructively registered can still make his title insecure. This is a situation which the Land Registry Act neither contemplates nor provides for. It is submitted that in order to prevent the credibility of the deeds register as a source of information on land titles being destroyed and with it, the present system of land titles registration under the Land Registry Act, 1962, the principles of Ussher v Darko and Ntem v Ankwandah should be reconsidered.

Woodman suggests that objections to the development of constructive registration might be met by restricting the doctrine to cases where the conflicting grantee takes with notice, or to cases where he is not a bona fide purchaser of a legal estate for value without notice.[884] It may be said in answer to such a suggestion that the Act does not seem to contemplate any concession in respect of such category of grantees of interest in land. Section 25(1) of the Act thus provides:

> "The registration of any instrument shall be deemed to constitute actual notice of the instrument and of the fact of registration to all persons and for all purposes, as from the date of registration, unless otherwise provided in any enactments".[885]

It is clear from the above provision that once an instrument has been registered, no one can claim that he is an innocent purchaser of the interest to which the instrument relates without notice of the previous transaction thereof. To restrict the application of the doctrine to the class of cases suggested by Woodman may confine its incidental problems

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883 See Lord Watson in Gibbs v Messer /1891/ A.C. 248 at p. 254. It should be pointed out that this statement is not true of a system of title registration properly so-called only. It is valid for the registration system like the one under the Land Registry Act too, although indefeasibility of title is not guaranteed, the system is designed for securing titles. That security can only be achieved if registration and the information in the records form the basis of land transactions. The fact that registration under the Act does not constitute state guaranteed title does not mean, as Apaloo C. J., seems to suggest, that rights to land can be acquired without formal registration. See Ntem v Amkwandah /1977/ 2G.L.R. 476 at 489.

884 G. Woodman, op.cit.

885 Emphasis supplied.

to a limited number of cases but cannot eliminate them altogether. The suggested solution would only enable grantees claiming under an unregistered instrument, who finding that section 24 has shut the front door against them, to slip in through the equitable back door.[886]

An alternative solution to deal with the sort of problems which arose under Ntem v Ankwandah situations is suggested by Woodman. As a result of delays in the registration procedure and administrative bottlenecks which may affect early registration of instruments, he suggests the institution of a system of applications for registration. This development he suggests, should be introduced by legislation or administrative action.[887] Although it is impossible within the scope of his paper to elaborate on how this should be done, it is clear that he has in contemplation a situation where applications for registration (pending their formal registration), will be regarded as registered for the purposes of the Act, so that legal consequences may flow from the instruments in respect of which such applications are made.

The institution of such a system will, however, be attended with certain inherent problems. If applications for registration are to be regarded as registered for the purposes of the Act, they will have to be filed together with plans and give material particulars of the land to which the applications relate in such a way that interested members of the public can satisfy themselves about the title situation concerning them. Anything short of this will lead to confusion and undermine the system as a source of information on land titles. The facility provided for ascertaining title at the land registry is what land registration is about. But since filing applications for registration in the manner described above is what registrations under the Act virtually consists of, the measure suggested by Woodman is likely to complicate and duplicate the functions of the registry unduly. It will also have the additional disadvantage of prolonging the already time-consuming procedures further, increase both administrative costs in staff and equipment and augment costs to applicants.

Considerations of justice led the courts to make the decisions in Ussher v Danko and Ntem v Ankwandah. But as the law stands at the moment, it would appear a better policy to allow the law to bite purchasers

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886 This was in fact a criticism of the doctrine by Woodman himself

887 G. Woodman, Loc.cit.

of land in certain individual cases as the price to be paid in the interest of certainty of title through the present system of land registration. The price to be paid for trying to do poetic justice in such isolated cases through the development of a doctrine of constructive registration will be far too costly.

The case of Ntem v Ankwandah underlines the defects in the present law where section 20(a) and (b) of the Act has still not been brought into force. If these provisions had been brought into force, the problems which arose in the above case would have been avoided. On refusing to accept the instrument for registration, the registrar would have proceeded by putting into motion the machinery for settling the uncertainty concerning the title deeds under section 22 of the Act, as a preliminary step to the actual registration. There was no evidence in the case to suggest that because the stool occupant who executed the deed was not gazetted, he had no legal capacity to deal with the property. But the registrar refused to accept the instrument for registration because he believed that failure to gazette the chief was a matter on the face of the record which made it appear to him that the chief was not entitled to deal with the land as the instrument purported to do.[888]

The court by holding that the registrar had no power to refuse to accept the instruments for registration in this particular case and that if the plaintiff had taken a writ of mandamus to compel the registrar to perform his public duty of registration, she would have succeded by reason only that section 20 of the Act had not been brought into force, implied that even in those cases where on the face of the records an instrument presented for registration appears to be defective, the registrar will be compelled to accept it for registration. It is surprising that the courts are persuaded to apply liberally, an Act whose language is so clear, in an attempt to accommodate such situations as constructive registration for which it does not provide, while applying it strictly to situations for which it provides but not brought into force.

One would have thought that it is rather in the latter situations where to restrict the discretionary powers of the registrar in this way will under mine the land registry system as a means of securing titles that judicial inventiveness and interstitial legislation are called for. To restrict the power of the registrar in the manner suggested by the Court of Appeal would, like the doctrine of constructive registration, undermine the credibility of the land registration system. Should

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888 See section 20(b) of Act 122.

the registrar for instance, accept an instrument for registration in respect of a piece or parcel of land which has already been registered? What should he do if on the face of the records, the necessary concurrences which are necessary under the traditional law for an effective disposition of interest in land are not had? Should he accept it for registration because section 20 under which he can reject such documents for registration has not been brought into force?

Impirical investigation of how the system works in practice reveals that despite the fact that section 20 of the Act has not been brought into force, the registrar would not accept an instrument for registration unless he is sure that title to the land to which it relates is free from doubts as to its validity. It stands to reason that this should be the condition under which instruments must be accepted for registration. It will be absurd to say that because section 20(a) and (b) of the Act have not been brought into force, the registrar has all along been exercising his power wrongly. Land titles registration is a practical measure. Administrative procedures can be devised within the scope of the Act so as to achieve its purposes. When the registrar refuses to accept an instrument for registration because he honestly believes that there is doubt about title, he is not necessarily exercising his power under section 20. He may just be following a commonsense administrative procedure developed over the years.

It is suggested that the principles of Ussher v Darko and Ntem v Ankwandah should be reconsidered in the light of the objections raised, Section 20 of the Act should also be brought into force in order to forestall the undermining of the land registration system.

E. Priority of Instruments

In a land registration system like the one under the Land Registry Act, 1962, priority between conflicting instruments should not feature prominently as it is a condition for accepting instruments for registration that they should be accompanied by accurate plans of the land areas to which they relate. Provided there is an efficient method of checking the accuracy of such plans against base maps drawn to nationally accepted scales, barring human errors, there should not be any question of registering conflicting instruments. Moreover, as we ahall try to show below, the Act does not appear to contemplate that priority between competing instruments should become an essential feature of the registration system as the courts and text writers would seem to

make it appear at present.

Under the Land Registry Act, 1962, it is provided that a registered instrument is to take effect as against other instruments affecting the same land from the date of its execution if it is presented for registration within whichever of the following periods is applicable:

a. if executed at the place where it is registered, the period of fifteen days from its date;

b. if executed elsewhere in Ghana, the period of sixty days from its date;

c. if executed abroad, the period of three months from its date [889] and

d. in any other case, the instrument should take effect from the date of its ~~execution~~ registration when registered. [890]

This means that if an instrument is not presented for registration within the times specified, it loses the advantage of being registered with retroactive effect from the date of its execution. After the expiration of the times specified it remains to be of no effect until registered.[891] The question which readily comes to mind is whether one can meaningfully talk of priority between competing instruments in the light of the way in which the system of registration is designed to work in practice? Considering section 25 of the Act under which it is provided that registration constitutes notice to the whole world, and its effect on the application of the nemo dat quod non habet rule, it would seem that priority between competing instruments is not expected to play an important role in the registration system under the Act.

Section 24 of the Act says that an instrument shall remain to be of no effect until it is registered. The case of Ussher v Darko, and to some extent, the case of Ntem v Ankwandah, have created some doubts as to the meaning of section 24. The two cases create doubts as to whether an unregistered instrument is or is not void. If it is void, then there will be nothing by way of an instrument to consider. If on the other hand it is not void, then although it is ineffective, the document can operate to confer rights under certain circumstances. This is what, as we have seen, the two cases seem to be saying.

But one fact on which all are agreed is that an unregistered instrument is ineffective until registered which means that no legal consequences can flow from it. It follows that one can only consider priority between

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889 S.26(2)

890 S.26(5)

891 S.24.

two or more conflicting instruments which have been registered. Such situations may arise where for example, one registered instrument takes effect from the date of registration while the other takes effect retroactively from the date of execution as a result of the grantee having presented his instrument for registration within the specified period.

But is this sort of situation possible, within the meaning of the Act? It would appear that it is not. Section 25 of the Act says that the registration of any instrument shall be deemed to constitute actual notice of the instrument and of the fact of registration to all persons and for all purposes as from the date of registration. The language of this provision is clear. It means that as from the date of registration, no subsequent purchaser of the same interest relating to the same land can claim that he is a bona fide purchaser of the interest for valuable consideration without notice of the prior registration. Moreover by section 24 of the Act, as soon as the instrument is registered, it becomes effective to divest the grantor of his interest.

If these arguments are valid, it follows that there can be no case in which the courts will be called upon to determine priority between two valid conflicting instruments. For the registration of the first instrument will have the effect of serving notice to the subsequent grantee and at the same time divest the grantor of his interest. It is agreed, as was demonstrated in Amefinu v Odametey that an otherwise perfectly binding transaction might be concluded in respect of a piece of land, but until it is registered,it would not have the effect of divesting the grantor of his interest. This means that the grantor could conclude other transactions in respect of the same land with subsequent transferees. This shows that there could be one or more competing instruments. But for the purposes of the Act none of these is valid until registered. It follows that the question of determining priority between them cannot arise.

One of the transferees in such a case may proceed to register his instrument. But as soon as he does so interest vests in him. The others will be served with notice, the grantor will be divested of his interest and the others will be holding no valid instrument within the meaning of the Act so as to compete with the registered instrument.

Moreover, as we have argued earlier, provided plans annexed to registrable instruments are accurate and provided that there is an efficient system of checking such plans against base maps drawn to acceptable scales, barring human errors, the possibility of registering

two conflicting instruments should be very rare indeed. Even in cases where conflicting instruments are registered by error, in principle, only the first one can be valid for the purposes of the Act, since as we have pointed out earlier, the first registration would have divested the grantor of his interest rendering the latter unregistered instruments worthless.

It follows that the only way by which two valid competing instruments can exist under the Act is where both are registered at the same time. Since the possibility of such a situation arising is obviously unlikely, there would seem to be no justification for the emphasis placed on priority between competing instruments by the courts and text writers.[892] It seems that it will be a good policy for the courts to ignore unregistered instruments and treat them as invalid, and therefore as if they do not exist at all. The courts can then proceed from that position to consider only registered instruments on their own merits. The pursuit of such a policy might cause occasional injustice to persons in the Ussher v Darko and Ntem v Ankwandah situations, but not for long. Such occasional injustices to individuals will be the price to be paid for "giving teeth"[893] to the Act and making titles certain through the application of its provisions. When the ultimate goal of general security of title has been achieved such unfortunate situations would cease to arise.

F. Procedure for Registration

i. Mode of Registration

The procedure for registration is based on provisions contained in Part III of the Land Registry Act dealing with the method of registration. An examination of the records of the Lands Department, as we shall see presently, reveals, however, that the Lands Department has over the years built up a large number of records and registers far beyond the scope of the provisions of the Act. This has become necessary as a result of some statutory and administrative requirements other

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892 See Bentsi-Enchill, op.cit., Hanningan, "The Question of Notice under the Ghanaian System of Registration of Deeds" (1965) 3 U.G.L.J., 27. Woodman, "Giving Teeth to the Land Registry Act" (1970) 4 R.G.L. 331

893 Woodman used the phrase in his article referred to in note 892 above.

than registration, which the law demands ought to be satisfied in order to acquire a valid interest in land.[894]

Section 11 of the Act provides that subject to the exceptions made in its provisions, the registrar should keep a Register into which he should register in the manner prescribed by the Act, all instruments presented to him. Registration "shall consist in filling a duplicate or copy (to be provided by the person presenting the instrument for registration) of the instrument brought for registration."[895] The registrar, after registering the instrument in the manner provided, should place upon it a certificate in the form provided under schedules D or F as the case may be, or as near thereto as may be, specifiying the year, month, day and hour of the proof or presentation as the case may be of such instrument. When the instrument is ultimately registered, a certificate specifying the year, month, day and hour of registration must be issued and the times specified in it should be taken as the date and hour at which the instrument was registered.[896]

The above provisions are very imnportant in so far as the time of registration affects subsequent transactions in respect of the same land to which the registered instrument relates. Section 12(2) requires that every duplicate copy of a registered instrument should bear the certificate required by section 10 of the Act to be placed on the original instrument and must also include a certificate signed by the registrar that such duplicate has been compared and verified with the original. The duplicate or copy of a registered instrument upon which a certificate in the manner prescribed by section 10 of the Act has been placed, may be printed, written, typewritten, photographed or copied by any other process.[897] The registrar is enjoined to number every such duplicate or copy filed consecutively, and shall file duplicates or copies in the order in which they are received by him.[898]

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894 See for instance, the following Acts. S.75 of the Local Government Ordinance, No. 29 of 1951, (Cap.64) 1951 Rev., Article 164(3) of the 1969 Constitution of Ghana, and section 8(1) of the Administration of Lands Act, 1962, Act 123. All of these enactments in one way or the other, requires for the validity of acquisition of stool lands that the minister should give his consent. See also the Stamp Act, 1965, Act 311, S.14.

895 S.12(1).

896 S.10.

897 S.12(3).

898 S.13

Where a map or plan is annexed to an instrument brought forward for registration, the registrar is enjoined to file in the register a true copy of such a map or plan.[899] Although the wording of the above provision would seem to suggest that the requirement of annexing a plan to an instrument is permissive and not mandatory it is an administrative procedural requirement of the Lands Department that an instrument will never be accepted for registration unless it is accompanied by a site plan of the parcel of land to which the instrument to be registered relates.

The registrar is enjoined to keep a book in which he should, upon registration of any instrument, enter the registered number, the names of the parties, the date and the nature of the instrument and the date of registration.[900]

It is along the line of these provisions that the procedure for registration of instrument affecting lands has developed over the years. As the demands of land administration in accordance with statutory requirements have made it necessary for many more registers to be established, advantage is taken of section 17(2) of the Act which gives the registrar discretionary power to keep such other books and registers as he may think fit. What follows is a description of such registers and records of an imperical research and the Memorandum of a working party of a committee created in September 1976 to investigate the feasibility of introducing a pilot project for establishing a Register of Title to Land in Accra.[901]

ii. Registers of the Lands Department.

It is the primary responsibility of the Technical branch of the Lands Department to compile, revise and maintain maps, plans and registers containing data relating to lands and titles thereof and estate management. This technical branch could carry out minor surveys, cartographic recordings and other functions connected with land and its valuation. In dealing with these matters, a distinction is drawn between three main categories of land each of which has its own registers. These are classified as follows:

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899 S.16.

900 S.17(1).

901 See Memorandum to the Government Advisory Committee for Land Administration Research Centre on the Feasibility of Introducing a Pilot Project for Establishing a Register of Title to Land in Accra. January, 1977, Lands Department, Accra.

a. state lands;

b. stool or skin lands, and

c. family or private lands.

Related to this classification of lands and the registration of instruments affecting them, is the statuory requirements of section 14(5) of the Stamp Act, 1965, [902] by which no instrument can be accepted for registration until it is officially stamped. To meet this statutory requirement of stamping three registers have been created as follows:

a. the Property Register;

b. the Valuation Register and

c. the Stamp Duty Assessment Record Book.

On receipt of an instrument for registration at the Lands Department, the material particulars of the instrument and the land to which it relates are entered into a ledger recording the following:

a. the Land Serial Number or Numbers; (L.S.N.)

b. the Deeds Registry Number;

c. the Key Plan Number;

d. the Date of the Instrument;

e. the Nature of the Instrument

f. the names of the parties to the transaction;

g. the description of the situation of the land in question;

h. the purpose for which the land has been acquired;

i. the particulars of the site plan;

j. the duration of the tenure;

k. date of expiry;

l. Plan Reference Number;

m. The means by which grant is terminable, notice or otherwise

n. if renewable;

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[902] Act 311

o. other related transactions, if any;

p. Title Number and

q. Remarks.[903]

Later, when the necessary vetting of the above data is completed, these particulars are transferred from the Ledger onto cards maintained by a card-index system. These ledgers known as Geographical Registers have been maintained since the nineteen twenties. They are maintained for geographical location and cross-indexed by plan numbers. A separate register, called the Names Index Register is maintained for recording the names of the parties to the transaction to be registered. There is also the Number Register which is indexed by the Land Serial Numbers. A record is kept of the plans and maps for each area and these are indexed and kept in drawers known as the Plans Register.

Finally, there is what is known as the Valuation Register. It is one of the most important of all the registers because it contains all the vital information concerning the material particulars of the lands to which the instruments relate. It is thus used for answering public searches and as it provides comparative information for valuation purposes, it is frequently used by the stamp duty valuers. This register is maintained in loose leaf book form. Records like these have been maintained since 1947.[904]

Each index card contains the following information:

a. Valuation Sheet Numbers

b. P. D. Number (Particulars Delivered Number)

c. Address and stool (if stool land)

d. property number

e. short description

f. date of instrument

g. type of instrument

h. vendor or lessor

i. purchaser or lessee;

j. consideration or rent

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903 See the memorandum of the Working Party referred to, note 901

904 Ibid.

k. price per sq. ft.

l. estimated net rental value;

m. area;

n. rateable value;

o. lettings;

p. duration of grant;

q. assessed value of property;

r. special covenants;

s. full description and plan of lay out.

A space is left for the recording of subsequent information or transaction relating to the same land. Records like these are maintained for every valid instrument stamped in the Lands Department, the details of which will be described below.

iii. Stamp Duty and Registration

The payment of stamp duty has no direct bearing on land titles registration in Ghana as such. But it would seem that the requirement of stamping has been used since the colonial era as a means of levying tax indirectly on real property.[905] This ingenius device for collecting property tax has been conveniently preserved and linked with land registration. As the Stamp Act makes stamping a condition precedent to accepting instruments for registration, it has become one of the many hurdles to be overcome in the long procedure for registration.

Thus when an instrument is presented to the Lands Department for registration, it is the stamping office attached to the Department that receives it first. The former, on receipt of the instruments, refers it to the Technical branch of the Lands Department for the purpose of checking the accuracy of the site plans annexed to it against base maps supplied to the latter by the Survey Department. This then begins the long procedure for registration as follows:

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905 See for instance, the Stamp Ordinance, No. 12 of 1889, S.17, under which it was provided that "no deed shall be registered in the Registry of Instruments affecting land, unless the same shall be duty stamped . . ."

a. when the instrument is returned to the stamping office, the land transaction to which it relates is recorded into the main register of the stamping office and given a "stamping office number" which is the sequence of numbers given to any document arriving there. A form acknowledging receipt of the instrument is issued to the applicant. If the instrument refers clearly to a stool land, an additional number is attributed to it and a file opened under that number at the Lands Department.

b. The stamp office attaches to it a form called "particulars delivered" form. This is a form on which the particulars of the land to which the instrument relates are entered. Some of these particulars are the date on which the instrument was executed, the names of the parties to the transaction, the situation of the land, its description, area and the type of interest transferred, that is whether it is a lease, a gift or otherwise.[906]

c. The documents are checked as to the correct number and type of interest. Two copies of the instrument are required, to each of which must be attached a a site plan of the land area in question; and a further two site plans are required to be attached to the "particulars delivered" (P.D.) form. This means that an applicant must present for registration, two copies of the instrument and four site plans.

d. The documents are sent back to the Lands Department from the stamping office where it is forwarded to the technical branch of the Lands Department for checking against the list sent from the stamping office. If in agreement, the list is filed and the documents sent to the chief Technical Officer's "plan examination section."

e. The plan examination section records the particulars of the document into a register using the number attributed to it by the stamping office. The site plans are then scrutinised in order to ascertain their accuracy. The Survey of Ghana maps, and base maps supplied to the Lands Department by the survey department or the Town and Country Planning Department are employed in this exercise. Where the land in question is in a town, the survey of Ghana "town sheets" are used, checking the particular plot against known existing buildings and control points.

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906 This is a type of form prescribed under section 16 of the Stamp Act, 1965, Act 311.

f. Here if any serious errors are detected during the "office check", field checks will then be instigated by the chief technical officer's staff, and a report made to the chief technical officer. If the doubt as to the accuracy of the plan is such that the service of the Survey Department would be required to resolve it, the assistance of the latter will be required and the matter referred to it. If the site plan is ultimately rejected on account of its inaccuracy or being in conflict with an already registered instrument, the instrument is returned to the grantee or the applicant through the stamping office without stamp duty being collected. If on the other hand, the site plan is acceptable, the instrument is forwarded to the legal section of the Lands Department.

g. The legal section of the Deaprtment checks the legal details about the instrument, its authenticity, and other statutory requirements which ought to be fulfilled before it can be valid. For instance, if it is stool land, the legal staff will check to see whether the necessary consents and concurrences of the accredited persons have been obtained. If the document has not been given a stool land number, it will be returned to the stamping office for this to be done, and order a file for it to be opened at the Lands Department. Instruments affecting lands under state control are, however, not subject to such legal checks because the deeds thereof are prepared by the legal section of the Department itself. What are subject to search are assignment of leases, or subleases and mortgages of state lands in order to ascertain if the Lands Commission's consent has been obtained.[907]

h. All the documents are sent to the central records room of the Lands Department where they are checked against government lands and government development programme proposals. If the site falls on any such development area which means the grantee cannot use the interest for which he requires the land, then the latter will be informed and advised accordingly.

i. When the relevant checks are completed the instrument and its related documents are sent to the Lands Department's Valuation Drawing office for plotting, and if necessary, the addition of a Property Number. The plotting is done on the basis of the large scale survey of Ghana

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907 See Article 164(3) of the 1969 constitution of Ghana, Section 8(1) of the Lands Administration Act, Act 123, and the Lands Commission Decree N.R.C.D.24 (1972) as amended by N.R.C.D.112 (97).

sheets, records of which have been maintained since 1947. Most plots in Accra and other regional capitals, particulary those in statutory development areas have property numbers in the Valuation Drawing office records. Where plots are subsequently sub-divided new "sub-plot" numbers based on the original plot numbers are attributed to them.

j. The plot outline and its numbers are recorded including all material partiuclars of the plot. All this information is recorded and maintained on a Valuation Form kept in a comprehensive record, under a Property Number and is used for both valuation on comparative basis and for answering searches and enquiries.

k. At this stage, the instrument is ready to be accepted for registration subject to any other administrative or statutory requirement that may still be required to be fulfilled. From the Valuation Drawing office the documents are once again returned to the stamping office where the stamp duty is assessed ad valorem by a valuer of the Lands Department attached to the stamping office. This concludes the long process of stamping which also forms part of the procedure for registration.

l. The instrument is either returned to the grantee or if he wants to complete the process of registration at once, the instrument is returned to the legal section of the Lands Department where the actual registration takes place.

m. On receipt of the instrument for registration, the oath of proof of due execution is sworn before the Registrar. If such oath has not already been sworn before a Judge, a High Court Registrar, or a District Magistrate, the oath can be sworn before the Registrar by any signatory of the instrument.[908]

n. A receipt is issued to the applicant in respect of the instruments deposited and the documents are sent to the Registrar who is always a lawyer, for checking personally, the conformity of the instrument with existing statutes, decrees, legislative and executive instruments. If there is no evidence of root of title, the Registrar may require a statutory declaration from the grantor.

o. If the instrument and all the related documents are approved as satisfactory, the applicant is required to submit his tax clearance certi-

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908 See section 10 of the Act.

ficate or prove that he is not subject to taxation or / is up-to-date with his tax obligations. The registrar would not complete the registration unless the applicant satisfies this requirement which is a governmental directive to all Lands Departments.

p. When this condition is satisfied, the instrument is accorded a number and sent to Accra for the signature of the Commissioner for Lands and Mineral Resources who is the Chairman of the Lands Commision whose consent is required for the validity of the transaction. This is the case where the land affected falls within the category of lands in respect of which such consents are required.

q. At Accra, the particulars of the instrument are subject to further checks, particularly the site plans. If they are found to be in order, the instrument is placed before the Commissioner of Lands who normally appends his signature. This is in fact, only a rubber stamp.

r. The instrument is returned to the Lands Department from where it was sent. Here, entries into the Register are indexed alphabetically and kept in the deeds registry store room. There is an index card for the surname of both the grantor and the grantee and if there is more than one grantor or grantee, it is indexed by the person whose name appears first on the document.

s. After recording the year, month, day and hour at which the instrument is registered,[909] the applicant is issued with a certificate of registration upon the payment of a registration fee of ten cedis. This concludes the registration procedure and the validation of the transaction.

G. Delays

It can be discerned from the long procedure for registration outlined above that the system has its own in-built delays. The procedures to be gone through at the various stages at different sections of the Lands Department, including other departments such as the Survey, Town and Country Planning and the Stamping Office constitute a recipe for red-tapism and its consequential delays.

The requirements of stamping as a condition for registration may be one of the convenient and effective ways of levying property tax on landed-interest holders, but it does not only delay the acquisition of

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[909] See section 10 of the Act.

interests in land but the rule operates unfavourably against transferees of interests in land. It is normally the grantee anxious to get his acquisition validated who pays such tax during the course of getting his instrument registered. Since the cost of valuation and the stamp duty are not usually taken into account during the course of negotiations leading to the conclusion of the transaction, the grantor is often able to shift his tax obligations in this regard to the grantee.

Thus what is intended to be a property tax on persons holding an interest in land becomes in practice, a tax on prospective grantees of interest in land. They are taxed even before the interest becomes vested in them. This would seem to be unfair. A solution would seem to lie in a general property tax. It is possible that such tax could be added to the cost of land rights, but it would at least remove one of the procedural requirements in the registration exercise that causes unnecessary delays.

An equally contributory factor in the delays of the system is the need to submit a tax clearance certificate to the land registry as a condition for instrument registration. Perhaps, the rational for this requirement is that those who seek the services of state agencies should be up-to-date with their tax obligations. But it would seem that apart from the fact that this requirement is fraught with unnecessary delays, it constitutes a formidable obstacle in the way of the majority of illiterate farmers and peasants of the rural communities who might wish to acquire lands in accordance with the requirements of the law.

Farmers are not generally subject to direct taxation in Ghana. This means that they should be exempt from the fulfilment of of this condition. But not infrequently, the problem has been how to determine who a farmer is. Is he the absentee farmer who is also a civil servant? Is the business man who has a small farm-yard behind his estate a farmer for this purpose? To avoid this problem, the registrar requires those who claim not to be subject to taxation to bring along a certificate of examption from the Commissioner for Income Tax in lieu of a tax clearance certificate.

Members of the rural community are often bemused by such obstacles in the way of land acquisition. Ignorant about the bureaucratic processes involved in fulfilling such requirements, resort is had to the aid of literate members of the community or legal practioners at great expense to obtain the relevant documents. There would seem to be no sound basis for linking matters relatiang to general taxation to land registration.

The agencies responsible for tax collection should be made more efficient and other ways of making the public meet their tax obligations should be devised instead of clogging unnecessarily the process of land acquisition and registration with such unnecessary conditions.

Apart form such statutory and administrative requirements, the fulfilment of which is fraught with delays, the failure to establish land registries in the manner prescribed under Part 1 of the Land Registry Act, 1962, also accounts for much of the delays that occur within the system. Within the meaning of the Act, a Chief Registrar would have been appointed as the administrative head of the scheme in such a manner as would concentrate human and material resources at one place and under one administration.[910] The concentration of trained personnel and equipment at one place under a single management would certainly avoid duplication of functions and would assist in reducing costs in time and money.

In a well equipped and properly staffed land registry, the functions of valuation for the purposes of assessing stamp duty could be performed by a valuation officer attached to the registry. There should be no need for this to be done in a place outside the registry such as the stamp office. This will not only have the effect of cutting down delays considerably, but will reduce the number of registers which the land registry and other departments would have to maintain at present. Searches can be made easier as all available information can be kept in one place. It is for reasons like these that the need for establishing independent land registers must be seriously considered now if the system should work efficiently.

H. Public Education

There is no doubt that the law relating to land titles registration in Ghana has very important consequences for land acquisition and use. But unhappily, there is no provision for a programme of public education and information on the substantive law, its objectives, social, economic and legal implications. As we have seen earlier, the Land Registry Act, 1962,[911] Section 8(1) of the Administration of Lands Act, 1962,[912] the Land Commissions

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910 See sections 1 and 2 of Act 122.

911 Act 122, s.14.

912 Act 123.

Decree, 1972 [913] the Conveyancing Decree, 1973 [914] and the Stamp Act, 1965 [915] all have the effect of making writing, stamping, the consent of the minister in some cases, and registration, conditions precedent for the validity of transfer of interests in land.

Since the provisions of the Conveyancing Decree have imposed a general mandatory requirement of writing on land transactions, it follows that even land acquisitions under the traditional system ought to be evidenced in writing. A memorandum or deed of conveyance becomes an instrument affecting land which must be registered either under the conveyancing Decree or in accordance with the Land Registry Act in order to be effective. To be able to do so the bureaucratic processes of stamping and presentation of tax clearance certificate will have to be gone through. The question which must be considered, however, is how many Ghanaians know about these statutory and administrative requirements? Are people complying with the law? Certainly they cannot, if they are not aware of the existence of the law. In a survey of 80 sample villages conducted by the Land Administration Research Centre, U.S.T. between July 1976 and January 1977, it was discovered that less than four per cent of the people questioned in the villages knew about the Land Registry Act and the requirement that the consent of the minister is necessary for valid alienation of an interest in stool lands.

Surprisingly, over 45% of the people questioned knew about stamping, but not in the sense in which the Act requires it. It has been the habit of letter-writers to affix postage stamps on agreements reduced into writing whether or not the agreement relates to a land transaction. Even an illiterate grantor or grantee might want a postage stamp of any value to be placed on the memorandum. It is regarded much more as a symbolic pact concluding insignia or what may be called a seal under English law than a form of taxation, the value of which is determined by the consideration or value of the land within the meaning of the Stamp Act.

Investigations at the Lands and Town and Country Planning Departments at Ho, and Kumasi disclosed that in the urban and city statutory development areas, the majority of people are unaware of these statutory and administrative

913 N.R.C.D. 24

914 N.R.C.D. 175 SS 1-7 inclusive.

915 1965, Act 311.

requirements and the consequences of non-compliance with the law on land transactions. Many grantee's of interest in land became aware of these requirements for the first time during the course of negotation for the grant or where litigation arises out of the grant and the need arises to tender the document in evidence to prove title. Frequently, it is when the grantee is applying for development permit from the Urban or City Council that he is for the first time confronted with the requirements of the law

Indeed, in a survey carried out in Kumasi between May 1977 and August 1977 on solicitors dealing with land matters, some of the legal practioners confessed that they were not aware of the significance of the relevant provisions of the Conveyancing Decree, 1973 dealing with the recording of oral grants. Today, cases such as Asare v Brobbey [916] and Amefinu v Odametey [917] might have provided bitter lessons from which the few persons connected with the litigation might learn about the legal consequences of non-registration. But such cases without more, cannot be adequate means of educating the public on these important matters.

Surely, ignorance of the law means that there are thousands of illegal dealings in land at present, particularly in the rural communities. Numerous land transactions under the abunu and the abusa system by which many stranger-farmers develop land can be found to be in principle, illegal for two reasons. Firstly, the greater majority of such transactions are conlcuded by illiterate stranger-farmers with stools without the terms being reduced into writing.[918] Secondly, they are never recorded in the manner provided under the Conveyancing Decree, 1973.

It is not so much because of the need to comply with the law generally that the need for public education on these matters is being stressed here. A programme of land titles registration can have significant effects on a land tenure system. Title registration normally leads to individualisation of interests and makes transfers of interests in land easy. The individualisation of interest which will accompany the implimentation of the scheme can have the effect of changing the communal trappings of the land tenure systems of the country.

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916 /1971/ 2 G.L.R. 331.

917 /1977/ 2 G.L.R. 135.

918 See the Law Reform Commission Report, November, 1975.

In fact, since Sir Wlliam Maxwell's principles of the abortive Public Land Bill was abandoned in 1897, individualisation of interest has been consciously encouraged through the adjudicative processes of the courts, the influence of lawyers, text writers and conveyancing forms. The institution of a system of a deeds registration and the present efforts by the government to introduce a system of title registration, properly so called, is intended to consolidate this process of individualisation and to transform community-based prescribed user-rights into freehold titles.[919]

This kind of policy involves questions relating to social economic and political considerations. It is thus of paramount importance that the public should be informed about the programme of land titles registration. Such information should not only include the explanation of the current law on the matter but its likely consequences on the land tenure system and how it might affect society and the individual. This in itself should generate debates on the issue and should give opportunity to the rural community to express its view on the matter.

It may well be that from the ensuing debates on the issue, new ideas and alternative proposals on how the problems for which the system is designed to solve can be dealt with will emerge. It has already been pointed out that the acquisition of freehold titles is not a necessary condition for efficient land use and development. All that one needs is the acquisition of an interest in land or a right to use land.[920] The development and the success of the cocoa and the mining industries in Ghana since the last decade of the nineteenth century which did not depend in the past or at present on the acquisition of freehold titles have been sited as good examples for this proposition.

It has also been pointed out in the discussion of land administration in the North that the primary objective of land registration which is title security can be achieved through the already existing machineries for the control and administration of all lands by the government. One of the main arguments often raised in favour of land titles registration is the unwillingness of financial institutions to give agricultural credit on the security of landed interests which are insecure. But when titles become secure through the control and administration of all lands by

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919 See the Memorandum of the Working Party referred to above, note 901; and the Law Reform Commission Report, November, 1973 and 1975.

920 See pp. 72-73 above.

government agencies, the banks will no longer insist on the fact of registration but on the value of the interest to be given as security. The consideration of all these aspects of the issues concerning land titles registration in Ghana makes public education and general information on the question a matter of public duty and necessity.

C. K. Meek rightly points out the fact that the desire by colonised people to acquire freehold titles during the colonial times was much influenced by the wish to acquire political equality with Englishmen. Yet in England and elsewhere many farmers prefer tenancy to ownership, since capital expended on development is more productive than when sunk in the purchase of land.[921] He stresses the fact that in the case of small-holders, the purchase of freehold may involve the exhaustion of capital resources; pointing out that in all the colonies where agricultural debt became a state problem, the excessive buying of more land than could bedeveloped had been the principal causes of such indebtedness.[922] Noting some of the dangers of the freehold ideas, Meek writes;

> "The ability to borrow money on freehold property has everywhere been a curse to the peasant proprietors who had not learned the proper use of credit. Freehold opens the door for speculation and under-development. A recent Land Commission in Northern Rhodesia observed that it was monstrous that 80,000 acres of land, much of it more suited for cattle than for tobacco, should be lying idle at a time when land was so urgently needed; and they added that, since there were mnay other extensive areas held by companies and individuals for purposes of speculation, the Government should seriously consider a tax on undeveloped land. In Kenya, for the same reason, a similar measure is under consideration".[923]

These dangers concerning which the learned author writes are very real to the situation in Ghana where land law reform bodies and those in positions of influence on land policy formulation are pressing for excessive individualisation of interests and the creation of freehold titles. Land titles registration is the means by which they seek to attain their desired objectives. What has not been done, however, is to consider the social and economic implications of such policy in the manner that Meek approached his subject. In the light of the views expressed above, it is deemed necesssary to examine in the concluding chapter of this study, this process of individualisation and its social and economic consequences for Ghana.

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921 See his Land Law and Custom in the Colonies, Oxford, 1946, 244.

922 Ibid.

923 Ibid.

PART IV

INDIVIDUALISATION OF INTERESTS UNDER THE TRADITIONAL LAW

PART IV

INDIVIDUALISATION OF INTERESTS UNDER THE TRADITIONAL LAW

A. Introductory

The withdrawal of Sir William Maxwell's Public Lands Bill of 1897 marked the beginning of a trend in the evolution of the customary schemes of tenure in which the tendency was to regard the interest which an individual member of a land holding community acquires through the exercise of his inherent community membership right as involving the absolute acquisition of the land to which his interest relates.

Today, some students of the indigenous law would go as far as asserting that the customary schemes of interest in land has undergone such metamorphosis that the individual interest in land can now be regarded as approximating to a freehold title on the same footing as the term is understood under English law with its connotations. To those who hold this view, the evolution of the customary interest into a freehold is not necessarily incompatible with the "trusteeship idea" which is essentially an ethical justification of property.[924]

To some of the proponents of this view, the trend towards individualisation is progressive and ought to be encouraged and crystallised under a scheme of title registration. This, it is believed holds the key to the efficient and effective land use and economic development. Such transformation of the traditional interest into a freehold is a necessary condition for easy accessibility to agricultural credit since such title could be used as a collateral for the security of loans from financial institutions.[925]

Among the factors influencing these trends and attitudes are:

i. the impact on land values of European commerce and the development of the mining industry in the late nineteenth century;

ii. the introduction of cash crops based on permanent cultivation; and

iii. the reception of Anglo-American ideas of tenure by an emergent African middle class and elite consisting of lawyers, judges, doctors, merchants and the educated native.

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924 See S. K. B. Asante, Property Law and Social goals in Ghana 1844-1966, Accra, 1975, p. 31

925 See The Report of the Law Reform Commission on Proposals for the Reform of Land Law, November 1973, pp. 7 and 13-14.

What has never been seriously considered, however, is the likely effect which such changes will have on the socio-economic and political value systems of the traditional schema.

The kind of transformation envisaged by this school of thought raises serious questions regarding efficient and improved methods of productivity, the distribution of resources in society and the raising of standards of living. These are questions transcending the economic and social sphere into the realms of politics. Even as of now, over 60% of the working population in Ghana is engaged in the exploitation of landed resources.[926] The ecological processes of such resource exploitation normally occur within the family milieu and their distribution is usually channelled through the same medium in rural communities where the basic tools of production are still the proverbial hoe and the cutlass. The cooperative effort funnelled through the family system would appear to be the best way of developing farms in any appreciable economic sizes.[927]

The question which must be of concern to the land administrator and the policy maker on lands generally is whether the family system and the community-interest ideas inherent in the traditional property systems can be accommodated by the individualisation and private ownership being advocated by this school of thought. It would appear that there is a false thesis underlying the views of those who advocate individualisation of interests. It is erroneously assumed that individual ownership of land is a necessary condition for effective utilization of land and a pre-requisite for acquisition of agricultural credit from financial institutions.

B. Reception of European Ideas of Tenure

The nineteenth century laissez-faire doctrines of private enterprise and individual initiative and competition formed the cornerstone of capitalist production and commerce throughout the four centuries of European contact with the west coast of Africa.[928] These laissez-faire ideas had a great attraction for the educated elements of the African community and traders. The ability to read, write and speak English in an illiterate society

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926 See S. Y. Brenner, Agriculture and Economic Development of Low Income Countries, The Hague, 1971, p. 156.

927 During the late nineteenth century when the cocoa industry began, migrants from the south of the Gold Coast to the East in search of lands had to form companies which were corporate groups in order to employ the advantages of joint effort in the development of the industry. See Generally, P. Hill, The Migrant Cocoa Farmers of Southern Ghana, Cambridge, 1963.

928 The Portuguese landed in the Gold Coast as early as 1471 and began the trade in the Gold.

placed this class of natives in a special privileged position.

As middle men in the trade between the natives and the European merchants, they were in a unique position to acquire wealth as well as wield considerable influence in society. The tendency was to imitate European ways of life and in some cases regard certain European values as in many respects superior to those of African traditional values and to regard some aspects of the latter as obstructive to economic development.

Thus Casely Hayford, for instance, in his Essays on the Forest Bill of 1910, complained that in the past, they had been taught to believe that the "noble traditions of the British nation, which governed its conduct in dealing with weak peoples, still controlled public conscience . . . and it is because we fervently cling to such belief that we are persuaded that British public opinion will not tolerate any plans that might be formed by the so called friends of the indigene to prevent the possibility of a landlord class, black or white ever arising in a crown colony".[929]

Here was a prominent lawyer and a public figure, the successor of Mensah Sarbah as the President of the Aborigines Rights Protection Society openly advocating the creation of a landlord class within the traditional property systems. And this was the "noble traditions of the British nation" to which they "fervently cling". It must be remembered that the idea of landlord and tenant relationship is an English-tenurial concept which is contrary to native ideas of property rights, since land is regarded as a community asset and resource. No member of a land-holding group could be a tenant of any one since no individual has ownership of the land. Such relation could only arise between the group and a stranger in which case, whatever rent may accrue from the relationship would be receivable by the community as an entity and not by any individual landlord.

However, the influence of the reception of Anglo-American juristic ideas and the conception of tenure by the native middle class and their attitude towards land rights are reflected not only in the above statement of Casely Hayford, but in the local press in the late nineteenth century. In the 15th June, 1897 edition of the "Methodist Times", for example, J. P. Brown, a critic of the Crown Lands Bill, and a Vice President of the A.R.P.S. was described as a "striking example of the public". He

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929 J. E. Casely Hayford, op.cit., p. 42. Emphasis supplied.

was the son of a Wesleyan Minister, "a cultured member of the aristocracy" not convicted of any crime, a preacher . . . and "a land owner". It is interesting to observe how the association of a person with membership of a cultured aristocracy and land ownership was regarded as an index of respectability in the Gold Coast Society.

Similarly, throughout the period of opposition to the Lands Bills, men like Mensah Sarbah and Renner who argued the case on behalf of the traditional authorities before the Legislative Council used language suggesting that the lands belonged to the chiefs individually, arguments which were inconsistent with Sarbah's own writings in his book, Fanti Customary Laws. For example, as will be recalled, during the debate he said:

> ". . . Section 19 of the Supreme Court Ordinance; 1876 particularly gives special directions for the enforcement and protection of the law of tenure in the protected territories of the Gold Coast; and subsequent legislation has taken special care to protect the law of tenure in this country. The bill, however, practically alters this customary law of tenure under which the land owner is an absolute land owner, by declaring that the largest right a native of the Gold Coast has in the soil of his country is what is called a settler's rights". 930

Statements such as these do not only give a false impression about the nature of traditional schemes of interest in land, but are influenced by Anglo-American juristic ideas.

In addition to the influences of the native middle class, the European merchant class, concession hunters and speculators had some controlling influence on land transactions. In their negotiations with the traditional authorities, they were concerned about the security of the interests they acquired. The African or native lawyers who were the middle men, employed English conveyancing forms and terminology in the drafting of the ensuing concession agreements. This relationship united the European merchant class, the mining firms and the native middle class in the pursuit of their common economic objectives. Thus in 1894, when the idea of the Crown Lands Bill was introduced, the Liverpool Chamber of Commerce sent a telegram to the Governor requesting him not to pass the Bill until they had considered the matter and gave their opinion on the subject. They complained that the Bill affected a large section of the community "especially the more intelligent and educated section, and we know nothing about it until it was passed. It was passed behind our back." 931

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930 See the Legislative Assembly Debates, C096 295, p. 477. Compare this statement with what he says about individual ownership in his book, Fanti Customary Laws, op.cit., p. 61 and pp. 68-69. Emphasis supplied.

931 CO/96, 257, p. 280, at p. 281. Emphasis supplied.

Thus the western conceptions of tenure and the nineteenth century lassaiz-faire ideas of private enterprise premised on competition and individualism united the European merchant class and the native middle class including the lawyers in opposition to a legislative measure which would have gone a long way in preserving the communal character of lands which is an inherent ethical principle of traditional land tenure. This class of persons took exceptions to the possible check on the process of individualisation and the limitation which the law sought to place on free negotiability of land sales. Under the influence of these forces, the process of individualisation became a feature of land tenure in the city and urban areas where such influences were considerable. However, this cannot be said to have changed the basic tenets on which the traditional system of tenure is based in the rural communities.

C. The Introduction of Cash Crops and Permanent Cultivation

The individual interest in land which a member of a land-holding community acquires through the exercise of his community membership right by effective occupation of the community's land is an interest of potentially unlimited duration.[932] It is inheritable and subsists so long as successors are to be found and the land is not abandoned.[933] However, the durability of such interest, dependent as it is on continued occupation and resource exploitation, may be limited in duration where land development patterns are not based on projects of permanent nature. As such, before permanent agriculture emerged the frequency with which land was abandoned did not usually allow for permanent attachment of the individual to a specific confine of the commons land for many years.

Land use patterns in the late nineteenth century is well ilustrated by an 1889 Report on "Economic and Agricultural Potential of the Gold Coast". Paragraph 4 of the report stated:

> "In this tropical country where nature repays every effort of cultivation by a hundred-fold return, and the wants of men are confined almost exclusively to his daily necessary food, there is no incentive to exertion, and thus, although agriculture is the main occupation of the people, we have no hesitation in stating that probably not more than three per cent, certainly not more than five per cent of the soil is brought under cultivation in any one year".[934]

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932 Bentsi-Enchill op.cit., p. 109

933 See Ollennu, op.cit., p. 57.

934 See Report of a Commission appointed in 1887 to investigate the Economic and Agricultural potential of the Gold Coast, Accounts and Papers - 1891, No. 110, in ZHC 1/5239, P.R.O.

Under conditions like these described above in the Report, the abundance of land made it easy and feasible to abandon lands frequently within the framework of shifting cultivation in which for lack of scientific means of replenishing the soil with fertilizers or manures, the land was left fallow for a number of years until it had sufficiently regained its fertility before recultivation. With large areas of unoccupied land available, the fallow periods were so long that a previously cultivated area might be regarded as having been abandoned. Since the individual was not tied down to the cultivation of a particular area of land, rights in land were of relatively short duration.

With the introduction of permanent crops such as cocoa, coffee, cotton and rubber plantations into the agriculture of the people however, a new element in land development patterns was introduced.[935] In addition to this new element in land use patterns there was increased demand for land which was one of the consequences of the mining industry which began in earnest in the last quarter of the 19th century.

These events led to a sharp rise in land values, the rights of which were keenly contested. These were some of the principal factors affecting the evolution of traditional schemes of interest in land.

It will bear emphasis to remind students of the indigenous law that in any analytical treatment of the phenomenon of an interest in land under the traditional schema, it must be borne in mind that no amount of long possession or un-interrupted occupation based on permanent cultivation or otherwise may transform the community-based prescribed user right into absolute ownerhsip of the soil.[936]

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935 Between 1837-1840, James Swanzy was already managing a coffee plantation which was later purchased by Rev. T. B. Freeman who developed it into an agricultural traininhg centre. A group of cotton growers in Cape Coast planted 25,000 "bushes" of cotton ... and in 1864 the Basel Mission arranged cotton growing in the Trans Volta area. See David Kimble, Political History of Ghana, 1850-1928, p. 8. The export of cocoa began in 1891 with an experimental shipment of 80 lbs. See Lord Hailey, Native Adminsitration in the British African Territories, Vol. III, p. 199.

936 The authorities in support of this view are abundant. See Sarbah, op.cit., pp. 68-69.
See also the cases of Owusu v Manche of Labadi (1933) 1 W.A.C.A. 278,
Manko v Bonso (1933) 3 WACA 62,
Kuma v Kuma (1938) 5 W.A.C.A. 4,
Golightly v Ashrifie (1955) 14 W.A.C.A. 676,
Addo v Wusu (1940) 6 W.A.C.A. 24,
Accuful v Martey 1882, Sar. F.C.L. p. 156, etc.

This is the logical consequence of the way in which such interests are created. As has already been argued, the interest does not usually come into being until the exercise of inherent rights founded on membership of the community. A logical nexus is thus established between individual enterprise and the establishment of the right. By necessary implication, the cessation of land exploitation for a reasonable time during which period it may be said that no wealth of the interest holder's creation remains on the land should have the effect of reverting the land which can then be regarded as vacant to the community in which the paramount title is vested.

Yet there is a school of thought which seeks to establish that under the traditional schemas of tenure, the introduction of permanent crops which has the effect of tying down the individual to a specific confine of the land for many generations transforms the user right of such occupiers into individual ownership of the soil to the exclusion of the corporate groups in which such titles are known to be vested from time immemorial.

D. The Influence of the Judiciary and the Bar

It is the tradition of the common law for the judges not to articulate in their decisions the policy objectives actuating their decisions, yet more often than not the court decisions are not inreflective of the socio-economic trends within the society. The judiciary can therefore through the adjudicative processes of the courts influence the direction of policy and changes in the law. This may even be more true of the members of the Bar whose daily social intercourse with members of society through client-solicitor relationship has a formative influence on the law.

So it is that both the Bar and the Bench imbued with Anglo-American juristic ideas and sometimes Roman-Dutch Law, usually play a considerable role in the encouragement and introduction into the indigenous law concepts and ideas which tend to encourage individualisation and the creation of individual ownership of land. Hence emerged at the beginning of the twentieth century, a movement in the courts which sought to encourage and promote the creation of freehold titles in the traditional systems of tenure.

The driving force behind this movement was Sir William Brandford Griffith C. J., whose views held sway over the superior courts of judicature in the Gold Coast at the beginning of the twentieth century. The basic idea underlying his decisions was that the new trends in land use patterns fashioned by the introduction of perennial crops made it inevitable for

the individual to occupy land for long periods of time. For this reason, the landed interest of the person in such permanent occupation ought to be regarded as having evolved into absolute individual ownership of the soil or land to which such interest related. This judicial attitude, regarded by Asante as an exercise in realism in response to the socio-economic changes of the times was exemplified in the much discussed case of Lokko v Koklonfi.[937]

In this case, Koklonfi inherited from his father, a subject of the Berekusu stool, certain cocoa farms and sugar cane plantations. He built a cottage on the farm and continued the farming which his father had started in his life time. He obtained a loan on security of the farms without prior notice to the stool. Upon default the creditors obtained judgement at the courts and sought to attach the land under a writ of fi:fa. A claimant interpleaded on behalf of the stool on the grounds that the land being stool land could not be seized in satisfaction of the private debt of a stool subject interest holder. For this to happen, the consent of the stool should have been sought before pledging the land.

One of the principal issues which the court had to resolve was whether or not the stool subject had acquired such right, title or interest in the stool land as could be attached in execution of the judgement debt. In order to resolve this issue, the Chief Justice, Sir W. Brandford Griffith noted that the interest which a stool subject acquired through land exploitation was an attachable interest. He observed:

> ". . .it is notorious that as long as the stool-subject continues to live on or to work land, so long is he entitled to live on and to work that land. Furthermore, the evidence shows that Koklonfi is entitled to use his village and farms; as long as he likes he can live in his village, cut his sugar canes and pluck his cocoa, and the stool holder cannot disturb him. He has, therefore, even assuming the land to be stool land and not his property, a valuable interest in this land. I see no reason why this interest or property should not be seized and sold in execution".[938]

Certainly, these statements were sufficient to resolve the legal issues involved in the case. The finding of fact that the stool subject had a "valuable interest" in the land capable of being attached was a recognition and restatement of the traditional law which regards wealth created on communal or the public land as the exclusive individual property

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937 (1907) Ren. 450. See Asante, op.cit., pp. 41-42.

938 Ibid., p. pp. 452-453. Emphasis supplied.

of the creator. There is therefore no reason why it should not be attached in satisfaction of a private debt.

However, the Chief Justice did not conclude his judgement with these statements. He proceeded to make certain ex cathedra pronouncements suggesting that such an interest could be transformed into an absolute title independent of the stool. His reasons for the decision were set out in the following statements:

> "In the present case there has been continuous occupation for about 40 years and the occupier has been permitted to build a village on the land and to make permanent farms. The present is like thousands of similar cases. Stool land has been settled by a father, the son has succeded, has built a village and has made a home on the land; there has been no expressed alienation by the stool, but there has been recognition of the exclusive occupation."[939]

The Chief Justice regarded the 40 year period of uninterrupted occupation as the factor which warranted the declaration that the subject's interest had approximated to absolute ownership of the land itself. To buttress his view on the matter, he posed the following questions:

> "Suppose the Berekusu stool fell into debt. I can quite understand that Koklonfi would be expected to share the debt, for he is subject of the stool, but if the stool land were to be seized in execution, can there be a doubt that Koklonfi could successfully interplead?"[940]

The learned Chief Justice answered these questions affirmatively, pointing out that once there was enough evidence to support the fact that Konklonfi and his family had continuous occupation for 40 years or over, and that Koklonfi had permanent cultivation upon the land, the court would decide that he had appropriated that portion of the stool land to himself with the tacit consent of the stool and that it was no longer stool property, but his own property.[941]

It may be observed that the Chief Justice's arguments have run into certain logical problems here. But before dealing with the logical defects in the argument, it may be pointed out, for the moment, that he showed a basic misconception of the nature of stool property. In terms of the administrative controls which the stool land administrators, the management committee, normally exercise over unappropriate land, the Chief Justice may be right in saying that the land in occupation of Koklonfi was no longer stool property. But in terms of the reversionary right

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939 Ibid.

940 Ibid.

941 Ibid., pp. 453-454

which the stool retains as the paramount title holder, the land in occupation of Koklonfi was still stool property, and in this sense the Chief Justice was wrong.

As to the logical defects in the argument, it may be seen that the Chief Justice laid it down that long and uninterrupted occupation of stool land by the subject creates an absolute title adverse to the stool. The question which he posed and answered can be restated that because a subject can successfully interplead in cases where the stool land on which he has established rights is to be seized in execution to satisfy stool debt, it follows that the subject acquires an absolute title over the area to which his interest relates. But this is a non sequitur.

The reason why the subject can successfully interplead against the levying of execution on stool land over which he has established rights is not because he has absolute title to the land, but because he has acquired a valuable interest in the land. An interest which is exclusive individual property over which the stool has no control. Thus to levy execution on the stool land on which such valuable interest or individual wealth has been created would amount to taking what belongs to the individual to pay for the debt of the stool.

It is true, as the Chief Justice rightly observed, that if the stool were to be in debt, Koklonfi would be expected to contribute money in payment of the debt as his civic obligation. But he would not be expected to pay over and above that which other citizens would be expected to pay. Hence any levying of execution on the stool land which will involve the confiscation of the subject's individual property acquired through unaided effort of the stool cannot be permitted under the customary law.

This is what the customary law frowns upon. It is in order to protect individual rights in this respect that the customary law provides that the stool has no right to alienate land in possession of the subject, without his consent. It is indeed for reasons such as those outlined above and the operative effect of the above rule which will make it possible for the subject to successfully interplead when stool land encumbered by him is in danger of being sold in satisfaction of stool debt. It does not necessarily follow that because the subject has this right to interplead his user right has evolved into absolute ownership. Basing his conclusions on these mistaken premises the leanerd Chief Justice continued:

> "Whether the stool has impliedly consented to Koklonfi appropriating the land as his own, or whether the view be taken that the stool is now stopped from putting forward its claim to the land, does not matter, but I am of the opinion that the occupation has been

of such continuance and of such character that the land must now be deemed to be the property of Koklonfi and seizable in execution."[942]

Some of the reasons given by the Chief Justice to reinforce his views were that while Koklonfi gave part of the produce of his subsistence farms to the stool, as was customarily required of a stool subject, he performed no such services in respect of the land under his permanent cultivation. He pointed out that the stool had tacitly acknowledged the validity of the pledge by urging Koklonfi to pay the judgement debt in order to save the land.[943]

With respect, the Chief Justice seems to fall into the common error of assuming that the performance of customary services by a stool subject is an incident of land tenure which, in fact, it is not. It cannot be over emphasised the fact that the right of the subject to beneficially enjoy an interest in land inheres as a result of his membership of the corporate group in which the absolute title is vested. It is a right which is independent of the giving of customary services which may relate to political allegiance and tax obligations and not an incident of tenure under customary schemes of tenure. It would thus be wrong to suggest that because Koklonfi was not performing such services in respect of the land developed by him, he had thereby acquired an absolute title to the land.

It does not also appear to be logically sound to say that because the stool urged Koklonfi to pay the debt in order to save the land, the former necessarily acknowledged the absolute title of the latter. Of course, because the purchaser may be a stranger, the sale of the farms may have the effect of placing the reversionary interest of the stool in danger of being lost. For such reason the stool, could urge the subject to pay the debt without necessarily implying that the subject had acquired a title the sale of which would have the effect of extinguishing altogether the title of the stool.

E. Background to Sir William Brandford Griffith's decision

In Asante's opinion, the Chief Justice reached his conclusions "by an empirical examination of the new economic order."[944] With due deference

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942 Ibid., pp. 453-454.

943 Ibid., p. 453.

944 S. K. B. Asante, op.cit., p. 42

to the learned author, it may be said that anyone acquainted with the C.J.'s views about the traditional schemes of interest in land would view the accuracy of that proposition with scepticism. Sir Brandford Griffith had certain fixed views about the nature of the systems and what they ought to be, even long before any serious empirical investigation of the land tenure systems had ever been conducted. What he appeared to be doing in the Lokko case was an attempt to crystallise these views into legal rules through the adjudicative processes of the courts.

For, his views in the present case reflect certain opinions he had expressed in 1891, sixteen years earlier. It will be recalled that in 1891, the Governor of the Gold Coast, Sir William Brandford Griffith, father of Sir W. Brandford Griffith, (the Chief Justice in the present case) asked the then Chief Justice of the Gold Coast, J. H. Hutchinson to give his opinion on his proposed Crown Lands Ordinance. Sir Joseph Hutchinson, the Chief Justice in response to such a request, gave it as his opinion that according to native law, all lands in the protectorate, whether occupied or unoccupied had an owner. For the crown to vest such lands in itself would therefore amount to confiscation of private property which would be unjust.[945] The Governor did not seem to be convinced. He thus sought a second opinion, that of his son, the young Brandford Griffith who had then been transferred from the Gold Coast to Jamaica.

The latter in response to his father's request then gave an opinion which is reflected in the present judgement. Writing from Jamaica in 1891, in support of the Crown Lands Bill, he advised that the primary objective of the Bill should be the creation and the establishment of freehold titles in the traditional tenure systems. The main reasons for his advice were set out as follows:

> "Take any particular piece of land away from the towns. No doubt this land will belong to some natives, but what individual claims are will be hard to ascertain. Probably numerous persons would each of them possess some indefinite claim to the land. Some of the claims will probably conflict, and if any person desired to purchase this land he would experience great difficulty in getting a secure title owing to this indefinite and conflicting claims. But not withstanding that such a tenure is inconvenient, debars any part owner from making the most of the land, yet the land undoubtedly belongs to the natives and may seem unjust policy for the crown to dispossess them of their rights".[946]

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945 See the Secret Despatch from Griffith to Ripon, 29 August, 1894, CO 879/46.

946 Ibid., p. 20. In enclosure 2, No. 9. Emphasis supplied.

These were the learned judge's view of customary tenure in 1891. He thought rights in land under customary law were indefinite resulting in insecurity of ittle. He thought the system was inconvenient and could prevent any part owner from effective exploitation of the land. This was certainly a serious misconception of the nature of individual rights in land, under the customary law. The observation that individual claims of right in land were indefinite is not justifiable. Everybody in a land-holding community was clear in his mind, even at the time the Chief Justice expressed his views, where his farm was. As the way in which rights were established over land in the past and at present continues to be through land development, it is hard to see how claims to rights in this respect could be said to be indefinite.

The Chief Justice was also under the wrong impression that the "communal ownership of the land" was obstructive to individual effort in the production of wealth. He thus had the mistaken belief that the system was "inconvenient and probably debars any part owner from making the most of the land." There was and still is, under the systems, the problem of insecurity of title. But adequate research reveals that it is not because "numerous persons would each of them possess some indefinite claim to the land." The basic problem is lack of surveys and the difficulty involved in outsiders identifying the accredited persons with legal capacity to deal with land. In the more general level, it is because of non-demarcation of boundaries between the polities comprised in the state of Ghana.

Not having recognised these factors, Sir William Brandford Griffith, as will be recalled, advised his father, the Governor of the Gold Coast to make titles definite so as to enable taxes to be levied on lands. He said:

> "Land in the Gold Coast, as in almost all other places under civilised government must bear its burden of taxation and far better that the present wretched system of land tenure should be got rid of as soon as practicable, and before mixed application of English law and native law gets things into an inextricable tangle". [947]

It would appear that as this proffered solution was not achieved through the abortive land Bills, the Chief Justice having returned to the Bench in the Gold Coast thought the opportunity had come to do away with the "wretched system of land tenure" by creating "freehold" titles

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947 Ibid., see the discussion of his letter from Jamaica to his father at pp. 105-108.

through the adjudicative processes of the courts. It is therefore doubtful if Asante's claim that the Chief Justice's decision in the Koklonfi case was a result of "an impirical examination of the new economic order."

The Chief Justice was certainly aware of the effect of the new economic order which showed that individuals could acquire interest in land of potentially unlimited duration through permanent cultivation - a valuable interest which could be attached in execution of debt. It was capable of being used as a security for loan. These facts were recognised and noted in the Lokko case. The Chief Justice in his experiences at the courts would most probably have been aware of the fact that most of the concession agreements under which mining operations on such a large scale were going on did not involve absolute acquisition of the lands encumbered by the concessions.[948] He was therefore aware that whatever new economic order might have been brought about by these developments were comfortably accommodated by the traditional system of tenure.

Thus when he went out of his way to overturn the land tenure system by making his far-reaching ex cathedra pronouncements to the effect that long and uninterrupted occupation by a stool subject transformed the latter's interest into a title adverse to the stool, he was not necessarily making a decision based on empirical investigation of a new economic order to which he thought the traditional law was obstructive. What he seemed to be doing was an attempt to engraft onto the traditional schema, legal, expedients and devices proved useful in European industrialised systems of law, which he honestly believed were the indices of civilization. The Gold Coast being under a civilised government such as Great Britain ought to evolve a freehold tenure. These were views which the Chief Justice held and expressed sixteen years before the decision in Lokko v Koklonfi and which he sought to legalise here.

It must not be overlooked the fact that the Chief Justice was not alone in this view. He was only echoeing the predominant views of the nascent African middle class and elite, the European firms, merchants and the literate town-dwelling natives. These were the sections of the community in the forefront of the movement towards individualisation of interests. Casely Hayford's views on the creation of a landlord class and the views expressed in the Methodist Times to which we have referred

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948 As we have seen, most of the concessions were leases of terms of 99 years or less. Se pp. 169-189.

lend support to this view. Even today, these members of the Ghanaian society which influence policy formulation on land use, management and administration, like Sir Brandford Griffith, still believe that the evolution of freehold in the traditional schemes of tenure constitutes an ethical justification of property and is a necessary condition for the effective and efficient land use. With its emergence, it will facilitate the acquisition of agricultural credit from financial institutions which could readily accept such a title as a collateral. [949]

Following the doctrines laid down in Lokko v Koklonfi in 1907, certain subsequent cases were decided on its principle. In Sam v Tham [950] for instance, Michelin, J., cited with approval the Lokko doctrine as the authority for the proposition that long and uninterrupted occupation of stool land by the subject matured into freehold title adverse to the stool. Delivering his judgment he said obiter, that:

> "Although this land is stool property, and cannot be said to have been given to the claimants as their family property, yet, in view of the fact that it has been cultivated by them for the past 20 years, they have undoubtedly acquired certain rights over the said property, and by reason of that judgment of the full court in Lokko v Koklonfi, I consider that the claimants are justified in setting up their claim to this land when such land is seized in execution under a writ of fi: fa." [951]

It will be perceived how the learned Judge fell into the same error as did the court in Lokko v Koklonfi by assuming erroneously that the legal basis of the claimant's interpleader in this case was the 20 years undisrupted occupation. But as noted already, the legal basis of their claim here was not the long possession. The legal and ethical justification of their claim was what the Judge found to be acquisition of certain valuable rights through the development of the land for 20 years hence, the individual wealth created on the land by their unaided efforts. The ethical reason is the abhorence by the customary law of unjustifiable confiscation of individual property by the stool and the legal basis for the claim is the rule that the stool has no right to alienate land in possession of the subject without his consent.

On similar wrong assumptions, Dean, C. J., followed the Lokko principle in Kodadja v Tekpo and others. [952] This was a case in which the stool subject interpleaded against attachment of land he claimed to have occupied

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949 See Note 925.

950 (1924) D.C. 1921-1925, 63.

951 Ibid., at p. 66.

952 (1923) S.C. 1929-1931, 45.

for 33 years, alleging that the land was not stool land but private property. Following the doctrine of Lokko v Koklonfi, the learned Chief Justice said:

> "I am of opinion further that even if it was stool land given by his father, his possession continued over a period exceeding 30 years during which he has had the undisturbed and exclusive possession of this land and has made it into a valuable cocoa farm, has now ripened into ownership of the land". [953]

Similar conclusions in which emphasis was placed on the time element in occupation as confering absolute title on the stool subject was reached in the case of Mensa v Ackonu. [954] Needless to say, these conclusions are not only founded on mistaken premises but are contrary to any legal or ethical principles of the indigenous law.

What would appear to have escaped the minds of the courts in the resolution of the issues raised by the cases is that, the traditional law is not basically concerned with long possession. What it emphasises is the creation of wealth.

Thus a man may by the exercise of his inherent right, within a year acquire such valuable interest in land in terms of cost and value that his interest could be regarded as more valuable than those of another who had been on the land for 30 years but whose development on the land might be insignificant in terms of value and cost. Will it not be absurd and a travesty of justice for the courts to decide in a case like this that in the first case, because the acquirer of the interest was in occupation for only one year while in the other it was for 30 years, the latter has acquired an absolute title while the former does not?

Happily, this trend towards individualisation of interest and attempts by the judiciary to change the land tenure system through the judicial process did not escape unnoticed. Even before this movement in the courts began, Governor Sir William Maxwell had warned in a speech to the Liverpool Chamber of Commerce on the Lands Bill in 1895 that "English men who reason about land tenures as if English theories and practice regarding freehold and leasehold, mortgages and conveyances, and disposal of real property by will were common to all the world, do not readily enter into native

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953 Ibid., at 47.

954 (1919) F.C., 31.

ideas about occupancy founded upon tribal rights".[955]

The courts, however, did not appear to have heeded the Governor's warning. No wonder that the West African Lands Committee which, from the papers submitted to it and the evidence before it had a better understanding of the nature of traditional schemes of interest in land severely criticised the principle laid down in Lokko v Koklonfi. The committee rightly criticised the C. J., Sir W. Brandford Griffith as having improperly applied English principles implying the introduction of prescriptive rights in the indigenous law. The effect of the decision, the Committee pointed out, would be to convert all stool lands into private land.[956]

No doubt, such criticism had its desired effect and the Privy Council endorsed Chief Justice Rayner's Report to the West African Land Committee which spelt out the basic principles underlying land tenure in West Africa.

In the notorious case of Amodu Tijani v Secretary of Southern Nigeria, the Privy Council per Lord Haldane stressed:

> "The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual."[957]

Although many Ghanaian jurists have criticised this statement as being of no universal validity in respect of land tenure in West Africa,[958] it would appear that those principles guided the courts in some subsequent decisions. In Owusu v Manche of Labadi[959] for example, where certain lands were compulsorily acquired in Labadi under the Public Lands Ordinance,[960] the Labadi stool claimed compensation in respect of the lands on the grounds that the lands so acquired were stool property. Certain subjects of one division of the stool made a counter claim challenging the right of the stool to receive such compensaiton on the grounds that the lands in question had become their private property as a result of their undisturbed and uninterrupted occupation for four generations, thus echoeing the Lokko doctrine.

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955 In enclosure No. 116, 4 July, 1896, CO 879/46, Africa West, No. 531, 137.

956 See C. K. Meek, Land Law and Custom in the Colonies, London, 1946. 182.

957 /1921/ 2 A.C. 399 at 404

958 See Bentsi-Enchill, op.cit., pp. 80-82, Asante, op.cit., pp. 45-46, and Ollenu, op.cit., p. 5. But see Kludze Ewe Law of Property, p. 114 and pp. 125-126.

959 (1933) 1 W.A.C.A. 278.

960 Cap. 139 (1951) Rev.

It was rightly argued on behalf of the stool that such long possession and use per se did not under customary law, crystallise into a title adverse to the stool. The court upheld this contention on behalf of the stool and re-affirmed the customary law. The rational for the court's decision was that compulsory acquisition under the Public Lands Ordinance has the effect of vesting title to the land in the Governor General and operates to bar and destroy all other "estates, rights, titles, remainders, reversions, limitations, trusts and interests whatsoever of and in the land", [961] and as the aboslute title was vested in the stool and not in the subject, compensation for the acquisition which had the effect of extinguishing such absolute title ought to be received by the stool.

This does not, however, deny the subject the right to claim compensation for disturbance of possession or for any wealth which the subject might have by his effort created on the lands affected by the acquisition. The development on the land being the exclusive property of the subject to which the stool has no claim, the proportion of the compensation amounting to the cost replacement value of the subject's property on the land ought to be received by him. [962]

Asante is however of the opinion that this case lacks some of the elements in the Lokko case which led Sir Brandford Griffith, C. J., and his followers to "propound a robust theory of private ownership". For, as he argues, the subjects in the present case had not established any form of a permanent cultivation on the lands in question as had the occupants in the previous cases. They had farmed intermittently by shifting cultivation in circumstances which left the basis of their claim to possession in some doubt. [963] For this reason, he is of the view that the West African Court of Appeal decision in Owusu v Manche of Labadi may be regarded by the "realists" as regressive in as much as it relegated the subject's landed interest to the status of mere rights of beneficial user.

But it is difficult to see how this decision can be said to amount to relegation of the subject's interest. Under the traditional law, the subject's right was and continues to be that of benefit. The right is to benefit from the community resource, the land. Such benefit depends on user entailing individual effort in the exploitation of landed resources.

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961 See sections 3 and 11 of the Act.

962 See the explanation of the case by Ollenu in Wutoh v Gyebi decided by the High Court (Land Division) at Accra on 9 March, 1959, reported in Ollenu, op.cit., p. 193.

963 Asante, op.cit., p. 44.

It is submitted that this decision does not derogate from the basic principle on which these rights are founded and one can hardly see how this decision adversely affects the subject's rights and interests.

With due deference to the author, his criticism of the present case and the principles of native tenure set out in the Tijani case as a set-back to the "realist" movement in the courts is unjustifiable. The grounds on which he criticises the latter case are not dissimilar to those on which it was castigated by both Ollenu and Bentsi-Enchill, [964] The concept of the stool's dominium, he argues, does not foreclose exclusive possession of an individual, and the Anglo-American idea of unity of possession is only appllicable to waste lands to which the community resorts for fodder and other domestic items. [965]

Here Asante falls into the same error into which the previous critics of Rayner had fallen by regarding the subjects' community-based prescribed user right as a species of ownership within the Hohfeldian legal conceptions which defines ownership in terms of relations between persons and things, in terms which we have argued, is inappropriate for application to the customary law interest, since it is likely to create wrong impressions about its real nature.

Too, the author points out that Rayner's Report was prepared in 1898 when individual economic resources were not substantial to sustain the type of private enterprise conducive to the creation of "a regime of individual ownership or individual usufruct". Furthermore Rayner, he argues, did not recognise the emergence of individual ownership even in his own time, and he oversimplified the factors contributing to this phenomenon by attributing it entirely to the reception of English ideas. The idea which appears to have escaped so many of Rayner's successors, he thinks, is the idea that customary law is capable of changing in response to new conditions. [966]

The underlying assumption of this argument seems to be that the traditional schemas of interest in land, falling as it does short of absolute individual titles, was incapable of supporting or accommodating the kind of economic development which was taking place in the country at the beginning of the twentieth century when the decisions based on the basis

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964 See note 958 at p. 455.

965 Loc cit., p. 46

966 Ibid.

of the principles set out in Rayner's Report were being made. With respect, this would be a travesty of the true position. The success of the cocoa industry based on the abunu and the abusa system under the traditional law, which does not involve absolute ownership of land; the cultivation of the crop on a large scale by the stool subject on the basis of his user and beneficial rights, as we have seen in the Lokko case, which the court recognised was a similar case of many thousands; the success of the mining industry in which none of the concessions upon which it was founded involved absolute ownership of the land, provide an antithesis to the underlying assumptions of the learned Asante's arguments.

Although Asante accuses Rayner of over-simplification of the factors affecting the growth of indiviual ownership by attributing the trend to the intrusion of English ideas, it would appear that his own stand and views on the issue ~~is~~ are considerably influenced, if not controlled, by Anglo-American juristic ideas of tenure which he has imbibed through his education and in his profession as a lawyer. His views indicate that tendency which Lord Haldane, like Governor Maxwell, deplored in the Tijani case as "operating at times unconsciously to render title conceptually in terms appropriate only to systems which have grown up under English law". It was to prevent this tendency of confusing English titles with the traditional customary law interest that their Lordships re-emphasised the point that the customary interest is "qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the introduction of analogy of English jurisprudence."[967]

Although this will appear to be a fair overview of the title situation in the country, Asante's quarrel with the attitude of the courts of the post Brandford era is that they invoked Rayner's formulation as an immutable postulate and applied it without reference to contemporary social reality. It became fashionable, he laments, in the upper levels of the judicial hierachy in West Africa as well as the Privy Council, to promulgate "abstract principles fashioned a priori".

This criticism would seem to suggest that the laws being applied to issues relating to land tenure were no longer real customary law, as practice was at variance with the applicable law. For contemporary socio-economic

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967 /1921/ 2 A.C. 399 at 403.

circumstances had so undergone metamorphosis that the applicable law was no longer reflective of customary practices. Yet in none of the cases discussed by the learned author was evidence produced to show that the practice in land tenure or land use patterns had changed in a manner inconsistent with the applicable law. Nor has any evidence been produced to demonstrate that the non-recognition of absolute individual titles based on permanent cultivation or long uninterrupted occupation in the traditional systems was proving obstructive to land exploitation under customary schemes of tenure.

It is submitted that in so far as the traditional system is capable of accommodating contemporary exploitative norms based on modern techniques of production, any drastic transformation or radical change in the land tenure system based on the traditional ideals of the conception of land as a community asset and resource must be supported by cogent reasons and empirical evidence to show that the new change sought would prove to be a better alternative. Unless such evidence is weighed against the social, economic and political consequences for the society, the change might produce disastrous results in the future.

F. The Role of Conveyancing in the individualisation process

Before the advent of writing in Ghanaian communities, all forms of transactions were conducted by oral agreements. For record purposes, ceremonies of various kinds were devised within each community to make the compact memorable. Although these compact concluding ceremonies varied from one community to another, certain features of them were common. For instance the transaction had to be made binding or sealed by a ceremony accompanied by publicity in which some valuable objects such as drinks or a sheep is presented to the vendor by the vendee.

Allott's picturesque account of the ceremony associated with land sales under Akan customary law vividly illustrates the "stamping" or the sealing of the transaction. He writes:

> "Some of the Akan customary laws provide for the sale of land as cutting guaha. After agreement to purchase has been reached, the land has been inspected, the price fixed, the boundaries cut and marked with special trees (themselves as evidence of the extent of land conveyed), the parties return from the forest within doors. The guaha ceremony then takes place before many witnesses for both sides. Vendor and purchaser each provides a representative usually a young boy to cut guaha. The vendor provides a piece of fibre on which are threaded six cowrie shells. The two persons cutting guaha then squat down; each passes his left hand under his right leg and grasps one end of the string of cowries, holding the three cowries nearest to him. The respective parties keep the cowries

> used in the ceremony for ever, in order that in case of dispute between them or others over the sale, the cowries may be produced as evidence. In fact the production of the cowries is an essential piece of evidence as to the sale. After the ceremony the purchaser offers drink and a sheep to the vendor (the stamping or Aseda)".[968]

As the learned author rightly points out, the effect of this ceremony is to make the transaction complete and irrevocable. It also provides tangible evidence of the witnesses present at the ceremony. In order to prove the sale therefore, evidence as may be taken from the ceremony can be made available. Allott identifies several of them:[969]

i. the oral evidence of the witnesses;

ii. the boundaries cut on the land and the boundary trees planted on the corners;

iii. the cowries used in the Guaha ceremony;

iv. the hairs of the sheep in possession of the witnesses;

v. the bones of the sheep and the bottles from which drink was poured and burried on the land.

Yet the defects in the compact concluding function of the guaha cutting ceremony and the evidentiary value of the preservation of physical objects used or presented are obvious. Take the case of the witnesses as an example. Allott identifies two types of them, partial and impartial.[970] The latter merely testifies to the fact that the transaction actually took place. The former are themselves interested parties in the subject matter of the transaction. Their interest is bound by their presence and acceptance of the aseda which signifies their consent to the transaction when this is required.[971] This may be likened to their signature.

But the acceptance of the drink and objects has not that kind of permanent proof like the signature and a seal on a written document. The partial witnesses could destroy the objects in their possession if they were minded to do so. They can alter boundary marks, uproot bottles burried on the grounds and may tell deliberate lies to disprove their

968 See, Readings in African Law, Vol. 1, p. 85, ed. E. Cotran and N. N. Ruben. See also A. N. Allott, Essays in African Law, London, 1960, p. 243.

969 Ibid., p. 243. See also J. B. Danquah, Cases in Akan Law, London, 1928, p. XXXII

970 Readings in African Law, Vol. 1, p. 85.

971 A. N. Allott, Essays in African Law, London, 1960, p. 244.

consent. Impartial and partial witnesses may die and their oral evidence obliterated for ever. They may tell deliberate lies to falsify the evidence. Human memory grows dim and may not always be reliable. Some may lose the physical objects by mistake or they may be destroyed by fire or through some other means.

With these defects in the traditional method of land transactions, the Ghanaian business community quickly recognised the advantages of the written document when it arrived and welcomed it whole-heartedly. Its permanent nature and its peculiar characteristic of assembling all the relevant facts in a conveniently portable piece of document proved attractive to acquirers of interest in land. The modern tendency is thus for every prospective acquirer of interest in land to want to secure some record of the transaction in a written form. However, associated with the increasing use of documents as a means of transferring interests in land in a predominantly illiterate society; and the effect which the use of conveyancing forms employed by lawyers to transfer customary law interests through the use of language fitted into the straight jackets of Anglo-American tenurial terminology are certain formidable jurisprudential, social and practical problems.

What may be observed about the customary law transaction is that, the parties are normally directly and deeply involved in the transaction. During the course of the negotiations leading to the compact concluding ceremony, the parties are clear in their own minds as to what they are doing.

The parties use the vernacular which the interested parties and the witnesses alike understand. They have no doubt in their minds as to the nature of the transaction, the nature of the interest being transferred and each party's obligations under the contract.

The normal practice in contemporary transactions relating to the transfer of an interest in land is that, although the parties may no longer go through the traditional ceremonies associated with land sales, they normally agree on the terms before approaching a solicitor with the sole purposes of reducing their agreement into writing - a legal document, on their behalf. [972] The pertinent questions raised by this

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[972] From a survey conducted on solicitors dealing primarily with land questions in Kumasi under the auspices of the Land Administration Research Centre of the University of Science and Technology, Kumasi, between 1976 and 1977, almost all the questionnaire returned showed that the parties to land transactions reach agreement prior to consulting a solicitor.

recourse to documents are:

i. does the ensuing document serve only as a memorandum of what has been agreed upon by the parties?

ii. do the parties who may be illiterates themselves on whose behalf the memorandum is prepared understand the content, nature and quality of the document?

iii. does the use of English tenurial terminology to describe the interest which the document purports to convey, actually convey such interest although the interest held by the transferor falls short of that which the document describes?

The principal difficulty about providing a reasonable answer for these questions is that it is not always easy to determine whether or not when the parties request that the agreement be reduced into writing, they intend that the ensuing document should be a memorandum whose purpose it is to record in permanent and easily visible form, matters which might otherwise be in dispute.

Matters such as the description of the land conveyed, the nature of the transaction, whether it be an outright sale, a pledge, a mortgage, a lease, a tenancy agreement, etc. may be disputed.

If the objective of the writing is that the document should be a memorandum, then it cannot override the oral agreement reached between the parties subsequent to its preparation. On the other hand, if the document is to be regarded as an instrument, an operative part of the agreement between the parties, then if in conflict with the prior oral agreement it may prevail.

The difficulty is where to draw the line between the two. In order to determine whether the document has the latter or the former effect, it is important to bear in mind, as Allott has pointed out, that although on the face of it a document made by an African may appear to be an instrument, it may be nothing more than a memorandum; and there is the danger that a memorandum may be held to operate as an instrument.[793] A native court decision of New Juaben in 1950 to which the learned author made reference,[794] in which the court refused to go behind the terms of a receipt given in respect of a pledge and the case of Hamilton v

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973 Ibid., p. 245

974 Ibid.

Mensah [975] where the court held that a receipt recording a pledge was a sale and not a pledge illustrate the problem.

In Total Oil Products Ltd v Oben and Manu,[976] one of the issues to be resolved was the interpretation to be placed on the isntrument which purported to convey a "fee simple". Counsel for the plaintiff submitted that by customary law, a stranger forfeits his "usufructuary title" to land where he denies the title of the grantor. He contended that the recital in the deed of conveyance from the second defendant to the first defendant, "And whereas the vendor is seized in fee simple free from encumbrances" and also the habendum, "to Have and to Hold . . . unto and to the use of the said purchaser his heirs, executors and assigns in fee simple" showed that the second defendant claimed to be owner of the fee simple and also purported to convey the fee simple in the land which the subject of a stool did not have but solely vested in the stool. Council submitted that this amounted to the denial of the stool's entitlement and therefore the second defendant had forfeited his right in accordance with the customary law. [977]

These submissions of Counsel raised several issues of law and of fact which the court had to resolve.

i. Does the fee simple eixst in Ghana?

ii. When the parties entered into the agreement did the transferor actually intend to pass an interest greater than he actually had?

iii. Was there a valid contract for the transfer of an interest in land at all; and if so, did the use of English conveyancing forms and terminology change the quality or character of the interest into an English type title?

These were some of the pertinent questions raised by Counsel's submission. It would appear however that the court did not address itself to all of these questions. In answer to the question as to whether the fee

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975 (1937) 3 W.A.C.A. 224. In the survey on lawyers to which reference has been made above, all the lawyers were unanimous in stating that in the majority of cases, the parties to land transactions had agreed on the terms and the only thing required of them was the reduction of the agreement into a legal document. They agree that when their clients append their signatures to the document or make their marks, where they are illiterates, they do not necessarily understand the words used but trust that their lawyer has accurately recorded what they have agreed upon. The difficulty here is that by using English conveyancing forms and terminology, the lawyer may end up by drawing agreements which may have an effect unintended by the parties.

976 /1962/ 1 G.L.R. 228

977 Ibid., p. 232.

simple exists under customary law, the court, per Ollenu J., said:

> "The submission that a fee simple title in land is vested in the stool, and that the use of the word fee simple is essential in a conveyance of land by the holder of the usufructuary title is misconceived. There is no fee simple in customary land tenure." [978]

That there is no fee simple under the indigenous law is unquestionable. What is doubtful is the effect which the learned Judge said a purported transfer of the fee simple in land would have in Ghana. The learned Judge said:

> " . . . all the effect that a conveyance which purports to convey the fee simple in land in Ghana has is to pass the highest estate or interest vested in the transferor; and since the highest title which a subject of a stool can own in the stool land is the usufructuary or determinable title, the only title which passed under the said exhibit C and exhibit E is the usufructuary title which was vested in the second defendant." [979]

One would have thought that a preliminary enquiry as to whether or not the document as such represented a valid contract between the parties should have been made before the consideration of any effect which it may have on the passage of interest in the subject matter of the transaction. For if as said the Court, there was no fee simple in customary land tenure, then upon the basis of the document before it, it is arguable that the parties were contracting on a subject matter which they thought was existing at the time of negotiation leading to the agreement while in fact it was non-existent. Hence, the purchaser may be said to have bought a chance, res spes. [980]

Another side of the argument may be that if the transferee thought he was acquiring an interest approximating to the fee simple while the grantor intended to pass his beneficial interest in the land, then the parties were not ad idem as to the identity of the subject matter of the transaction. This may be enough, under certain circumstances to declare that there was no contract at all. These conclusions may be reached if the document is regarded as a memorandum merely setting out the prior agreement orally concluded between the parties so that one can go behind the document and accept oral evidence to clarify issues

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978 Ibid.

979 Ibid.

980 See Couturie v Hastie. (1865) 10 E.R. 1065. "The Contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased. No such thing existing, I think the Court of Exchequer chamber has come to the only reasonable conclusion upon it . . ." Per Lord Cranworth, at p. 1069.

which may be in doubt.

But as in this case, where the language used, was to place the customary law interest into the straight jackets of Anglo-American terminology, the parties may be said to have intended what appears on the face of the document to be their own act. In this view, the document may be regarded not merely as a memorandum but an instrument the contents of which may not be superseded by oral evidence and the meaning to be atrributed to the instrument will have to be limited to the "four corners of the document".

For it must be remembered that the transfer of an interest in land involves a contractual transaction in which the outward manifestation of the parties' intent and not their intent itself which determines the existence of a contract. Hence, unless the parties in this case could allege mistake, illegality, deceit, fraudulent or innocent misrepresentation or some other vitiating factor the document as it stood was what it ought to be and not otherwise.

Upon this reasoning it is logically sound to say that upon the basis of the deed of conveyance before the court, the parties agreed to convey a fee simple. The court found that such title did not exist under customary law. A fortiori, no title or interest could pass under a contract, the subject matter of which did not exist at the time of its conclusion. Ex hopothesi, it is impossible for such a transaction to have any effect on some other interest or interests which were not affected by the transaction.

It is submitted that this is the right conclusion which the court should have reached. This conclusion, it is suggested, would have the advantage that lawyers and solicitors in Ghana who are in the habit of using Anglo-American nomenclature to describe customary law interest while preparing documents for the transfer of such interests without caring whether or not it clearly represents what their clients actually intended would henceforth act with greater caution. The effect of a decision on the lines being suggested could draw attention to the pith and marrow of the problems associated with the transfer of interests in land by means of documents.

More often than not, as in this case, lawyers draw agreements for parties the nature and effect of which they either misunderstand or do not intend. Our survey of solicitors in Kumasi to which reference has already been made reveal that one of the frequent sources of litigation is a result of the interpretation which is placed on documents that the parties dispute as being not that which one or either of them originally intended.

It must be noted that the principle of nemo dat quod non habet is also a recognised doctrine under the customary law. The interest holder under the customary law can only transfer that which he actually has. It is therefore legally wrong for the court to rule that a document which purported to pass an interest which the transferor, at the time the document was prepared, did not have, had the effect of passing the interest which he actually had but had not contracted to transfer under the existing contract.

In the case of Addai v Bonsu II [981] where the issues were similar to those in the Total Oil Products case, the court adopted a similar approach in the solution of the problem. The court dealing with the appeal on the question of the effect of a document purporting to convey the fee simple title said:

> "We think that the learned judge of the land court mislead himself by placing undue reliance on the deed of conveyance, exhibit B, because the main issues which the trial court determined was that Hamidu Yadiga, the plaintiff's vendor had a usufructuary right which he inherited from his late brother Salifu Moshie and that it was competent for him to sell that interest. All that was left for the learned judge to do was to have defined the real interest which the plaintiff had in the disputed cocoa farm and to declare that as long as allodial rights of the real owner of the land, that is the defendant stool as caretaker for the Hiawu stool were recognised, the plaintiff is entitled to remain in possession of the disputed farm and has the same protection as if he were in fact the owner so long as he pays the yearly tribute." [982]

What the court appears to be saying in effect is that the deed of conveyance did not contain the agreement of the parties.

There was no evidence that the court made reference to any prior existing oral agreement between the parties and which it preferred to the deed of conveyance as expressing the real intention of the parties. The whole basis of the decision was the interpretation to be placed on this document.

But what the court did was in effect to throw the document overboard and to make its own agreement for the parties. With respect, this is a dangerous approach to the solution of a serious problem. The effect of the court's attitude is to regard all such documents as memoranda and therefore prepared to go behind such document so as to ascertain

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981 /1961/ G.L.R. 273

982 Ibid., at p. 277.

the real intention of the parties. It would have been a different case if the document were some receipt or some record prepared by an office clerk or a professional letter writer. In such a case, it may be said that genuine errors arising from lack of skill and technique are likely to occur. But even here, the document cannot be set aside entirely. It will form part of the evidence.

But here, where the document was deliberately prepared by a lawyer who is supposed to know what he was doing and the parties have appended their signature and put their seals on the document, it will not be for the courts to say that the parties intended one thing while the deed of conveyance expressed another. The danger in such an approach is that there may be occasions where the parties might actually intend a certain result but which they may later deny. This can prove damaging to the doctrine of pacta sunt servanda, a doctrine which is cardinal to the health and confidence of the business ocmmunity. For when the courts begin to go into the minds of parties to a contract although the devil itself knowest not what is in a man's mind,[983] confidence in the sanctity of contract as a basis of business transactions could be undermined.

It is submitted that what the court ought to have done was to declare such documents as having no effect at all. Having found that the subject matter of the contract did not exist, it would be absurd to say that it had the effect of passing title in some other property which was not a subject matter of the transaction at all. A person can only transfer what he has to another under a contract of sale because of the operative effect of the principle of nemo dat quod no habet.

It would appear that it is for reasons such as these that Allott, in his Essays in African Law, made the point that the adoption of English forms of transfer of interest in land such as the deed or instrument does not necessarily mean that such documents can transfer interests which are much more extensive than the transferor actually has. In his learned contribution to the question relating to testamentary disposition, he argues that the assumption that testamentary disposition in English form can effectuate a greater interest than the testator actually has

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983 Brian C. J., said: "It is common knowledge that the thought of man shall not be tried, for the devil himself knoweth not the thought of man". See Year Book Pasch 17 Edwd. 4, Fol. 2, pl. 2. See also Bowen L. J. in Edingington v Fritzmaurice (1885) 29 Ch.D. 483

"reflects a confusion between determination of capacity to make a will, which is contestible, and the complete liberty of disposition through use of a written will, which is open to challenge".[984]

Asante diagrees. According to the latter, Allott's thesis presupposes a rigid wall between imported forms and the substantive doctrine identified with such forms, which may be logically feasible. This he submits, "is hopelessly unrealistic". "It cannot be seriously maintained", he argues "that the introduction of such common law forms like conveyance and mortgage by deed has merely provided Ghanaians with colourless, if more efficient, devices for transferring interests subject to customary law, without any impact on the substantive body of customary law."[985]

To buttress his argument, he points out that the stool's dominium has been denuded of its substance "by the practice - plainly recognised by the courts of subjects alienating an estate in fee simple out of their usufruct." Waving the Union Jack, he says, may not be the most sophisticated form of advocacy, but it graphically demonstrates palpable reality, namely, the fact of British rule and the profound influence which the British connection had on customary jurisprudence. It is too late, he concludes, to deplore the contamination of customary law with English juristic ideas, for Ghanaians who resort to the Common Law will do so fully conscious of the doctrinal implications of this form.[986]

With due deference to the learned author, he appears to confuse two things. The impact of the reception of the Common Law forms of conveyancing by deed on the evolution of traditional schemes of interest in land and the mental attitude of those imbibing such ideas on the one hand, and the effect which recourse to the use of such forms to transfer interests in land can have on transactions on the other. There is a world of difference between the two.

On the one hand, while the impact may be to make people desire consciously or unconsciously to acquire interests approximating to English type titles, on the other hand, mere recourse to the use of the Common

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984 A. N. Allott, op.cit., p. 263.

985 S. K. B. Asante, op.cit., p. 59.

986 Ibid., p. 59. His reference to the Union Jack here is in criticism of Lingley J., in Andoh v Franklin (1952) D.C. (Land) "52 - "55, 24 where the learned Judge had remarked that Counsel could not provide any authority to support his case other than waving the Union Jack.

Law forms and terminology in the transfer of an interest in land does not, and cannot, by itself have the effect of transforming the interest conveyed by this means into an English type title if the transferor does not actually have that type of interest. This is an important dichotomy which the learned author appears to have overlooked. For, nemo dat quod non habet.

As we understand it, this seems to be the gravamen of Allott's complaint about the underlying assumptions of recourse to instruments as a means of transferring title or making testamentary dispositions by will which, not infrequently, involves the transfer of an interest in land. Furthermore, it is not too clear what the learned author means by the stool's dominium having been denuded of its substance by the "practice - plainly recognised by the courts of subjects alienating an estate in fee simple out of their usufruct".

Does this proposition entail, as the court assumed in Lokko v Koklonfi, that the denudation of the stool's dominium has transformed the individual community based prescribed user right into individual titles approximating to the fee simple? If this is the import of the learned author's thesis, then with respect, the cases do not support such a conclusion. Undoubtedly, the courts have been consistent, as we have seen from cases we have discussed, in their decisions in pointing out that there is no such thing as a fee simple under the customary systems of tenure. They have persistently refused to recognise the fee simple.

It may well be that Ghanaians who resort to the Common Law will do so fully aware of the doctrinal implications of the form. Yet, awareness of the implications and the influence of the British connection including the waving of the Union Jack have nothing to do with the quality of property or an interest which a person may have capacity to dispose of by will. If the property is family or stool property, for example, neither the British connection, the hoisting of the Union Jack nor the use of English nomenclature in a deed of conveyance will invest a family member or a stool subject with the legal capacity to dispose of the property by will. This is where the right to make a will in an English form and the capacity to exercise that right differ substantially; and this is the point which it seems Allott was making and in which we respectfully concur.

The learned author's attitude concerning the effect of documents on transfers of interests in land under the traditional law, seems to confirm Rayner's observation regarding the influence of foreign ideas

on individual ownership which Asante argues, the former over simplifies.

The excessive individualisation of interest implied in the learned author's thesis including the views of many other Ghanaian jurists who think like him ought to be seriously considered in the light of its social and economic effect on the Ghanaian society. The real value of the Ghanaian traditional systems of tenure is the emphasis placed on the communal holding and control of resources. The conception of the land as a community asset and resource has the effect of placing everyone within the community on the same footing in so far as the distribution of resources is concerned.

No one can be handicapped by the preliminary problems of finding money to acquire an interest in land. In the same way it gives no one an unfair advantage of having to contribute nothing to the production of wealth and yet enjoy wealth by appropriating rent from land which he has not brought about by his own effort. What may separate the individuals then is the individual effort, initiative and drive including talent which always vary. This could create a healthy atmosphere for healthy competition while maintaining the communal spirit and the cooperative effort in the development of the land and its resources within the traditional system.

It is submitted that, for this system to be substituted for another through engrafting on to the traditional system legal expedients found useful in highly industrialised legal and economic systems of western Europe, there must be a concrete and empirical evidence that the latter system will be better able to promote our social, economic and political objectives.

G. The Legal Definition of the Akan Family

i. Introductory

The family is not only recognised in the traditional property systems as a legal entity but it is one might argue, the most important social institution in Ghana. It constitutes the pivot around which the political and socio-economic organisation of society revolves. Membership of a family is thus of paramount important to the individual. It determines his beneficial enjoyment of rights in land and may generally affect his rights of succession to ~~heritory~~ hereditary offices in the hierarchy of political organisation within the traditional system. Morover, the family institution provides its own form of social security for its members.

Accordingly, the courts in Ghana are often called upon to define the legal composition of the family and to determine membership of it in order to confirm or confer rights on individuals on the basis of family membership. It is a matter of regret that in their attempts to delimit the ambit of the term "family" for these purposes, neither the courts nor the text-writers are agreed on the composition of the family as a legal entity. Some of the judges and text-writers, in their desire to promote and encourage individualisation of interests in land, often adopt a narrow view of the legal composition of the matrilineal Akan-family.

In their attempts to define the composition of the Akan-family for legal purposes, some of the judges and text-writers often fall into the serious error of equating branches of lineages or sub-lineages with a maximal lineage of which the former are mere segments. By doing so, they attempt to accord legal personality to the so-called immediate family. This implies that in those cases where a sub-lineage of a maximal lineage is entitled to the imemdiate beneficial enjoyment of property succeeded to or belonging to the whole lineage, the former also has the legal capacity to alienate such property absolutely without reference to the maximal lineage or the "wider family".

The complexities of the problems created by the court decisions establishing this immediate family view of the matrilineal Akan family are compounded by the fact that the proponents of this view often tend to label all kinds of descent and kinship groups together as the family without any distinction, although in many areas of Ghana, lineages are organised agnatically or patrilineally while in other areas they are organised matrilineally. As Allott points out, the dichotomy between patrilineal and matrilineal descent is more than a mere choice of line of descent. In the matrilineal case there is the contrapuntal connection between father and child cutting across the matrilineal one. This tension he points out, is largely absent from the patrilineal socieities; thus a matrilineal grouping is a priori likely to function differently in the legal sense from a patrilineal one.[987]

As will be seen from the discussion below, the school of thought which supports this immediate family view of the Akan familly are not only influenced by their desire to promote individualisation of interests

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987 A. N. Allott, "Family Property in West Africa: its Juristic Basis Control and Enjoyment", in Family Law in Asia and Africa, London, 1968, p. 125, ed. J. N. D. Anderson.

but they also confuse two important issues:

a. the rights of control with the rights of benefit and

b. the right of the maximal lineage to succeed to the instestate property of a deceased member with the right of the smallest sub-lineage members to benefit from the property thus succeeded to by the whole lineage.

The exponents of this limited view of the Akan family also fail to recognise the fact that the right to succeed to or benefit from an instetate property cannot be the only factor to be taken into account in the attribution of legal personality to the unit legally conceived of as a family under Akan law. The social and economic implications of individualisation of interests which the immediate family view exemplifies have not been seriously considered.

ii. Problems of Definition

If the "family" is now a term of art with a recognised legal meaning in the customary schemes of tenure, then it is imperative that the term must be precise enought for intelligible manipulation for legal purposes. What do we comprehend when we use the term "family" under Akan law? To attempt a precise definition of the term "family" will not be very helpful.

The definition of a thing is not itself the most useful way of identifying the thing sought to be defined. To define a thing is to describe it in such terms as would isolate and identify the essential elements and qualities that make the thing what it is, that is to say, to identify the elments which distinguish it from all other things. However, it is not easy to accomplish this task, since describing the thing involves the use of terms which may themselves require to be defined in a similar manner as the thing sought to be defined originally.

Similarly, definitions suffer from the defect that words do not have an a priori meaning but only that which usage, practice and experience give them. Accordingly, changing circumstances can alter the meaning of terms from time to time. It is submitted that in traditional property relations the emphasis should be on the administrative controls which can be exercised or are exercisable by the representative of the group as a corporate juristic entity over property held by it for the benefit of its

members. [988]

iii. The Matrilineal Family

It was Sarbah who first attempted the legal definition of the matrilineal family nearly a century ago. His proffered definition is, however, attended with some difficulties. He writes:

> "A Fanti family consists of all the persons lineally descended through females from a common ancestress, provided that neither they nor those through whom they claim to be the descendants of the common ancestress has severed their connection with that root . . ." [989]

While this definition does not indicate how far back one should trace descent to that original ancestress in order to determine the unit which in the contemplation of the customary law constitutes the family, our task is made even more difficult by what he later wrote:

> "there is no limit to the number of persons of whom a family may consist, or to the remoteness of their descent from their common stock, and consequently, to the distances of their relationship from each other." [990]

Now, if indeed, there is no limit to the number of persons of whom a family may consist, then the concept of the family is too nebulous

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988 P. C. Lloyd discusses the problems involved in the definition of the term "family" in Yoruba law and warns against the risk of anthropologist using the commonly-used Yoruba term "ebi" and giving it a precise definition. The term ebi is used by many literate Yoruba today with as little precision as it is used in English. He says that the "family" may connote any group of the smallest nuclear family consisting of a man, his wife and child, to several thousand persons tracing their descent from a common ancestor through many generations. The Yoruba term "family"; which the word ebi translates is even less precise. See his Yoruba Land Law, London, 1962; pp. 31-32; see also A. P. K. Kludze, Ewe Law of Property, London, 1973, pp. 32-33, where the learned author discusses the imprecision of the English translation of the family as fome in the Ewe language. Like Lloyd, Kludze points out the inadequacy of such loose terms for legal purposes. He writes: "Among the Northern Ewe-speaking people of Ghana, fome properly only means 'relations'. It comprehends an indeterminate circle of persons related by consanguinity on both the maternal and paternal sides and extends to relations of any remove". He lays emphasis on the point that the term "family" when used to denote fome is used only in a loose non-technical sense. The English term family which the Akan word Absua translates, has similar wide connotations when commonly used in everyday parlance.

989 Sar. F.C.L., p.33

990 Ibid., p. 36.

for intelligible manipulation as a juristic entity in the determination of rights founded on its membership.

Sarbah appears to recognise this imprecision in his definition. He tried to distinguish between a family as a sociological term, denoted by common descent, and the family as a corporate juristic entity, denoted by legal capacity to control and deal with property. "When we speak of a joint family as constituing a coparcenary", he writes, "we refer, not to the entire number of persons who can trace descent from a common female person, and among whom no cutting of the ekar has ever taken place; we include only those who, by virtue of relationships, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, and to burden it with their debts." [991]

This classification correctly attempts to narrow down the delimitation of the ambit of the term "family" as a legal concept to the category of persons who by virtue of such membership are entitled in law, to enjoy certain rights in property with certain legal capacities and powers concerning it. The introduction of the elements of control and enjoyment of rights strips the concept of its anthropological trappings and limits it to legal realities.

Yet even this classification still falls short of the kind of precision which is required for the identification of the salient featues which can enable one to shift from the large number of persons who can trace descent from a common ancestress, a readily identifiable body of persons constituting the "coparcenary", properly so called.

In his effort to overcome this difficulty, Sarbah identifies several incidents of the family which include:

i. a common clan;
ii. a common penin (an elder or head of the family);
iii. common liability to pay debt;
iv. common funeral rights; and
v. a common burial place. [992]

Once it is realised that one or more of these incidents of the family is or are equally attachable to other persons outside the "coparcenary", persons indicated by Sarbah himself to possess inferior rights, but who may under certain circumstances enter the coparcenary, then the inherent

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991 Ibid.

992 Ibid, p. 36.

problems of the definition can patently be seen to persist.

Both the courts and some lawyers frequently refer to Sarbah in their search for the group which constitutes the family in the customary law. Faced with the difficulty of deducing from Sarbah's proffered definition the class of persons falling within the group legally recognised as the family with the legal capacity to control, manage and administer property, recourse is had to what Sarbah says about the right of succession within the family as providing a clue to the identification of the unit. However, in doing so they usually not only fail to draw a distinction between the matrilineal and patrilineal family, but draw erroneous conclusions from Sarbah's work.

According to Sarbah, the real successor of a person is his mother. The proper successors are the uterine brothers and sisters and the issue of such sisters; but never can the pedigree be traced out of the female line.[993]

It is clear law that in Akan customary laws if a person dies intestate, his self-acquired property devolves on his family. Relying on this legal proposition, the school of thought which takes a limited view of the legal concept of the family erroneously assumes that what Sarbah calls real and proper successors is that which in the contemplation of the customary law, constitutes the legal composition of the family.[994]

It is submitted with respect, as will become clear from the exegesis that presently follows, that not only is the conclusion drawn from Sarbah's work founded on mistaken premises, but it is a myopic view to adopt concerning the legal constitution of the Akan matrilineal family, a view which if stretched to its logical conclusion would lead to the complete disintegration of the Akan family systems.

iv. The Judicial view of the Legal Concept of the Family - The so called Immediate Family

In a series of some High Court decisions, there emerged two clear views regarding the legal concept of the matrilineal family which has become known in Ghanaian legal terminology as the immediate and the wider families. The genesis of the immediate family view of the legal composition

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993 Ibid.

994 See Bentsi-Enchill, op.cit., p. 135.

of the family appears to be the 1946 case of Araba Busumafie v Hyde Cooper.[995] The case raised issues concerning the delimitation of the ambit of the family for legal purposes and the rights of succession to the self-acquired property of a family member who died intestate.

The facts of this case were as follows: the deceased intestate, Hanna Appia, bought a house which was accepted by the court to be herself-acquired property during her life time. She died without having made a will. She was survived by a sister. She had neither a child nor a brother. The defendant who took over the house as successor was therefore the sole surviving matrilineal descendant of her mother. She sold the property. The plaintiff appellant sued to set aside the sale on the grounds that the house became ancestral property on the death intestate of Hanna Appia. For this reason, her consent was a necessary condition for the validity of the sale.

The appellant's argument was that one must look back further and trace ancestry in this case, from the grand mother of Elizabeth Hyde Cooper and thus include her grandchildren of whom Araba Busumfie is one, as being a daughter of Amuaba Berdzie, who was the sister of Araba Berdzie, the mother of Hanna Appea.

To resolve the issues raised by these argumetns, the court posed this problem: "Accepting the fact that the property has acquired a character known as "ancestral", the difficulty has been to determine at what point that acestry starts."[996] To solve the problem, the High Court endorsed the lower court's view that it commenced from the person who first acquired the property, the deceased intestate. The court's reasoning was that if the appellant's argument was sound then there was "no reason why the ancestor should not be traced back even further, e.g. a great-great-grand mother and thus include in the term "Family" more than one stock of descent."[997]

By this holding the court has delimited the ambit of the family to the immediate matrilineal sub-lineage of a person, what the court regards as one stock of descent or what Sarbah refers to as "real" and "proper" successors, the immediate family.

The effect of this decision is to detach from the maximal lineage of which the immediate family is a mere segment and attribute to it legal

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995 (1946) D.C. (Land) '38 - '47, p. 245.

996 Ibid., p. 246. My emphasis

997 Ibid.

personality. The court thus excludes what Sarbah calls "ordinary" and "extraordinary" successors consisting of persons descended from the maternal grandmother of a person such as uncles, aunts and the issue of such aunts including the issue of a house domestic with a male person of the "heritable blood, domestics, clan or tribal relative", [998] although they can also form part of the maximal lineage.

It must be pointed out at this stage that the court falls into the serious error of confusing among other things, two important issues, namely the right of the maximal lineage, otherwise known as the wider family, to succeed, and the rights of the immediate family members to have immediate beneficial enjoyment of the property. The former relates to the power of control importing the legal capacity to deal with the property through compliance with certain rules of procedure and the right of protecting the reversionary rights of the lineage including spes successionis. The latter pertains to the right to benefit and enjoy the property with certain inferior rights implying conditional user so as not to extinguish or destroy the reversionary rights of the lineage of which the present beneficiaries are part.

It is respectfully submitted that the principal source of misunderstanding in the discussion of the legal concept of the matrilineal family is traceable to the failure to draw this vitally important distinction between right of control and the right to benefit. Similarly it is suggested that it is the confusion of the two issues which clouds the judgment of that shcool of thought which mistakenly draws wrong conclusions from Sarbah's treatment of the Akan Law of Succession.

Be that as it may, there are a series of High Court decisions based on the same mistaken premises and upon which the exponents of the so-called immediate family view rely to assert that the immediate sublineage is a legal entity in itself. Supporting this view of the ambit of the family is the case of Arthur v Ayensu[999] in which the plaintiff sued as head of the wider family of a deceased intestate. Adumua-Bossman J., upheld the contention that the plaintiff head of the wider family had no locus standi, as the property, the subject matter of litigation vested in the immediate family alone.

The relevant points made by the learned Judge was that: " . . . the self-acquired property of the late John Ayensu, deceased, does not

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998 See Sarbah, op.cit., p. 102.

999 (1957) 2 W.L.R. 357.

devolve upon the wider Anona family of which, in his life time, he was a member and the head of which the plaintiff claims to be - but upon his immediate family as I have said, consisting of Mrs. Faustina Daniels and others like her, claiming through females from John Ayensu's mother."[1000]

Following this case was In re Eburahim, Ansa v AAnkrah[1001] inwhich the head of the immediate family applied for letters of administration with regard to the deceased intestate's property. The head of the wider family entered a caveat on the grounds that the applicant had been appointed as head by the immediate family members only without any consultation with the lineage head. The same Judge, Adumusa-Bossman granted the application holding that it was the immediate family which was entitled to inherit the property and was therefore competent to appoint its own head without reeference to the wider family.

As in the previous case, the learned Judge relied on the case of Larkai v Amorkor[1002] and Tamakloe v Attipoe[1003] the authorities of which, it will be submitted, are suspect.

Next in the line of the learned Judge's decisions is the case of Daatsin v Amissah[1004] where there was an action for a claim of debt due to the deceased. The court on similar grounds held that the plaintiff as head of the wider family had no locus standi arguing that the latter had no interest in the property.

Adopting similar views in the case of Ennin v Prah[1005] in which he placed reliance on Larkai v Amorkor, as in the previous cases, he confirmed the limited view of the legal concept of the matrilineal Akan family.

In this case, an action was brought by the wider family head to impeach the validity of the sale of cocoa farms by the immediate family without the prior consent of the former. The Judge held that the property vested in the immediate sublineage absolutely with plenary dispositive rights without the necessity of prior consultation with the wider family.

The case went on appeal to the Supreme Court. However, prior to the resolution of the issues by the Court, the parties agreed to withdraw the case, having reached a compromise. They agreed that the sale was invalid. The purchase money was returned to the vendee who agreed not to

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1000 Ibid at p. 360.

1001 (1958) 3 W.L.R. 317.

1002 (1933) I.W.A.C.A. 323.

1003 Unreported, Civil Appeal No. 38/1952, W.A.C.A., 22 June, 1953.

1004 (1958) 3 W.L.R. 480.

1005 /1959/ G.L.R. 44. See also the consent judgment of the Supreme Court resulting from the Appeal in /1961/ G.L.R. 59.

insist on his rights. The Supreme Court accepted this compromise.[1006]

These decisions provoke several comments. First of all, the learned judge for his decisions relied on the cases of Larkai v Armorkor and Tamakloe v Atippoe.[1007] However, as Woodman has demonstrably shown, in the former case, the court merely drew a distinction in Ga-Mashie law, between succession to an office such as a stool and succession to property rights. The former may relate to patrilineal succession while the latter may concern matrilineal descent.[1008]

The court thus found that although the plaintiff occupied the stool which belonged to the Larkai family of which he was a member and head, that did not necessarily mean that he was a member of the group, which for purposes of Ga-Mashie law , entitled him to succeed to the deceased intestate's self-acquired property. The court argued that though the plaintiff may belong to his own paternal family, in accordance with Ga-Mashie law, in which property descends in the female line, on the death intestate of Ahuru, his property devolved, not on the Larkai family, but on his own matrilineal family.

On this reasoning therefore it is patently manifest that the court in Larkai v Amorkor was not concerned with the delimitation of the ambit of the family for legal purposes. Although the decision may have the effect of vesting rights to benefit in the so-called immeidate family, the court never specifically considered the issue as to whether or not the latter was a legal entity in itself. It is therefore submitted that the authority of Larki v Amordor is suspect and cannot be relied upon as the basis of Adumua-Bossman's decisions expounding the immediate family view of the family.

It should be pointed out also that the case of Tamakloe v Attippoe referred to by the learned judge cannot be a reliable authority. That case concerned the law of succession in a Patrilineal Ewe Community which operates differently from the Matrilineal one.

It should however, be observed that although the validity of these decisions are questionable on the grounds outlined above they laid down the legal proposition that an immediate sub-lineage of the Akan maximal lineage constitutes a corporate juristic entity with the legal capacity to control in absolute terms, property, and to benefit thereof. This

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1006 See (1961) G.L.R. 59.

1007 See notes 1002 and 1003.

1008 Gordon Woodman, "Two Problems in Matrilineal Succession", (1969) 1 R.G.L. p. 6 and p. 8.

entity, the immediate family, is separate and independent of the maximal lineage of which it is a mere segment, and as such, a legal personality of the Akan property systems.

The learned Judge and the exponents of this view are misled into thinking that the right of immediate beneficial enjoyment of the self-acquired property of a deceased intestate nearest in blood relation to the group which is entitled to such benefit is the sole criterion by which the legal composition of the family can be determined. As indicated earlier, this school of thought has fallen into the serious error of confusing the right of this immediate sub-lineage to benefit from such property with the right of the whole lineage to succeed to the property. It cannot be over emphasised, the desirability of dichotomising between the right of individual memebrs of the family to benefit from property held by it and the right of the family to administer, manage and control such property generally. This distinction is imperative as it is the major source of confusion in the exegesis of the legal composition of the family.

As Allott's imperical research has led him to believe, an analysis of traditional property systems such as those of the Akan, ought to be based on this fundamental dichotomy between benefit and control.[1009] Significantly, he writes:

> "At the level of BENEFIT persons are entitled by the law to profit from economic resources; this claim to benefit includes rights of use, to the fruits, and of abuse. Powers of control constitutes a higher-order system, which specifies how claims to benefit may be exercised. Control is the grammar of the property system, a set of meta-norms erected over exploitative norms connoted by benefit."[1010]

It is the failure to recognise the kind of distinction of which the learned author is concerned that has led to the bizzare conclusions reached by the courts and some legal writers on the legal concept of the family. The fact that members of the family nearest in proximity to a person dying intestate have the right to benefit from the self acquired property of such deceased member does not necessarily constitute such beneficiaries into a family in the legal acceptation of that word. They remain members of the maximal lineage of which they are a mere segment and beneficiaries of such property. Their right of benefit does not per se, divest the

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1009 See A. N. Allott, "Language and Property: a Universal Vocabulary for the Analysis and Description of Proprietary Relationships", /1970/ African Language Studies, 12 at p. 16.

1010 Ibid., at p. 16.

family as a whole of its rights to succeed to the property with its superior powers of control and administration.

The supervisory role of the family, represented by its management committee may be necessary to determine how rights or claims to benefit may be exercised equitably so as to preserve what is a group property in which the family has a reversionary right.

Before further comments on the effect of these decisions establishing the immediate family view of the legal concept of the family, it will be worthwhile to delve into the opposite view which maintains that the whole lineage is that which constitutes the legal person in Akan institutions of tenure and not a segment of it.

v. The Wider Family

Neither the courts nor some text writers are clear in their minds whether the wider family is a legal entity in itself, independent of the so called immediate family or whether the latter is part of it. What can be deduced from the decisions however appears to be that there is only one type of family known to the Akan law, although there may be variations in one community and another with regard to internal arrangements as to how rights may be enjoyed.

Upon this basis the family is regarded as a lineage segmented into a number of branches or houses.[1011] The process of segmentation continues with population increases until one comes to the immediate matrilineal sub-lineage of a person. This last segment normally consists of a person's mother, brothers and sisters and the issue of such sisters which as will be recalled Sarbah refers to as "real" and "proper" successors, the group which the exponents of the immediate family view regards as a family in itself.

One difficulty of regarding the family as a lineage consisting of several segments each of which trace descent from a common ancestress is that, it is not too clear how far back one ought to trace descent in the pedigree in order to discover the corporate juristic entity. It is in fact, this difficulty which the immediate family school of thought has exploited to place such explicit limitation on the ambit of the family.

It would appear however, that the lineage can be traced to the oldest living descendant of the lienage in the female line and her living brothers and sisters and the issue of such sisters. There is no doubt that members

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1011 See A. N. Allott, "Family Property in West Africa: its Juristic Basis, Control and Enjoyment" in Family Law in Asia and Africa, London, 1968, p. 130; ed. J. N. D. Anderson.

of the lineages themselves are clear in their minds as to which lineage they belong.

This wider family view of the family was established in the West African Court of Appeal case of Amarfio v Ayorkor.[1012]

In this case, the plaintiff was the head of the wider family of the deceased. He sued a member of the immediate family who was treating the property in question as his exclusive property. In the West African Court of Appeal, Mr. Akuffo Addo, learned Counsel for the Appellant sought to establish that the larger family had no interest in the property until the immediate family of Ayiku was exhausted and therefore the plaintiff had no right to interfere with the management of the property or to maintain the action.

In answer to the first leg of his argument, the presiding Judge Coussey J. A. observed that the first inquiry must be to what family did Ayiku belong during his life time.

"Upon Ayiku's death", said the learned Judge, "his self-acquired property fell to his family united by the tie of blood traceable, as the evidence shows through the female descendants of Adaku Mensah, the maternal grand mother of Koshie."[1013]

The rational for this conclusion would appear to be what the learned judge observed to be saying that no woman stands alone, for behind her stands a united family bound by the tie of blood. This is perhaps, a metaphorical way of saying that the ambit of the family is not so narrow as the appellant sought to establish. The important point about this decision though is that, it has established the view that in determining the ambit of the family, descent ought to be traced from the maternal grandmother of a person. This would include "Ordinary" successors such as uncles, aunts and the issue of such aunts.

There is also some dicta in the case suggesting that the immediate family is excluded from administrative controls over property held by the lineage. For, the learned judge observed thus:

> In my view, therefore, the plaintiff was the one and only head entitled to manage and control the property self-acquired by Ayiku, but which upon his death had become family property and the action was properly brought by him to ward off the defendants claims."[1014]

1012 (1954) 14 W.A.C.A. 554.

1013 Ibid., at p. 556, my emphasis.

1014 Ibid., my emphasis.

It is regretable, however, that the court did not give any indication as to the nature and the extent of the immediate family's interest in the property. It is submitted that the right of the immediate family members is the immediate beneficial enjoyment of the property with some inferior rights of control. That of the group as a whole is the right of management and control as the court rightly pointed out.

Six years after this decision, Ollenu J., as he then was, had an opportunity to review the cases and define the legal concept of the family in Kwakye v Tuba (Dauda Tuba - applicant).[1015] In the present case, the immediate family head sued as a successor to establish title and right of possession to some property. The head of the wider family applied to join as co-plaintiff on the grounds that he was the head of the wider family of which the present successor from the sub-lineage was a branch and that as between the two of them, it was he the head of the major segment who was entitled to litigate over the property.

Ollenu J., as he then was, dismissing the application of the wider family head said:

> " . . . Upon the death of a person intestate, although his self-acquired property becomes the property of the whole of his family, the immediate and the extended together, the right to immediate enjoyment of the beneficial interest in it, and to the control of it, rests in the immediate or branch family and the person appointed successor to the deceased is, in law the head of the immediate or branch family.[1016]

It may be understandable that the immediate beneficial enjoyment of the property resides in the persons nearest in relationship to the deceased which is the immediate family. However, it is anything but clear what the learned judge implies by the proposition that control of the property rests in the immediate family. If as the learned judge rightly says, the property devolves on the immediate and the extended family together, does control here imply or carry with it plenary dispositive rights which will have the effect of extinguishing the reversionary rights of the lineage for example?

It is submitted that it is extremely doubtful if this is the logical import of the term "control" in this context. For, if this be the case, there would seem to be no tangible reason for asserting that the property

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1015 /1961/ 2 G.L.R. 535.

1016 Ibid., at p. 538. My emphasis.

devolves on both the wider and the immediate family together. For if the latter has the legal capacity to destroy the reversionary interest of the whole group then it will be superfluous even to suggest that the wider family has any interest in the property at all.

As will be recalled, the case of Amarfio v Ayorkor left open the question as to whether the two types of families constitute two legal entities with the one independent of the other. It also failed to indicate the rights of the immediate family members. The learned Judge in the present case, Kawkye v Tuba, was Council for the successful litigant in Amarfio v Ayorkor and one would have thought that he would take this opportunity to clarify the issue, but he made no reference to that case. Instead, he made other observations in the present case which does very little to assist us in the resolution of these issues.

For instance, he ruled that prior to the appointment of a successor, the right to litigate and preserve and take charge of the property remained with the head of the "next wider family". Similarly when a successor of the immediate family mismanaged such family property, "the head of the wider family with the concurrence of the principal memebrs of the family - the trunk and the branch as well - can set in to preserve the property." [1017]

The question is, from where does the 'trunk' family derive its authority to intervene in those circumstances indicated by the learned Judge? Though he does not express it, it is submitted that such powers are derivable from the reversionary rights and the overall controlling powers of the head of the "trunk" family, the lineage head. These are powers, the exercise of which lends support to the view that in Akan property systems, there is only one type of family though there may be variations in internal arrangements concerning the enjoyment of rights and priorities in that regard.

The phrase employed by the judges to denote the beneficial rights of the so-called immediate family is significant. The phrase, "immediate enjoyment" by the immediate family imports the present and future enjoyment of rights. Inherent in the choice of phrase is the recognition of the right in the present beneficiaries to enjoy the property, while it also concedes the right of the next segment nearest to the present beneficiaries to enjoy such property in the future should the latter be extinct, though

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[1017] Ibid., at p. 538. He likens the lineage to the trunk of a tree with the various segments as the branches attaching to the trunk.

the power of control may still remain in the whole group.

That this is a reasonable conclusion to be drawn from the decision in Kwakye v Tuba is underlined by the observations made by the learned Judge on the decisions of Adumua-Bossman. In the present case he approved of In re Eburahim, Ansah v Ankrah to the extent that it accorded to the immediate family the right to benefit from the property and that the head of this group was the proper person to deal [1018] with such property. He would, however, disagree with that aspect of the case which established that the property vests in the immediate family alone to the exclusion of the wider family. Here again, the use of the phrase "the right to deal" with the property is ambiguous and does not clarify the extent of that dealing with the property, yet again as we have argued, taking the case as a whole, the only reasonable conclusion to be drawn from it is that it establishes, like Amarfio v Ayorkor, the view that the right to benefit at the first instance is in the immediate family while the right of control remains with the maximal lineage; that there is therefore not two separate families, on the one hand, the wider, and on the other, the immediate. They are two segments of one and the same thing.

These views are confirmed by the learned judge in his review of the cases in his book. [1019] The author rejecting the immediate family view of the legal composition of the family in his review of the cases on the subject, is of the opinion that Adumua-Bossman J.'s decisions establishing this view were made per incuriam. His contention is that the latter judge's attention was not drawn to the West African Court of Appeal decisions of Ghamson and others v Wobill [1020] and Krah v Danquah and others (Consolidated) and Amarfio v Ayorkor [1021] during the course of his judgement. As the two cases were in direct conflict with Arthur v Ayensu, In re Eburahim; Ansah v Ankrah, Daatsin v Amissah and Ennin v Prah which estasblished the immediate family as a legal personality of the customary law, they must be regarded as having been given per incuriam.

1018 My emphasis. It is unfortunate that the learned judge does not make it clear the extent and nature of such dealings with the property. It leaves unexplained the nature of the rights of the beneficiaries vis-a-vis the family.

1019 The Law of Testate and Intestate Succession in Ghana, London, 1963, 109-126.

1020 (1947) 12 W.A.C.A. 181.

1021 (1954) 14 W.A.C.A. 554.

To buttress his argument, he points out that the last case noted above, Ennin v Prah, was appealed against to the Supreme Court where the decision of the High Court Judge was reversed by consent judgment. On the basis of these arguments, Ellennu concludes:

> " . . . the only binding judicial pronouncements on the subject as to the family which succeeds and which is entitled to manage and control self-acquired property of which a person, male or female dies possessed, are Ghamson v Wobill and Krah v Danquah (Consolidated), Amarfio v Ayorkor and the judgment in the Supreme Court in Krabah v Krakue". [1022]

He concludes that it is the principles in the above cases which he summarised in his decision in Kwakye v Tuba and others. [1023]

With regard to the first part of his argument, Woodman has convincingly refuted it on the grounds that the West African Court of Appeal decision of Ghamson v Wobill which the author regards as binding on the High Court, was not concerned with the problem of the delimitation of the ambit of the family. [1024] The issue on which the appeal was fought was that of choice of law. The question was whether Efutu customary law in Winneba according to which children inherit their fathers was applicable or the Fanti customary law which excludes the children was that which should apply.

The West African Court of Appeal in deciding the issue was of the view that it was the personal law, Fanti customary law, and not Efutu law, the lex situs which should apply. It was upon these grounds that the West African Court of Appeal reversed the decision of the lower court. As Woodman has demonstrably shown therefore, the case of Ghamson v Wobill cannot be a direct authority on the point and may not be regarded as being in conflict with the cases according legal personality to the immediate family.

As to the second part of the argument to the effect that the Supreme Court reversed the decision of thge High Court in Ennin v Prah, Woodman again rightly points out that the compromise which the parties reached was that which the court accepted and that the court did not decide the issues raised by the case. [1025] Certainly, it will be illogical to say that an agreement reached by the parties concerned and accepted by the court is necessarily the decision of the court. As Woodman point out, it may well be that the parties reached this compromise in order to avoid

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1022 N. A. Ollennu, p. 121. The last case referred to, Krabah v Krakue /1063/ 2. G.L.R. 122, is one of the cases establishing the wider family view.

1023 /1961/ G.L.R. 535.

1024 Gordon Woodman, "Two Problems in Matrilineal Soccession", (1969) 1 R.G.L. p. 6 at p. 9.

1025 Ibid., at p. 10. See also A.P.K. Kludze, Ewe Law of Property, London, 1973, p. 272.

costly litigation and in order to maintain cordial relations between the various segments of the family.

Upon the basis of these arguments, the case of Ennin v Prah cannot be said to be a decision of the Supreme Court and which reversed the decision of the lower court. Thus the only case which would appear to be in direct conflict with the cases, the effect of which is to attribute legal personality to the so-called immediate family is Amarfio v Ayorkor, which we have argued is not very clear on the respective rights of the wider and the immediate families.

However, there was an outright rejection of the immediate family concept by the Supreme Court in Pobee v Arhin,[1026] where Blay J.S.C., made the following significant observations:

> "It seems to me that this so-called doctrine of the immediate family, as enunciated in the case of Arthur v Ayensu and in the Divisional Court judgment of Isaac Ennin v Kwaku Prah which evidently influenced the appellants to institute these proceedings, if allowed to be extended unchecked, the whole of our family system would be in jeopardy. It would mean that as in this case, where it is admitted that the stool and all that is attached to it, were acquired by Awortwi and more so Arhin I, by whose name the stool is known, only Arhin's brothers and sisters and their descendants (the immediate family) could succeed to the stool and the properties attached to it, to the exclusion of the descendants of Arhin's or Awortwi's maternal cousins of the same grandmother, otherwise known as Ena Mba. (The wider family). That clearly is not the customary law as I have always understood it." [1027]

Perhaps the courts themselves are becoming weary of the multiplicity of litigation which the previous decisions have encouraged. Ollennu who was a member of the panel of judges who presided over the present case was therefore forced to change his views which he had earlier expressed in Kwakye v Tuba that it was the immediate family which succeded to the rights of control and benefit, although the wider family could intervene to preserve the property on occasions where it was being mismanaged. He thus quotes with approval Blay J.S.C.'s observations quoted above and emphasises the fact that: "it is the entire family, and not a branch of it - not the immediate family which succeeds."[1028]

Happily, the courts and some commentators are beginning to realise the distinction between the right of the entire family to succeed and the right of certain individual members to benefit immediately from the

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1026 /1964/ 1 G.L.R. 40 at p. 44. It is clear from this warning the unhappiness of the courts about the encouragement which the court decision has given to members of the immediate sub-lineage to assert absolute rights over property from which they are presently benefitting.

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1028 N. A. Ollennu, op.cit., p. 123

property thus succeeded to. The recognition of the inherent problems of carving out multiple families out of lineages which may result in the disintegration of the family system must also be noted. Not only the courts, but certain students of the law are also becoming concerned about this trend.

Allott for example, commenting on the attribution of legal personality to the so called immediate family regards the decision by Adumua-Bossman in In re Eburahim as a re-interpretation of the Akan law.[1029] He rejects the learned judge's proposition that the self-acquired property of a person dying intestate becomes the property of his immediate family only i.e. his minimal matrilineage and not of the whole family lineage and that it is the principal memebrs of the immediate family alone that are competent to appoint the successor to the exclusion of the wider family.[1030] It is his opinion, based on empirical research that the preferential claim to benefit from the self-acquired property of the deceased rests in his immediate sublineage, but he points out that this claim to benefit depends on the superior title of the lineage as a whole.

He makes it clear that the family has not merely the reversion to the property but a right to control its alienation. To deny the title of the family and to equate successor and head of family will contradict all the previous authorities in Akan family law and make nonsense of the texts which have previously expounded it.[1031]

Against these views recognising the inherent defects and the undesirable consequences of the attribution of legal personality to the immediate family, is that school of thought which maintains that the delimitation of the ambit of the family to the immediate family is a good policy to adopt, arguing that it is consistent with modern economic trends.

The principal exponent of this view is Bentsi-Enchill who regards the trend as progressive.[1032] In his erudite discussion of the uncertainties concerning the ambit of the term, "family", he argues that so far as it can be gathered from the table of descent given by Sarbah, the succeeding family consists of the uterine brothers and sisters of a deceased intestate and the issue of such sisters and the children of their daughters

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1029 A. N. Allott, "Family Property in West Africa: its Juristic Basis, Control and Enjoyment", in Family Law in Asia and Africa, London, 1968, p. 132, ed., J. N. A. Anderson.

1030 Ibid.

1031 Ibid.

1032 Kwamena Bensi-Enchill, op.cit., p. 138

and so on until there are no more descendants of the deceased's mother tracing descent exclusively through females. Bentsi-Enchill regards the possibility of not finding any such descendants, in which case one has to fall back on the mother of the deceased remote.[1033]

He submits that title to and beneficial enjoyment of the deceased's property rests in the uterine collaterals of the deceased and descendants through females of the deceased's mother. To support the appropriateness of this inference from Sarbah's treatment of the subject, he draws attention to the fact that Sarbah stresses that the "real" successor of the deceased is his mother and refers to the deceased's sisters as the "natural and proper guardians" of the deceased's property during the minority of the persons eligible for choice as successors, not the mother's sisters, although the deceased's mother is herself a member of a wider family.[1034]

This view, he submits, has received explicit enunciation in judgments by Adumua-Bossman J. The author in his review of the cases approves without qualification the latter judge's decisions expounding the legal concept of the immediate family. He writes:

> "On this view, the title and the right to possession and enjoyment devolve on the "immediate family" exclusively, and this immediate family has an unfettered right of disposal thereof. The wider family has only a spes successionis." [1035]

By these propositions, the learned author agrees with the view which regards the immediate family as a family in itself with legal capacity to enjoy and control property in absolute terms carrying with it the right to dispose of such property without reference to anyone.

In his opinion, this view can be supported on cogent grounds of administrative convenience of allowing a person or his immediate next-of-kin enjoy the fruits of his enterprise. It is also consistent with the need to achieve certainty with regard to membership of a land holding group. The explicit limitation of the term, "family" to the group defined in the cases narrows the area of search for determining membership, lessens the number of persons whose consent may be necessary for valid alienation of property and at the same time commands rational support that a man must enjoy the fruits of his enterprise and failing to make a will, on his death his immediate next-of-kin.[1036]

1033 Ibid., p. 135.

1034 Ibid.

1035 Ibid., at p. 138

1036 Ibid., at p. 138.

He argues that these views are in harmony with the observable fact of progressive individualisation, and opens the way for according greater weight to the interest of children as against that of remoter matrilineal relations.[1037] He reviews the cases which hold that the property devolves on the whole family and submits that there is very little to commend that view. "We conclude then that the better view is the first one which holds that upon the death intestate of a person, both the legal title to and the beneficial enjoyment of his property devolves upon his immediate family",[1038] he writes.

The author's arguments have been outlined in some detail because we regard them as provoking commentary on the socio-economic underpinings of the law involving considerations of policy which ought to be taken into account in a perspicacious analysis of the issues raised by them. Before delving into such policy matters it is pertinent at this stage to observe how in the search for the family as a legal entity, we have found ourselves discussing the right of succession to property. The reason as we have noted earlier, is the axiom that in Akan customary laws, when a person dies intestate, his property devolves on his family. Thus in almost all the cases discussed, the preliminary inquiry has been the determination of the issue as to which family the person from whom the property is transmissible had belonged in his life time. The question of delimiting the ambit of the term, "family" for legal purposes is thus frequently raised.

However, as has already been noted, one is likely, in the course of doing so, to blur the distinction between the right of the individual member or members of the family to benefit from property to which the whole family has succeeded in this way with that of the family as a corporate juristic entity, separate and independent of its corporators to succeed to the legal title in that property. It cannot be over emphasised the need to draw this distinction which ought to be borne in mind continually in the exposition of Akan customary law.

Unhappily, the school of thought which holds that the immediate family is a legal entity in itself has not infrequently fallen into this error in its analysis of the law of succession. We fear that Bentsi-Enchill has also fallen into this common error in equating the right

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1037 Ibid.

1038 Ibid, p. 141.

to benefit with the right to succeed, both of which operate in different orders. It must not be overlooked, the fact that in all the decided cases, including those advancing the immediate family view, the right of members of the next segment of the lineage nearest to the immediate sub-lineage to benefit in the event of the latter being extinct is always conceded.

vi. Considerations of Policy

The view which we seek to urge is that the decision as to the composition of the family for the purposes of enjoyment of rights in property and the legal competences concerning it ought not to be legal decisions devoid of the consideration of socio-economic, even political policy objectives.

For the disintegration of the family system and the individualisation of interests inherent in the immediate family doctrine is certainly an expression of a new economic and social development trends. The social and economic underpinnings of the doctrine is a movement away from the traditional communal, ethical and economic value systems concerning property rights which lay emphasis on social cohesion and strengthening of family bonds. A system through which skills are funnelled through cooperative effort in the exploitation of resources and their equitable distribution with its incidental social security for its members.

The question which falls to be examined is whether it will be a good policy to promote and encourage the movement towards disintegration and individualisation. The decision as to which policy to adopt depends inescapably on our socio-economic policy objectives. The courts are supposed to be declaring and applying the laws. But if the law is to be regarded as a purposive ordering of human affairs, then the applicable laws must be reflective of social and economic facts which are more often than not inexhaustive in the laid down rules. This would suggest that the courts and jurists must necessarily bend the law to suit every kind of change without regard to the desirability for such change.

But society functions. Legal rules and social norms prescribe how it ought to function. Judges and lawyers have formative influence on the law. Economic policy objectives formulated, translated and crystallised into legal rules by lawyers and judges can determine how society ought to function. Didactive judicial and juristic opinions can thus have a useful role to play in shaping socio-economic policy and the social ordering of society.

To say, as does Bentsi-Enchill, that the attribution of legal personality to the immediate family is consistent with modern trends of individualisation without relating this to the effect which this process can possibly have on resource exploitation within the family systems in the rural community where over 70% of the working population is engaged in land development overlooks the functional role of the institution within the traditional system. One would agree with the learned author that a man must be free to enjoy the fruits of his enterprise and if he is unable to make any directions concerning it before his death, it must be enjoyed by his immediate next-of-kin, but it is unnecessary to constitute such groups into families in order to achieve this result.

Indeed, such a proposition is not a novel one. The land tenure systems of the various communities throughout Ghana recognise individual effort in the creation of wealth as being exclusive property of such creators. The right of immediate family members to benefit from it after the creators' death has never been denied in law or in fact. Obviously the considerations which weighed with the learned author to propose the attribution of legal personality to the immediate family have to do with certain attitudes to property rights which are developing among the urban elite, the merchant class and some educated elements in the cities.

The usual manner of creating individual property in the traditional family system is through group effort. Members of the immediate sub-lineage including wives and children normally assist in land development which noramlly creates such wealth. It is for this reason that in early times, the wealth of a man was determined by the number of wives and children he could maintain, since their number determined the size of his labour force. Even today, in the rural communities where the majority of the population is engaged in land exploitation, this pattern of development is still an essential feature.

Sadly, in the Matrilineal family, the wife and children of a man are not recognised as being a member of the husband's family for purposes of inheriting property. Hence, where the man fails to make a will before his death, his matrilineal relatives often seize his property and may leave the children and the widow destitute even though they might have contributed substantially in the creation of the property.

Today, the urban elite, and the merchant class do not necessarily acquire property through land exploitation or by joint efforts through the family system. They live outside the rural community where their matrilineal relatives reside and are therefore not in close contact with them. Living together with their wives and children, the ties that bind

husband, wife and children become stronger while those of the man and his matrilineal relatives become weaker and weaker.

Apart from these factors, the urban community has over the years imbibed and accepted western ideas of the family as consisting of a man, his wife and children. These factors have combined with economic pressures to create a situation giving rise to a process of individualisation, particularly in the urban and city areas, a process regarded by Bentsi-Enchill as progressive.

However, with due deference to the author, these are social and economic problems which cannot be solved merely by constituting the immediate family into a person of the law, thus detaching it from the lineage of which it is a part. Bentsi-Enchill is of the view that this would accord greater weight to the rights of children to succeed; but to accord greater weight to their rights is not to create such rights and the attribution of legal personality to the immediate family does not solve the problems concerning widows and children.

It must be borne in mind that we are not making a law for the urban community alone. It will be unrealistic to suggest that these social and economic pressures are not affecting the rural community as well. But the production of resources continues to occur within the family system through co-operative efforts. In a system where the tools of production remain the crude and inefficient old friends, the hoe and the cutlas, joint efforts will remain one of the best means of land exploitation.

It will therefore not be a good policy to adopt by encouraging the process of individualisation through policies which will have the effect of breaking up the family system without regard to its social and economic consequences on the rural community which produces the bulk of the country's wealth. The fact that such policies will be accepted by the urban minority does not necessarily mean that it will be healthy for the rural community or the country as a whole.

One of the cogent grounds upon which Bentsi-Enchill advocates the attribution of legal personality to the immediate family is administrative convenience and certainty with regard to the number of persons whose consent might be necessary for valid alienation of property held by the group. True, it is, that the explicit limitation of the term "family", to this group can reduce the number of persons with legal capacity to deal with the property to the barest minimum. The learned author's concern is obviously certainty of title which can be achieved in this way. Yet

as we have seen in this work, the creation of multiple families out of lineages by attribution of legal personality to the immediate family has had the opposite effect indicated by the volume of litigation incidental thereto. It is this phenomenon which has so alarmed the courts of the development in Pobee v Arhin.

We conclude with the following respectful submissions that:

i. the school of thought which contends that the immediate family is a legal person in Akan customary laws bases its arguments on mistaken premises by confusing the rights of the immediate next-of-kin of a deceased person to benefit from property left by him, with the right of the whole family, as a corporate juristic entity, separate and independent of its constituents to succeed to such property;

ii. the right of the family to control property entails the vesting of the legal title in it with a power to control how the rights to benefit from such property ought to be exercised so as to protect not only the spes successionis of other members but the reversionary rights of the family;

iii. the constitution of the immediate family into a legal entity will not necessarily solve the problems of intestate succession in Akan family law in so far as the rights of widows and children are concerned;

iv. it is a reductio ad absurdum to suggest that because Sarbah refers to members of the immediate family as real and proper successors he necessarily implies that the group is a family with legal personality in itself;

v. the attribution of legal personality to the immediate family is not a necessary condition for its members to benefit from property left by a deceased member;

vi. the exponents of the immediate family view have not seriously considered the social and economic implications of the creation of multiple families out of lineages;

vii. for these reason, the better view is that there is only one type of family in Akan family law consisting of lineages segmented into branches though there may be variations in places with regard to internal arrangements about how rights may be enjoyed.