THE FAMILY, PROPERTY AND SUCCESSION AMONG THE NORTHERN EWE-SPEAKING PEOPLE OF GHANA

by

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ABSTRACT

This thesis is on the law relating to the family, property and succession among the Northern Ewe-speaking people of Ghana.

The first Chapter offers a general description of the Ewe in both Ghana and Togo and proceeds to identify the section referred to as the Northern Ewe-speaking people of Ghana. In the second Chapter the political structure is described, showing the area as a congeries of small autonomous chiefdoms, each with its own system of law.

In Chapter III the nature of the Ewe family, which is patrilineal, is examined as the unit for purposes of citizenship, succession to hereditary offices, entitlement to ancestral property and assumption of certain obligations. The position of the head of family is considered in Chapter IV where it is submitted that succession to the office is automatic and the holder of the office is accountable but generally irremovable.

Chapters V and VI concern interests in land. It is shown that as a rule the respective families hold the paramount title to land, with the dependent interest in the members of the family, and that stool lands as generally understood in Ghana are practically non-existent among the Northern Ewe.

In Chapter VII it is explained that, apart from the ancestral family lands, family property is rare among the Northern Ewe.

Alienation of interests in property by sale, gift, pledging and tenancy is discussed in Chapters VIII - XII, stating the formalities and the effect of each type of alienation.

The law of succession to interests in property is discussed in Chapter XIII. It is shown that succession is not by the family but by individuals as of right and that the interest of a successor is generally that of a purchaser, so that the interest is both alienable and inheritable.

ACKNOWLEDGMENTS

This is a pioneering effort to state the law of the family, property and succession among the Northern Ewe-speaking people of Ghana. No systematic study of the laws of the Ewe has so far been undertaken and it is to be hoped that studies on other aspects of Ewe law will follow. This study has been confined mainly to the Northern Ewe of Ghana and does not cover all Ewe. Hence, although expressions such as "Eweland", "Northern Ewe", "the Ewe" and "Ewe law" are used, unless the context otherwise indicates, these should be taken to refer to only the Northern Ewe-speaking people of Ghana. Because the study primarily concerns the Northern Ewe of Ghana, the dialect forms of that area are preferred to the "standard Ewe" when vernacular terms are employed.

The University of Ghana released me from my teaching assignment with a generous grant of a three year leave of absence with pay for the purpose of the present research. I wish to place on record my gratitude to that University.

My method of approach was to read as many Native Court decisions as possible, as these courts have for long been regarded as repositories of the customary law. I am indebted to the Registrars of the Grade II District Courts at Kpando and Ho for placing at my disposal the old Court records of both districts. I have also relied on decisions of the Higher

Courts although, as will be seen from the text, I often found them to be at variance with the practised customary law.

I am grateful to the Clerk of the Volta Regional House of Chiefs, Ho, for making available to me some declarations of the customary law in different parts of the Region. I am also indebted to the Director and staff of the Ghana National Archives in Accra for permission to consult their records.

Owing to the dearth of written material and decided cases, however, a large part of my research consists in oral interviews with chiefs and other traditional dignitaries knowledgeable in the local law. After formal interviews I usually stayed on or paid a second or a third visit incognito when I sought confirmation from a wide cross-section of the ordinary members of the community. Sometimes I attended arbitration proceedings unnoticed. This is an advantage of an "auto-ethnographer" as, being myself an Ewe, I was able to communicate directly with my informants without the aid of an interpreter. There is, however, the danger of an auto-ethnographer seeking confirmation of his own preconceived views. I have endeavoured to avoid this pitfall and have found that the present research has resulted in my un-learning much of what I had hitherto vaguely assumed to be the law.

The number of persons who volunteered information to me during my field research is so large that I cannot mention all of them. I include a separate list of some of my principal

informants as an Appendix. To all of them and to those whom I am unable to mention by name I wish to express my profound gratitude and appreciation. For I met with willingness and co-operation wherever I went on my research.

I would also like to thank all those who accompanied or otherwise assisted me at various times in my field interviews. In particular, I would like to mention my sincere thanks to Mr. Norbert Anani Kludze, Miss Margaret Galevo, B.A., Miss Janet Atiedu, Q.R.N., S.M., and Miss Bertha Akosuavi Kludze. Without them I would have been a lonely wanderer from one place to another.

When I was in Ghana for my field research I seized the opportunity of having some discussions with Mr. Justice Nii Amaa Ollennu, a Judge of the Supreme Court and author of very useful works on the customary law in Ghana, together with whom I had been engaged in some teaching programmes in the Faculty of Law of the University of Ghana. Although in the end I am unable to share the views of that great lawyer on some propositions of law, the discussions were very helpful and rewarding. I am very grateful to Mr. Justice Ollennu.

The maps were drawn for me by Mr. Godwin K. Agbodza of the Department of Geography, University of Ghana, Legon, to whom I am grateful.

In London, I have had the benefit of unorganized discussions with individuals like Mr. Vincent M.K. Agbodo, B.Sc.

(Eng.), his wife Justine Vivian Tuku, and Mr. Willie Adom. To them I am grateful for their elucidation of some points which occasionally required clarification, and for their encouragement throughout my efforts.

I take this opportunity to thank all the members of the Advanced Seminar in African Law in the School of Oriental and African Studies, London, for the period 1966 to 1969. Their discussions stimulated my own thinking and greatly helped me to understand the law better.

Above all, I must express my deep and ever-lasting gratitude to Prof. A.N. Allott of the African Law Section of the School of Oriental and African Studies, London. To him I owe more than I can say. He supervised this thesis with patience and understanding, and by his many and invaluable criticisms he freely allowed me to benefit from his profound knowledge of African Law. He took a personal interest in this work and without his inspiration and guidance it would never have been completed. I shall remain indebted to him for all my life.

I may be excused to express here a posthumous gratitude to the late Amega Christoph Anku Kludze, alias "Monu", known among the family as "Tatatsitsie". The late Tatatsitsie, my father's brother and mentor, became my "father" since the death of my father in the early stages of my secondary education. With vision and determination, and at considerable sacrifice to himself, Tatatsitsie assumed responsibility for

my education. In my field research for this thesis he was to be one of my vital sources of information. As a man who had lived for about a whole century filled with a tremendous wealth of experience, his brain was a great storehouse of knowledge on which I drew freely. Furthermore, he facilitated my field research by introducing me to useful informants in various places. However, a few months after my return to England to complete this thesis, Tatatsitsie peacefully passed away. While the earth lies lightly on him, the completion of this work may stand as a monument to his efforts.

I have expressed my gratitude to those who have assisted me in the writing of this thesis. It is to their credit that they have helped to minimise my errors. However, as the Ewe say, Nunya adidoe, asi metune o, that is "knowledge may be likened to the trunk of a huge baobab tree, which cannot be encompassed by the arms of any man". There may be errors and imperfections and for them I alone am responsible. This, however, does not derogate from my gratitude and I repeat, after our forefathers, that "when the cock crows at dawn tomorrow, it is me expressing my thanks to all of you": ne koklo ku ato etso, miawoe senu loo!

A.K.P. KLUDZE

London,
March 1969.

ABBREVIATIONS

A.C.	Appeal Cases
All E.R.	All England Reports
Ch.D.	Chancery Division
D.Ct.	Divisional Court Reports (Gold Coast)
E.R.	English Reports
F.C.	Full Court Reports (Gold Coast)
F.S.C.	Federal Supreme Court Reports (Nigeria)
G.C.R.	Gold Coast Review
G.L.R.	Ghana Law Reports
I.C.L.Q.	International and Comparative Law Quarterly
J.A.A.	Journal of African Administration
J.A.L.	Journal of African Law
J.A.S.	Journal of African Society
J.Comp.Leg.	Journal of Comparative Legislation
Jur.	Jurist Reports
L.L.R.	Lagos Law Reports
N.L.R.	Nigeria Law Reports
Ren.	Renner's Gold Coast Reports
Sar. F.C.L.	Sarbah's Fanti Customary Laws
Sar. F.L.R.	Sarbah's Fanti Law Reports
Univ. of Ghana L.J.	- University of Ghana Law Journal
W.A.C.A.	West African Court of Appeal Reports
W.A.L.R.	West African Law Reports
W.A.R.	West African Review
W.L.R.	Weekly Law Reports
Yale L.J.	Yale Law Journal.

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CHAPTER I

THE LAND, THE PEOPLE AND THEIR HISTORY

Geographical Location of the Ewe

The Ewe are but one of the many peoples of West Africa. The late Armattoe has described them as one of the most intelligent peoples who inhabit the West Coast of Africa, as well as one of the most industrious, and he says the Ewe were the first iron-working people in Africa.[1]

The Ewe occupy generally an area stretching from the Gulf of Guinea to about latitude 7° 10" north in the west (in the Republic of Ghana) and about latitude 7°40" north in the east (in the Republic of Togo). The western limit of Eweland is roughly delimited by the Volta River, while the Mono River is its approximate eastern boundary. The coast-line measures about 80 miles from east to west, and its extension inland is of about the same length.

There are no other tribes between the Ewe and the sea to the south. The western sector, which in fact forms the south-eastern corner of Ghana, is the main component of the Volta Region, one of the eight administrative Regions of Ghana, the only main non-Ewe area in the Volta Region being

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1. R.E.G. Armattoe, The Golden Age of West African Civilization, Lomeshie Research Centre, Londonderry, 1946, p.23.

the quasi-Akan population of the Buem-Krachi District. The eastern sector of Eweland comprises the southern half of the Republic of Togo, in which Republic the Ewe seem to occupy a more dominant position.

The Ewe have sometimes been confused with their neighbours. For example, the work of Colonel Sir A.B. Ellis,[1] a former colonial District Commissioner of Keta (in Eweland), which was published in 1890 and purported to be a work on the Ewe, entitled The Ewe-speaking Peoples of the Slave Coast of West Africa, was for long regarded as the locus classicus on the Ewe, written in the English language. This book has, however, been condemned by recent scholars, both historians and anthropologists alike. An Ewe historian, Amenumey, says "The title is a complete misnomer. Ellis confused the Ewe with other neighbouring people".[2] Indeed Ellis' book offers no contribution to our knowledge or understanding of the Ewe people because the subject of its treatment is Dahomey which is not part of the Ewe. It is true that Dahomey and other Fon languages seem to have an Ewe base, or at least bear a close resemblance to Ewe; but the areas in which these languages are spoken are not part of Eweland and should not be confused in the study of the Ewe.

1. According to W.E.F. Ward, A History of Ghana, Allen and Unwin, London, 1966, p.314, Colonel Sir A.B. Ellis was appointed District Commissioner of Keta in January, 1878.

2. D.E.K. Amenumey, The Ewe People and the Coming of European Rule, 1850-1914, Unpublished M.A. thesis, University of London, 1964, p.5.

A similar error was committed by Crowther when as late as 1927 he attempted to write on the Ewe-speaking people.[1] Crowther dealt with only the Anlo and the Tongu Ewe, then fell into the error of including Ada, Akwamu and Cherepong-speaking peoples among the Ewe. His was, of course, a double error of exclusion and inclusion! The majority of the Ewe areas, including the Northern Ewe of Ghana, were omitted, while obviously non-Ewe peoples were included in his work.

Perhaps one explanation for this confusion is that, quite apart from the fact that they are not a centralised, single political entity, the Ewe do not form a strict linguistic unit. The Ewe language belongs to the "Kwa" group of western Sudanic languages to which also belong inter alia Twi, Fante and Ga in Ghana, and Tomba, Nupe, Ibo, Ijaw, Yoruba and Edo in Nigeria.[2] However, the local variations in the dialects of the Ewe language are such that an Ewe from say Glidzi in Togo has considerable difficulty in understanding the Gbi (Hohoe) dialect of the same Ewe language. Westermann has dealt with some of these dialects in his monumental work on the Ewe language.[3]

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1. F.G. Crowther, "The Ewe-speaking People", (1927) 3 G.C.R. 11-55.

2. D. Westermann, A Study of the Ewe Language (translated by A.L. Bickford Smith), O.U.P., London, 1930, pp.199-200.

3. D. Westermann, A Study of the Ewe Languages, 1930. See pp.246-256 where (though with some minor errors) he records passages in the Gbi, Ve and Ho dialects.

It is nevertheless the same Ewe language, and variations in dialect are not a peculiarity of only the Ewe language. There is, therefore, no excuse for including other ethnic and linguistic groups among the Ewe.

The expression "Eweland" has been used and will be used in this work only for the purpose of ethnic and cultural identification, and not in reference to a political entity as such. The Ewe have never lived together as a single political unit even in early times.[1] In more recent times, unlike some other tribes of West Africa, their cultural homogeneity has been destroyed by their colonial experiences, with the result that they are now divided between the two republics of Ghana and Togo.

Before the First World War, the Ewe came under two separate colonial administrations. A large portion of them were together with other ethnic groups in the then German colony of Togo, where they formed the main ethnic group.[2]

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1. Though Amenumey says that at Notsie "The entire community /i.e. the Ewe/ lived each in its own section, but all alike were ruled by one supreme King". See Amenumey, op.cit., p.16. The "King" was Agokoli. If this meant having a centralized political unit, the people would probably have destooled the "King" rather than dissolve the union because of his despotism which is discussed in pp.30-31 infra.

2. This dominance may account for the suggestion that "Togo" is a corruption of the Ewe word "to go" or "togodo" meaning "the bank of a river, lake or lagoon." It seems that this name was applied to the whole country because the German Consul, Dr. Gustav Nachtigal, signed the first treaty with the chief of the village of Togo. See Togoland, British Foreign Office (Historical Section), Foreign Service Handbook No. 117, 1919, p.14.

The rest were in the south-eastern corner of the then British colony of the Gold Coast, in which territory they were one of the large minorities. As a result of the defeat of Germany in the 1914-18 war, Togo was divided between Great Britain and France and placed under their respective administrations under the Mandatory System of the defunct League of Nations.[1] Writing on the Ewe, Miss Barbara Ward says,

> Their territory is now divided ... between the French and British administration. The Franco-British boundary was fixed by a commission appointed by the League of Nations in 1920-22, after a considerable time spent in ethnic and economic survey ..." 2

It is impossible, however, to convince the Ewe that Eweland has been partitioned on any rational ethnic basis; for the border is indeed an arbitrary international boundary.

These "mandated territories", as they were then called, later became "trust territories" of the same administering powers after the Second World War, under the Trusteeship System of the United Nations which replaced the League of Nations.[3]

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1. E.g. the British Section by virtue of the Mandate granted to Great Britain by the Council of the League of Nations and dated 20th July, 1922.

2. B.E. Ward, The Social Organisation of the Ewe-speaking People, Unpublished M.A. thesis, University of London, 1949, p.1.

3. Thus British Togoland became a Trust Territory under a Trusteeship Agreement between His Britannic Majesty and the U.N., approved by the General Assembly of the U.N. on 13th December, 1946. See Cmd.7083.

This, of course, meant very little to the indigenous inhabitants in terms of administration and policy. While France constituted French Togoland into a separate colonial entity, Britain administered western Togoland, to all intents and purposes, as if it were an integral part of the Crown Colony of the Gold Coast.

The result of these different colonial administrations was that the Ewe on either side of the inter-territorial frontier developed along entirely different lines. The awareness of this fact, as well as the hardships experienced when the frontier was closed during the war years, led to the emergence of an Ewe irredentist movement soon after the 1939-45 War, with the objective of uniting all Ewe-speaking people under one administration.

For a variety of reasons, however, the Togoland unification movement did not succeed. Instead, by a plebiscite held in 1956, conducted by Britain through the Gold Coast Government,[1] Togoland under United Kingdom Trusteeship decided by a majority[2] to be integrated into the then Gold Coast as the independent state of

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1. The Government of the internally self-governing colony of the Gold Coast was at the time formed by the C.P.P. Both the C.P.P. and its leader, Kwame Nkrumah, were strongly opposed to Togoland unification.

2. The final figures were 93,095 to 67,492 in favour of integration into the Gold Coast (Ghana), or 58% against 42%. See Report of the U.N. Plebiscite Commissioner for Togoland under U.K. Trusteeship to the 18th session of the U.N. General Assembly, 1956, U.N. General Assembly Document No. T/1258 of 19th June, 1956, paragraph 494.

Ghana which attained her independence in March, 1957. The overwhelming majority of voters in the Southern part of British Togoland, which was the Ewe area, voted against integration into the Gold Coast (Ghana)[1]; but the Southern majority was engulfed when the votes were taken together with the whole of the Trust Territory (including inter alia the Mamprusi, the Dogomba and other non-Ewe tribes in the North). This was a defeat for the declared objective of the Ewe and Togoland unification movements; but it resulted in the formal unification of the eastern half of the Ewe under one administration in Ghana. As far as can be seen now, therefore, the Ewe are permanently divided between the Republic of Ghana and the Republic of Togo. Thus we now have anglophonic and francophonic Ewes.

The Early History of Ewe People

The actual origin of the Ewe-speaking people can at best be only a matter of conjecture. What appears certain, however, is that they must have migrated in a westerly direction to their present places of abode. Fiawoo says:

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1. The voting in the Ewe area was 36,010 to 15,798 or about 69% to 31% against integration into the Gold Coast (Ghana). See para. 495 of above report, reference Ho District (18,981 to 7,217) and Kpandu District (17,029 to 8,581).

> the Ewe-speaking people appeared to have emigrated to Yoruba country ... from /there/ first to Dogbo ... then to Tado, situated east of the River Mono ... from Tado the next settlement was Notsie to the west of the River Mono 1

The Ewe historian, Amenumey, also says:

> Ewe tradition recalls a migration from the east - from Ketu, a town lying to the west of the River Niger ...

and that from Ketu they eventually came to Notsie.[2] Similar accounts of Ewe migration are also given by Spieth[3] and Wiegrabe.[4]

Perhaps the Ewe migratory process, together with those of the neighbouring Akan began somewhere in the Sudan and progressed in a south-westerly direction to avoid the dry Sahara. The various points in their journey have been lost in the mist of unrecorded history. Unanimous tradition is, however, that the Ewe eventually settled in the historic city of Notsie, sometimes referred to as "Glime",[5] because of the great wall that surrounded it. The old walled city of Notsie is now the town which goes by the same name in the Republic

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1. D.K. Fiawoo, The Influence of Contemporary Social Changes on the Magico-religions Concepts and Organisation of the Southern Ewe-speaking People of Ghana, Unpublished Ph.D. thesis, University of Edinburgh, 1959, pp.29-30.

2. D.E.K. Amenumey, op.cit., pp.15-17.

3. Jakob Spieth, Die Ewe-Stämme, Dietrich Reimer (Ernst Vohsen), Berlin, 1906, pp.53-55.

4. P. Wiegrabbe, Ewegbale xexle: Akpa Enelia, Berlin, 1906, pp.18-43.

5. Glime in Ewe means "inside the walls", a reference to the great wall around the city of Notsie. Other names are Amedzofe, Agbogbome and Hahome.

of Togo.[1] All the inhabitants of ancient Notsie were enclosed by a thick wall, the remnants of which can be seen even today. The original purpose of the wall might have been the usual one of affording protection against the incursions of hostile forces. In the course of time, however, it was to ensure the incarceration of the entire people, serving as a means whereby the despotic chief, Agokoli, the ruler of the city, prevented the exit of the people whom he ruled with iron cruelty. Life in the walled city of Notsie became so intolerable that the chiefs and their people tore down the great wall at a point that had deliberately been weakened by being kept wet for this reason over a considerable period of time with waste water by the women. Thus the Ewe made their exodus from Notsie and moved in differing directions to the places where they have now respectively settled. Amenumey thinks that the exodus must have been around the middle of the 17th century.[2] There was no organised direction of the exodus, there being no single chief who ruled all the Ewe. Instead, each group moved away under its own chief, being only in the company of other friendly groups. The history of each Ewe group from Notsie to the present day, therefore, varies from place to place. Notsie, then, represents a sort of Biblical Babel for the Ewe, being the point from which the Ewe dispersal commenced.

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1. Sometimes spelt as Nuatja or Nouatche.

2. D.E.K. Amenumey, op.cit., pp.20-21.

The Anlo Ewe And The Tongu Ewe of Ghana

As has been already pointed out,[1] part of the Ewe-speaking people are in Togo and the other portion in Ghana. This thesis, strictly speaking, concerns itself with only a section of the Ewe who are in Ghana, that is the Northern Ewe of Ghana. Hence, although for convenience we may in the succeeding pages use expressions like "the Ewe", "Ewe law" and "Eweland", unless the context indicates a wider application, they should be understood strictly as references to only the Northern Ewe-speaking people of Ghana. It is necessary, therefore, to identify that area more precisely.

The Ghana Ewe occupy three main areas. One is the Anlo area. The other is the Tongu area. The third is the area of the group which we would like to refer to as the Northern Ewe-speaking people of Ghana, this last group being the one with which the present work is more precisely concerned. Our area of study will also be described; but, before then, we shall look at the first two areas, the Anlo and the Tongu.

The Anlo: The Anlo area comprises the Anlo proper and the surrounding people with whom they can be classified into one dialect group. They form the southernmost part of the Ghana Ewe and stretch northwards from the sea. This is a very important area because it established early contact with European settlers, and, because it had been continuously under

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1. See pp.26-29 supra.

sole British rule (having never been part of the former German Togoland), the general level of education in the area is comparatively higher than in the other Ewe areas of Ghana.

The dialect of the Anlo Ewe is basically the written Ewe, which is, however, christened "Standard Ewe". Indeed one would be more honest in saying that the so-called "Standard Ewe" is in fact simply the Anlo dialect. It sounds foreign to the other Ewe people. The orthography is so linked with the Anlo dialect that certain expressions in other Ewe dialects cannot be reduced into Ewe writing. In this thesis, however, the dialect forms of the Northern Ewe of Ghana are preferred to the so-called standard Ewe when giving the Ewe words and expressions which are necessary for this study.

In their political and social structure, the Anlo present some points of difference from the other Ewe areas. One important aspect of the Anlo political organisation is that it is far more centralised than that of any other Ewe area. Although each Anlo town or village has its own chief as one would find elsewhere in Eweland, yet there is a Paramount Ruler, the Awoamefia, to whom all other chiefs owe political allegiance. The seat of the traditional administration is at Anloga, where the Awoamefia lives. In this respect the Anlo political organisation is a departure from the general Ewe pattern and it bears a great similarity to that of the centralised Akan states of Ghana such as Akim Abuakwa or Akwapim; but the degree

of centralisation does not go as far as we find in Ashanti with an extra tier in the hierarchy.

Another feature of Anlo social organisation which differentiates it from other Ewe groups is that it is organised on a kind of "clan system". The Anlo clan system is similar to the Akan one in the sense that the members of each clan claim descent from a common ancestor and they are scattered throughout the various towns and villages of Anlo; and each clan has its respective totems, taboos and avoidances. This type of social organisation is not found among other Ewe-speaking people of Ghana. There is some uncertainty about the number of clans among the Anlo. Some think that there are thirteen clans. Recently Gaba has condemned as unwarrented an attempt to fix the number of clans at twelve, so as to correspond to the twelve tribes of Israel as stated in the Bible, an attempt whose objective seems to be to trace the Anlo origin to a connection with ancient Israel.[1]

The Anlo are a coastal people whose livelihood is linked with the sea, lagoons and rivers. Their mode of living is, therefore, very similar to that of other neighbouring coastal peoples, such as the Ga, the Ada and the Fante. They bear some resemblance to the Ada and other Ga-Adangbe people with whom they have constant intercourse. This may explain why so many Ada people bear Ewe names!

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1. C.R. Gaba, Anlo Traditional Religion, Unpublished Ph.D. thesis, University of London, 1965, pp.29-30.

In present-day Ghana, the Anlo form one political administrative district in the Volta Region. The district is known as the Keta District; but some refer to it as the Anlo District. The reason is that, while the traditional seat of administration is at Anloga, the modern political administration has its headquarters at Keta just a few miles away.

The Tongu: The Tongu[1] area stretches generally closely along the Volta River. In fact the meaning of "Tonu" in Ewe is "along the river" and it is only a term of reference applied by other Ewe groups to those of their colleagues bordering the Volta River and whose livelihood and industry are intricately bound up with that river in fishing and other riverain trade. The Tongue Ewe also share some common modes of living with the Ga-Adangbe people near the Volta River, which the Ewe of the north do not.

Tongu is not a traditional political unit in any sense similar to the Anlo. It is more a means of identifying an area than a term of political application. For, unlike the Anlo, the Tongu people have no centralised political organisation and each town or village is an independent unit. Indeed it would seem that the only unifying factor is the common dialect over the area along the Volta which they occupy; and another consideration is that because of their closeness to each other and their common riparian livelihood, they have similar customs

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1. Sometimes spelt as "Tonu".

and living habits. These are the distinguishing features which justify referring to them here as a single unit.

The people of the Tongu area were never in the German colony of Togo. They have remained in the Gold Coast colony and under British rule until Ghana attained independence. But the Tongu area is a relatively backward one. Their dialect differs from the Anlo dialect of the Ewe, but is regarded by some to be fairly close to the latter; at least it is closer to Anlo than to the northern Ewe dialects.

At present all the Tongu area is administered as one district, known as the Tongu District, with the district headquarters at Sogankope, a small village which is rapidly developing into a township. A few of the Tongu villages lie across the River Volta (i.e. west of the Volta), but these are unimportant ones, save Tefle.

The Northern Ewe-speaking People of Ghana

The Northern Ewe-speaking people of Ghana, as here referred to, are those Ewe-speaking areas of Ghana which lie outside both the Anlo and Tongu areas. The people included in this area are indeed geographically north of both the Anlo and Tongu people.

The area is covered by a large number of dialects, each of which is identifiable with a particular chiefdom. For example, the Ho dialect differs from both the Kpando and Gbi dialects, but the latter two are also different from each other.

However, people from one chiefdom in the Northern Ewe area easily understand the dialects of all the other chiefdoms of the area (unlike the difficulty in understanding, say, the Anlo dialect). This mutual comprehensibility of dialects, of which all are basically the same, especially when contrasted with Anlo and Tongu dialects, is a unifying factor and one fact which marks out the area as a convenient land area for the present study. In addition, their living habits, social and political organisation and systems of laws are very similar.

Most of this area, with the notable exceptions of Peki, Awudome and part of Kpeve, was formerly in the western part of the old German colony of Togoland. We may, therefore, also correctly describe the Northern Ewe-speaking people of Ghana as being the people of the Ewe-speaking area of the former British Togoland, together with Peki, Awudome and the rest of Kpeve. It must be understood, therefore, that the area, unlike the Anlo area, came under continuous British administration only after the 1914-18 War, following the defeat of Germany. This is an important fact which accounts for the comparatively undeveloped state of the area, as well as the fact that the generation of British-type educated people in this area is a relatively young one (there are still some old German scholars living in the area).

The Northern Ewe-speaking area of Ghana, as stated above, lies north of both Anlo and Tongu areas. It is entirely in the hinterland, without any sea belt, because it borders southwards on the Anlo and the Tongu who are nearer the sea. Towards the north it shares boundaries with the non-Ewe area of Buem-Krachi District. Its uppermost area is the Hohoe district, Hohoe being the last Ewe town northwards, after which one would come to Santrokofi, Lolobi and Likpe, who have their own different languages. On the east the boundary is formed with other Ewe people in the Republic of Togo; and on the west the Volta River roughly separates them from the Akan tribes of the Eastern Region of Ghana.

For the purposes of central government administration in Ghana, the area here described as comprising the Northern Ewe-speaking people falls precisely into two administrative districts. These are the Ho District and the Kpando District, with each of the district headquarters located in the towns by which the districts are respectively described. Ho is also the regional capital of Volta Region which comprises all Eweland in Ghana, together with the non-Ewe people of the Buem-Krachi District.

The area contains small enclaves of non-Ewe-speaking people with their own native languages which are entirely different from and wholly unlike the Ewe language. These are Logba, Tafi and Nyangbo in the Kpando District and Avatime in the Ho District. Some of these people are usually described

by writers as being autochthonous, in the sense that they were the original inhabitants of the area before the advent of the Ewe people. It is not the aim of this work to enquire into this claim.

The people of Logba, Tafi, Nyangbo and Avatime have been described as non-Ewe people, but only because they have their own native tongues. It would be perhaps more accurate to describe them as bilingual because, by and large, every adult in these areas speaks some Ewe as well. The fact remains, however, that they are not Ewe properly so called and should not be confused with them as is sometimes done.

It must be mentioned, however, that these non-Ewe populations have a great deal in common with their Ewe neighbours because they are minorities enclosed here and there by the Ewe people, with whom they have daily intercourse. As a result, much of what is said about the Ewe may be applicable to them as well. However, for the purposes of this thesis, the non-Ewe "islands" have been excluded from strict consideration. Although it was possible to talk to some people from these areas, no field research was conducted in these pockets of non-Ewe-speaking people. Hence any statement of the law that may be made shall not be taken to refer to them; and this though in fact it may well be that there is hardly any material difference between theirs and the customary laws of the Northern Ewe-speaking people of Ghana.

It has already been stated that the Northern Ewe-speaking people of Ghana fall precisely into two Districts, viz. the Kpando District and the Ho District. Each of these administrative districts is further sub-divided into Local Council areas, each consisting of several chiefdoms.

Under the present structure the Kpando District is constituted by three Local Councils, viz.

(a) The Kpando Local Council, with its headquarters at Kpando, comprises:

(1) Kpando	(5) Liate (with Gbledi)	(9) Have
(2) Gbefi	(6) Tsome	(10) Logba
(3) Ve	(7) Sovie	(11) Tafi
(4) Leklebi	(8) Agate	(12) Nyangbo

(b) The Dayi Local Council, with its headquarters at Kpeve, consists of:

(1) Kpeve	(5) Botoku	(9) Kpalime
(2) Anfoega	(6) Tsrukpe	(10) Aveme
(3) Vakpo	(7) Woadze	
(4) Wusuta	(8) Peki	

(c) The Gbi Local Council has its headquarters at Hohoe and is formed by:

(1) Gbi	(3) Fodome
(2) Alavanyo	(4) Wli.

Similarly there are now four Urban and Local Councils in the Ho District. These are:

(a) The Ho Urban Council, having its headquarters at Ho (the Regional and District Headquarters), with its area of authority extending over:

(1) Ho
(2) Tanyigbe
(3) Takla
(4) Hodzo
(5) Akoefe
(6) Tokokoe
(7) Kpenoe
(8) Nyive (Ghana)

(b) The Dutasor Local Council, with Awudome-Anyirawase as its seat, embraces:

(1) Awudome
(2) Hlefi
(3) Tsyome
(4) Anfoeta
(5) Etodome
(6) Kpale
(7) Abutia
(8) Sokode
(9) Ziavi
(10) Klefe
(11) Akrofu
(12) Goviefe

(c) The Adaklu-Anyigbe Local Council, with its headquarters located at Agotime-Kpetoe, consists of:-

(1) Adaklu
(2) Ave-Dakpa
(3) Dzalele
(4) Ziofe
(5) Agotime.

(d) The Yingor Local Council has its headquarters at Dzolokpuita and comprises:

(1) Dzolo
(2) Kpedze
(3) Saviefe
(4) Avatime
(5) Homuta
(6) Kpoeta
(7) Matse
(8) Akoviefe
(9) Dodome
(10) Lume
(11) Shia
(12) Taviefe
(13) Akome
(14) Atikpui
(15) Klave
(16) Hoe.

The chiefdoms listed above, excepting the non-Ewe-speaking areas already mentioned, constitute the Northern Ewe-speaking people of Ghana. They are the people with whom this work concerns itself. When we look at the Ewe within the frontiers of Ghana alone, they are the Northern Ewe and so are described as "the Northern Ewe-speaking people of Ghana". When, however, we consider the whole of Eweland, then the area would be properly described as Northwestern Eweland.

The Northern Ewe-speaking people of Ghana, as we have seen, lie entirely in the hinterland without a coastal belt. The area falls roughly between Latitudes 6^{o} 20" north and 7^{o} 10" north, more or less. Thus it lies on roughly the same latitudinal parallel with the forest areas of the Brong-Ahafo, Ashanti and Eastern Regions of Ghana. The land has been described in these terms:

> The southern section lies within a zone of savannah land, with light forest which extends inland ... the bush thickens gradually towards the north, the northern part of the section being true forest country. The southern quarter consists of flat plain with one conspicuous hill (Adaklu - 1,965 feet) in the centre ... 1

The main occupation of the people is farming. Formerly this meant subsistence farming; but now cocoa, coffee and palm fruit are among the agricultural produce of the area. There is, then, an occupational difference between this area, and the Anlo and the Tongu areas whose main industries are fishing and other work connected with the sea, lagoons and rivers. In fact, in terms of occupation, staple foods and living habits, the Northern Ewe of Ghana have perhaps more in common with the Akan people than with the Anlo and Tongu. For example, fufu is the staple food of the Northern Ewe-speaking people of Ghana as it is of the Ashanti and other Akan people; but the Anlo have, as their staple food, akple which is made of roasted corn flour and cassava dough.

1. Report of His Majesty's Government in the U.K., to the Trusteeship Council of the United Nations on the administration of Togoland under United Kingdom Trusteeship, 1947; Colonial No. 225; p.4.

In addition to farming of all types, pottery is a traditional industry of Kpando, Gbi (Hohoe) and other areas. In some chiefdoms cloth weaving and wood carving are among their industries. Those who live close enough to the Volta River engage in fresh-water fishing, and this sphere of activity is assuming a greater importance as a result of the artificial Volta Lake which has led to an increase in the different species of fishes.

Some old German geological survey maps seem to suggest that there are some mineral deposits in the area. However, no mines have been opened and this may mean that any such mineral deposits that there may be are not in commercial quantities to justify the expense of prospecting therefor. There is a total absence of modern industries in the Northern Ewe-speaking area of Ghana. Several of the towns like Ho and Hohoe have pipe borne water; but there is no electricity supply in any of the towns except Ho.

It may be desirable to refer to the name by which the people are generally called. Just as the other Ewe have given a name to the Tongu people, so also have the Anlo given a name to the Northern Ewe-speaking people of Ghana. The Anlo call the area "Ewedome". This literally means "inside the Ewe". It would seem, therefore, not to be far from correct when a foreigner translates this as "Ewe proper".[1] For sometimes the

1. Amenumey disagrees with Ward, for instance, who translated this as "Ewe proper" in the sketch map of her thesis already cited. See Amenumey, op.cit., p.39, n.1. However, Amenumey does not offer an alternative English rendering.

Anlo also refer to this area as "Ewe me", meaning "the Ewe area". It seems that this is also the area which the Europeans of the 18th and 19th centuries referred to as "Krepi" (sometimes spelt "Crepe" or "Kereaapey").[1] Certainly this is the term used for the area by Ward in his work on the history of modern Ghana.[2] It would appear, however, that "Krepi" properly refers to the people of Peki and its environs, like the Guan people of Anum and Boso which were under Peki suzerainty.[3] The origin of the term is not clear; neither is its meaning certain. Needless to say, the people do not call themselves "Krepis". They refer to their area as "Ewe me", which is "Eweland".

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1. See D.E.K. Amenumey, op.cit., p.38.
2. W.E.F. Ward, A History of Ghana, Allen & Unwin, London, 1966, p.134 et passim.
3. See esp. W.E.F. Ward, op.cit., p.134.

CHAPTER II

THE POLITICAL STRUCTURE

The General Political Structure

The Northern Ewe-speaking people of Ghana are organised in politically centralised chiefdoms of varying sizes. In contradistinction to the Anlo Ewe, the Northern Ewe of Ghana are not organised in large political units of any size approaching that of the Anlo Ewe or the highly centralised Akan peoples of Ghana. The Northern Ewe units are generally smaller, often only of the size of a township or even a village, but with different population levels. Nevertheless, these Ewe units exhibit the common feature of a central political organisation with a Head Chief or Fiaga at the apex of the political power structure.

The result of the organisation of the Ewe in small (though centralised) political units is a proliferation of "native states" in Ghana's Northern Eweland. Each chiefdom being separate and independent of all others, we have in this area alone about seventy autonomous chiefdoms. In 1934, the following observation was made on the native state structure

in the Southern Section of the then British Mandated Territory of Togoland which embraced most of the area now under consideration:

> ... In the Southern Section frequent mention has already been made that at the time when this area came under British Mandate there were no less than sixty-eight[1] mutually independent divisions, several of which consisted of only one village, and one having a population at the last census of not more than forty-nine. Whether the divisions had always been independent it is difficult to say at this stage of the history of the country. Various chiefs asserted paramountcy over others, but it is probable that alliances for defensive purposes existed among some of the divisions which did not involve allegiance of one to another during times of peace. 2 But whatever the reasons, the numerous small independent divisions were a big hindrance to any form of local government, and Political Officers carried out extensive propaganda on the advantages of amalgamation. The first natural reluctance to abandon an independence long since acquired soon disappeared when it was realised that the paramount chief of an amalgamated state would have no right to interfere with the management of the internal affairs of the respective divisions unless invited by them to do so ... 3

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1. This figure included, in addition to the Northern Ewe of the present Ghana, also the semi-Akan areas of Buem and other non-Ewe enclaves in the area; but it also excluded Peki, Awudome and other areas then in the Gold Coast Colony.

2. In particular, Peki claimed suzerainty over most of the area, as far as Alavanyo, Kpando and Kpedze. On the other hand Kpando also claimed paramountcy over places like Sovie, Awate and Tsome - see, e.g. Le Lievre, "The Kpando Division" (1925) 1 G.C.R. 29-52.

3. Report by His Majesty's Government in the United Kingdom to the Council of the League of Nations on the Administration of Togoland under British Mandate, 1934; Colonial No. 107; pp. 5-6, paragraph 7.

The facts emerge from the above report that small independent chiefdoms had been existing under the traditional political structure and that whatever amalgamations of the units later developed were deliberate creations of the colonial authority. It is necessary to emphasise this because the Administering Power indeed succeeded in creating "States" out of the independent chiefdoms in the 1930s. Those relevant to our area are the Peki State under Peki, the Asogli State under Ho, the Hokpe State (sometimes called Avatime State) under Avatime, and the Akpini State under Kpando.[1] The Ewe areas which rejected the merger with others under the "native states" system are the independent chiefdoms of Gbi, Ve and Anfoega. Later, in about 1949, Gbi, Ve and the strictly non-Ewe chiefdom of Likpe formed the short-lived Atando Native Authority with its headquarters at Hohoe. This was not a "State" but merely a local government unit. In any case, the Atando Native Authority disintegrated on the introduction of elective local councils in 1952. Therefore, the four "States" of Peki, Asogli, Hokpe and Akpini and the three independent chiefdoms of Gbi, Ve and Anfoega were those in existence in the area in 1952.

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1. These "States" were created under the Native Administration (Southern Togoland) Ordinance (No.1 of 1932).

Following the independence of Ghana, the Government encouraged the dissolution of the amalgamations because they were clearly unpopular with both the chiefs and the people. They were thus broken up by a policy of indiscriminate elevation of chiefs to the status of "Paramount Chief". To rectify the anomalies inherent in the indiscriminate elevation of chiefs by the old regime, however, the Military Government of Ghana[1] took an equally unpopular step by decreeing that every chiefdom and division should revert to what is in effect the status of 1952.[2] The present legal position, therefore, is that the four "States" have been resuscitated, though now known as Traditional Areas.[3]

The principle on which the amalgamations of the chiefdoms were founded was non-interference in the internal affairs of the composite units. It was, of course, not always respected. For instance, this principle did not prevent the Akpini State Council at Kpando from deciding in 1935 that Togbe Gayi (who objected to joining the Akpini State) was destooled as Head Chief of Wli and, by the same decision on the same day, declaring Togbe Titi enstooled as its Head Chief. This was not only a usurpation of the rights of enstoolment and

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1. i.e. the National Liberation Council which assumed power since the coup d'etat of 24th February, 1966.

2. The Chieftaincy (Amendment) Decree, 1966, (NLC Decree No. 112), of 2nd December, 1966, especially paragraphs 1 and 2 thereof.

3. By virtue of Section 11 of the Chieftaincy Act, 1961, (Act 81).

destoolment which were inherent in the people of Wli, but has also been the one cause of constant friction, instability and trouble in Wli right up to today. In any case, as the policy declaration made clear, the formation of the amalgamations did not alter the independent status of the composite chiefdoms, especially with respect to their internal affairs and the regime of laws applicable to them. What we shall say, therefore, will not take account of the amalgamations of "Traditional Areas" or chiefdoms as a result of pressure from successive central governments of the Gold Coast and Ghana. For, although Kpando and Alavanyo are both in the Akpini State, yet a rule of law applying in Kpando is not ipso facto applicable in Alavanyo. As we see from the report quoted above, the original purpose of the amalgamations in the 1930s was to facilitate "local government" under the colonial policy of indirect rule. This was necessary because elective local and urban councils had not been introduced. Customary law and traditional institutions and their structure were, therefore, by and large, not interfered with.

That the amalgamations into "native states" was a deliberate innovation of the British Colonial Government had not been denied nor regarded as a secret by that Government. On its general policy with regard to native states in Southern Togoland, the British Government in 1936 said:

> In order to understand the present position, it must be remembered that the formation of these States does not represent a restoration of an earlier system of native rule such as existed among the majority of the Gold Coast tribes, where a Head Chief exercised authority over a number of sub-chiefs. The Ewe speaking divisions of the Southern Sphere, from the time of their settlement in this area two centuries ago, existed as complete and independent patriarchal groups varying in strength from 6,000 people to less than 300, the largest groups comprising several villages and occupying a considerable area of land, while the smaller ones consisted of one village only. Apart from their common origin, language and customs, there has been no bond to unite these independent groups into larger political units and although friendship for mutual protection no doubt existed, these alliances for purposes of war never appear to have developed into permanent unions ... 1

In describing the traditional political and legal system, therefore, we shall concern ourselves only with the pattern and structure evolved by the people themselves, notwithstanding any measure of central government efforts at re-grouping or control. For, to many people of this area, the word "amalgamation" has unpleasant connotations and evokes inglorious memories of the past. The people live and organise their affairs in accordance with only the law and practice recognised within the frontiers of their traditionally independent chiefdoms. They can hardly think in terms of the so-called "States" forged out of the process of amalgamation.

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1. Report by His Majesty's Government in the United Kingdom to the Council of the League of Nations on the Administration of Togoland under British Mandate, 1936; Colonial No. 130; p.2, paragraphs 8 and 9.

The Internal Political Structure: The du

The internal political structure of any unit of Ewe society is organized on the basis of a de-centralisation of authority. Each political unit is thus a microcosm or macrocosm of a hierarchical state, depending on its population strength.

The largest political unit is known as du in Ewe. In some dialects it is edu. Sometimes it is also referred to as duko; but duko is also a word used in reference to a nation, so that we have Ewe duko ("the Ewe people") and Ghana duko ("the state of Ghana"). To avoid confusion, we shall confine ourselves to the word du, which is the more popular term.

What is the du? To find an apposite expression for it in the English language has always been difficult.[1] Some call it "town", which in a sense it is, especially in the few cases where all the divisions are grouped in one place; but this is unsatisfactory because it does not portray its political significance. In his Ewe-English dictionary, Westermann translates du as "1. village, town, together with the territory belonging to it; a chieftainship. 2. a foreign

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1. That is perhaps why Barbara Ward says there is "confusion in the Ewe terminology". See B.E. Ward, op.cit., p.216. There is really no confusion in the terminology for those who speak the language; the difficulty of finding English equivalents should not be confused with "a confusion".

town".[1] However, as this is the same unit that both Spieth and Westermann called stämm in German,[2] it has come to be known sometimes as "sub-tribe". Perhaps this is how the term sub-tribe crept into usage in relation to the Ewe. It is for instance used by Ward[3] and other writers. The term, however, appears to be most inappropriate because the idea of a "sub-tribe" postulates some major sub-division of a tribe, whereas the units so referred to are small settlements without any sub-tribal significance. A near analogy would be the inaccuracy of referring to Bristol or Woking as a sub-tribe of England, or Aberdeen or Edinburgh as a sub-tribe of Scotland. Neither can we refer to Jamasi, Mampong or Ejisu as a sub-tribe of Ashanti in Ghana, or Begoro as a sub-tribe of Akim Abuakwa.

The alternative would be to refer to the units as "states", which indeed they are within the contemplation of the customary law, insofar as politically each unit is autonomous and not subject to any other power. But this could be confused with

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1. D. Westermann, Ewefiala or Ewe-English Dictionary, Dietrich Reimer (Ernst Vohsen), Berlin, 1928, p.18.

2. The term "stämm" in German is used passim by D. Westermann in his Die Glidyi-Ewe in Togo, Berlin, 1935, and by Jakob Spieth in his Die Ewe-Stämme, Berlin, 1906, and in other works by these scholars.

3. B.E. Ward, op.cit., passim.

the modern "State", as well as the "State" in the Akan sense of popular usage in Ghana. Moreover it could cause an even greater confusion with the larger groupings or "States" formed in the Ewe area itself through the Colonial Administration's policy of amalgamation. The solution adopted by the Colonial Government was to designate the units as "divisions". The word "division" being a sufficiently neutral term, it could conveniently be applied to an area consisting of only one small unit as well as large ones with several settlements. One objection to this term, however, is that the du is politically an entity in its own right and not a division of any other unit.

It is suggested, if only for lack of a better term, that we should refer to the du as a "chiefdom". The term "chiefdom" is suggested because the du is the largest political unit which is under the authority of a Head Chief. It is a term which by its very meaning gives due expression to the emphasis on the political aspect of the du as an autonomous political entity which is ruled by a Head Chief.

Among the Northern Ewe-speaking people of Ghana, the du or "chiefdom" is the largest political unit. It is constituted by people who are united politically under a recognised Head Chief. It is a sine qua non that each du must have a Head Chief; in other words, there is no du without a Head Chief or Fiaga. In the political sense, the chiefdom or du is an autonomous,

sovereign and independent unit. The Head Chief, properly known as Fiaga, is its Paramount Ruler, and the Fiaga is not subject to any other political superior.

The chiefdom occupies a definable land area over which the Fiaga has absolute jurisdiction and authority, including legislative, judicial and executive powers for the maintenance of the social and political order. In most cases, however, the divisions constituting the chiefdom are scattered over a stretch of land. In a recent interview with Togbe Addai Kwasi X, Fiaga of Awudome at Awudome-Anyirawase, he lamented that because his divisions of Tsito, Anyirawase and Avenui are separated from each other, there is a tendency to treat them as different towns whereas in fact they are only part of the seven divisions of his chiefdom of Awudome. It is still a single chiefdom, although its divisions are scattered. We would say, therefore, that each chiefdom is a political unit which exists within a territorial framework.

Every chiefdom has a fixed and determinable population, though population census is unknown to the traditional rulers. Citizenship is ordinarily acquired only by birth and it seems that ordinarily it cannot be renounced by a voluntary act.[1] In the past it would seem that citizenship could be acquired by settlement and integration, and it could also be lost through

1. The possible exceptions are through the customary form of naturalisation. See pp. 173-174 infra.

slavery; but it is extremely doubtful whether these can apply today. Every citizen owes allegiance to the Fiaga, and serves the Fiaga through a lesser political authority. Allegiance to the Fiaga is expressed for instance, in an obligation to render military service in time of war, and a duty to join in communal labour to avert disaster or a calamity, and in operations to preserve the territorial integrity of the chiefdom. Generally the payment of tribute does not seem to be an Ewe practice.

Common descent is not necessary for the identification of the du or chiefdom. Indeed the idea of a common descent is hardly ever canvassed and it is certainly not a unifying factor. The du is a political and not a kinship organisation. In larger chiefdoms like Peki, Gbi, Anfoega, Kpando and Ho, the tradition rather seems to be that their numbers had been enlarged by a fusion of people of different ancestral origins. It would seem, however, that the integration of new members into the community is no longer a continuing process. The once amorphous units have now become stabilised with permanent populations, so that new members cannot now enter them en masse.

In view of what we have said of the du, we may describe it as a sovereign and autonomous political unit, united by the acceptance of a common legal system and organised within a territorial framework, under a Head Chief or Fiaga, to whom all citizens owe their ultimate political allegiance. The citizens

need not, and usually do not, share a common descent. They are, however, clearly and fairly easily identifiable, in the Northern Ewe areas of Ghana by their respective dialects of the Ewe language.[1]

Although each chiefdom is organised on the basis of a central political authority, it does not imply an absolute concentration of power at the centre as understood in the modern political concept of "democratic centralism". It only means that there is a central authority, from whom all subordinate authorities derive their power. In the Ewe chiefdom, authority is largely decentralised with the devolution of powers and functions to the constituent divisions. For, structurally each chiefdom consists of a number of divisions which are known as duta or gbota. Each division has its own chief, the fia or "divisional chief". In practically all cases the divisions are scattered about with considerable distances separating them from each other and from the headquarters division. Effective administration, therefore, can only be in the hands of the divisional chief. The divisional chief has a free hand in the exercise of his political, administrative, judicial and executive functions; but in all these he remains

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1. This may require a qualification. Some of the dialects are very similar, especially when a foreigner hears them. The dialects of Peki and Gbi (Hohoe), for example, are very identical though the two areas are separated by many miles and have many other chiefdoms lying between them; but this is because Peki and Gbi constituted a single chiefdom until after the Notsie days.

answerable to the Fiaga and an appeal lies to the Fiaga from anybody aggrieved. The legislative power of the divisional chief is limited because generally the same rules of law are enforceable throughout the whole chiefdom, so that divisional legislation is void to any extent that it is repugnant to a generally applicable law. The Fiaga is not only a primus inter pares but a real political overlord. The fia or divisional chief is a vassal of the Fiaga, but curiously enough he is not appointed by him but by his own division. Every citizen serves the Fiaga through the fia of his own division.

The number of constituent divisions in any chiefdom varies according to size and population. A place like Woadze is only a single duta or division constituted into a chiefdom. This is, of course, an exceptional case; but it nevertheless presents a microcosm of the state structure because the Head Chief has subordinate chiefs under him. It may be a classic example of Forde's "miniature state".[1] A chiefdom like Awudome has seven divisions, Ho has four, Anfoega has twelve, Peki has seven and Gbi formerly had seven but now has nine. The number of divisions offers no index to the size or population of a chiefdom because a division may be a tiny settlement whereas

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1. In a survey of traditional political systems in West Africa, Forde observes that "... they differ enormously in scale, ranging from ..... populations of hundreds of thousands down to miniature states in the size of a village". See D. Forde, "The Conditions of Social Development in West Africa", in Civilizations, (1953) Vol. III, No. 4, p.473.

others are very large; but it does mean that the Fiaga has many divisional chiefs under him.

The seat of administration is located in one of the divisions, where the Fiaga resides. The headquarters division of Anfoega is Anfoega-Akukome, that of Kpando is Kpando-Gabi, that of Awudome is Awudome-Anyirawase and that of Gbi is Gbi-Hohoe. In most places, like Kpando, Anfoega, Ho and Gbi, the Fiaga, in addition to his position as head of the whole chiefdom, is also chief of his own division. Thus Togbe Gabusu is Fiaga of Gbi as well as fia of Gbi-Hohoe division; Togbe Dagadu is Fiaga of Kpando and at the same time the fia of the division of Kpando-Gabi. In Fodome the information is that the Fiaga has no direct divisional responsibility but is responsible for the affairs of the chiefdom as a whole.

As between the different divisions of the chiefdom, there is a definite order of seniority inter se. This is reflected in the table of precedence as affecting the divisional chiefs or fiawo at state functions, where seniority is shown even in the sitting arrangements.

The above has been a description of the du or chiefdom in its political construction. This is irrespective of size because size is irrelevant, once there is the state structure exhibiting the essential form outlined above and there is a single regime of law applicable throughout the territory. It is as irrelevant as is the relative difference in the sizes of

Gambia with a population of about 300,000, Togo with 1,660,000, Ghana with 8 million, and India with over 400 million people, when recognition is extended to each of these as sovereign states in international law. Some of the Ewe chiefdoms, however, have not been relatively too small. For instance, the chiefdom of Gbi consisted of 7,822 people, Kpando had 7,661, Ho had 7,481 and Anfoega had 4,976 in 1948.[1] The comparative figures for some Akan areas show that Sefwi-Bekwai had a population of 7,546, the Essumeja State (in Ashanti) had only 3,776 people and Eguafo State in the Cape Coast District (now Central Region) had only 3,208.[2] In spite of the smallness of these sizes, these Akan areas were granted the "state" status with their traditional rulers designated as "Paramount Chief". If the criterion was the size of population, then, on the basis of the figures, there could be no justification for not having recognised as "states" the chiefdoms of Gbi, Kpando, Ho, Anfoega and the other larger ones within that population range. Perhaps it was due to a lack of proper understanding of the Northern Ewe political organisation.

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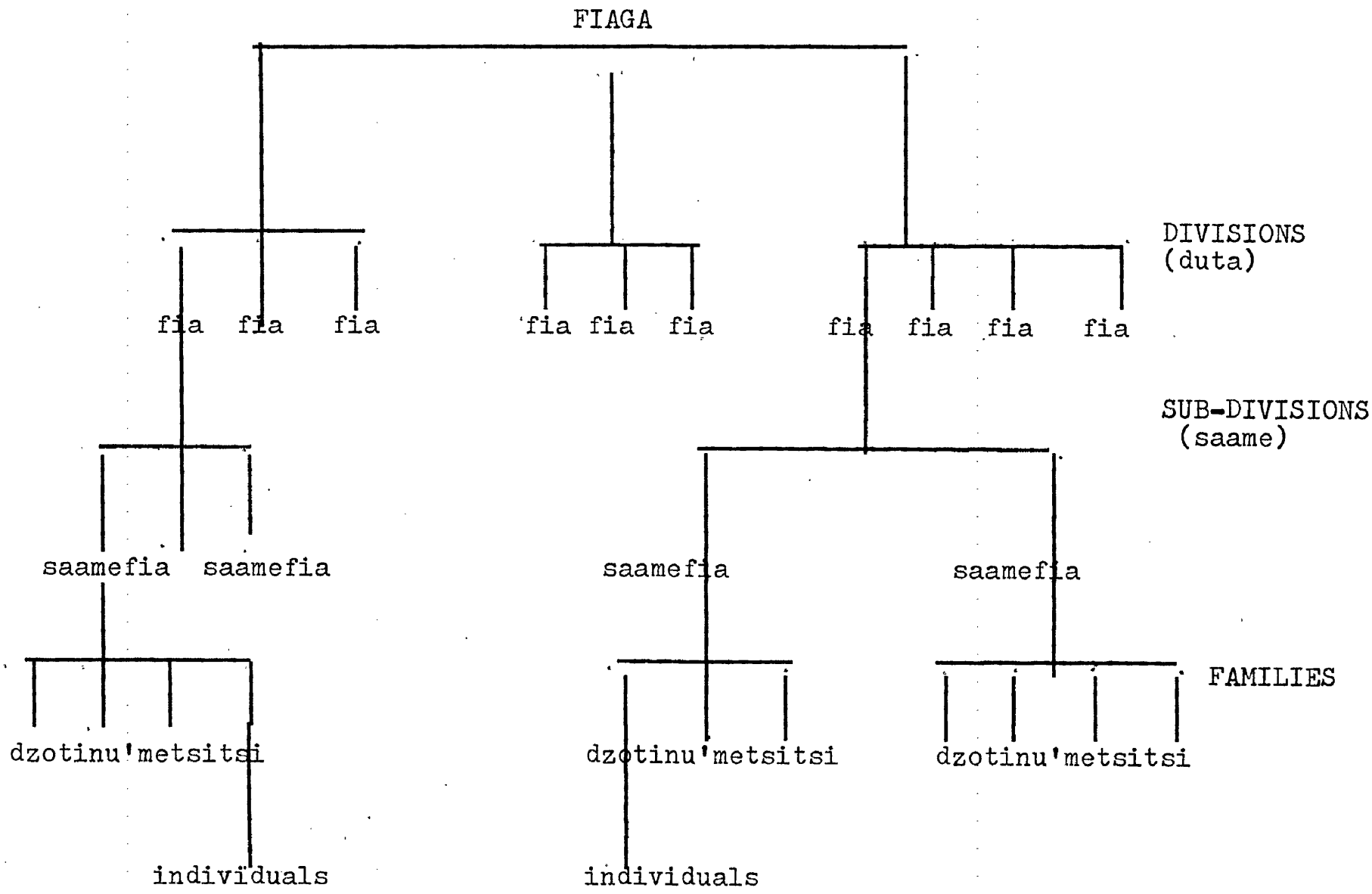
1. The Gold Coast Population Census, 1948, Crown Agents, London, 1950.

2. Ibid. Other examples from Cape Coast District are Mankessim State with a population of 6,048, Esiam State with 3,704 and Hemang State with 1,356 in 1948.

THE HIERARCHY OF POLITICAL STRUCTURE OF A CHIEFDOM



The Internal Political Structure: The Duta

We have said that each du or chiefdom consists of divisions which are known as duta or gbota (pl. dutawo and gbotawo). The division is the unit for effective political administration. As far as the strict position of the Fiaga or Head Chief is concerned, this is the unit known to him and whose ruler, the fia, owes direct allegiance to him and is responsible to him. Every duta or division is, therefore, ruled by a fia or divisional chief, who is immediately subordinate to the Head Chief.

The duta or division, however, is an exact replica of the du or chiefdom in its political and administrative organisation. For each division is again split for political and administrative purposes into smaller units which are called saa (pl. saawo). We may refer to the saa as a "sub-division". Each saa or sub-division normally has its own chief, known as the saamefia or "sub-divisional chief", who is responsible to the divisional chief as his immediate political overlord. The sub-divisional chief administers the affairs of his sub-division only, while the divisional chief has the overall responsibility for the administration of the division as a whole. We see then, that the chiefdom is a macrocosm of the division in its hierarchial political structure and devolution of power.

The number of sub-divisions in any division is not fixed. To take examples from Gbi, Gbi-Wegbe has five sub-divisions, Gbi-Kpeme has four, and Gbi-Hohoe (the capital) has four. The sub-divisions of Gbi-Kpeme are Wodevi, Asedukluvi, Daklovi and Kitivi; in Gbi-Hohoe they are Tokoni, Ahado, Tsevi and Trevi.

It has been pointed out that the constituent divisions of each chiefdom are usually separated from each other. It is not so with the divisions. As a rule, each division is a compact unit. All the inhabitants of each division live in one place, though they are organised into their component sub-divisions. Therefore, unless one section is separated from the rest by natural or physical phenomena such as a marsh, lake or physical elevation, one should find the division or duta as a single territorial unit.

The fact of the compactness of the division should not, however, give rise to any suggestion of a common descent for its members. For the division, like the chiefdom, is not a kinship but a political organisation. In Gbi-Hohoe, for example, there is no common descent of members of say the Ahado and Tokoni sub-divisions or any other sub-division for that matter; but they all dwell in the same place and are territorially identifiable as a single unit. It is perhaps only the fact of common local residence and the resulting facility of inter-marriage that make the inhabitants of a

division fairly closely related by both affinity and consanguinity.

Just as in the chiefdom as a whole we speak of seniority of the divisional chiefs, we see also that within the division itself the sub-divisional chiefs have their order of seniority inter se. If we look at the Gbi-Bla division of Gbi, we find that the ruling chief is Togbe Buami of the Tsrivi sub-division, who is also the divisional chief of all Bla. The Tsrivi sub-division is thus the first in political superiority in Gbi-Bla. The next in order of seniority is the sub-division of Bla-nyigbe; and this is followed by Bla-dzigbe.

The normal position is, as we have stated, that each sub-division is ruled by a political head known as saamefia or sub-divisional chief; but there are exceptions. In Gbi-Kpeme in Gbi for example, the Kitivi sub-division has no sub-divisional chief. This means that this sub-division has no ancestral stool on which a chief can be installed. When this is the case, it seems that some other office of a comparative importance is reserved to the sub-division. In the Kitivi example, the sub-division has the constitutional privilege and responsibility of providing the tsiami ("spokesman" or "linguist") to the divisional chief of Gbi-Kpeme as a hereditary office.

The Internal Political Structure: The Saa.

Of the chiefdom and the division, we said that they are not kinship but political units. We cannot say the same of the sub-division or saa, a number of which constitute the division or duta. In the saa or sub-division we see the kinship organization dovetail into the political structure, so that we have a sort of a politico-kinship organization.

The word saa has not been found its appropriate English rendering. More often it has been translated as "clan". In so far as a "clan" means "a number of persons claiming descent from a common ancestor, and associated together",[1] it is difficult to argue that the term is inapplicable to the saa as constituted among the Northern Ewe. However, a long period of usage in Ghana has hallowed the word to such an extent that it seems to have a special application to a different social organisation among the neighbouring Akan of Ghana.[2] Among the Akan, the "clan", though its unity and identification is the belief in descent from a common mystical ancestress, does not involve a common local residence of members. The genealogical tree in all cases is lost, so that a member of, say, the "Asona

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1. The Shorter Oxford English Dictionary.

2. See, e.g. R.S. Rattray, Ashanti Law and Constitution, Clarendon Press, Oxford, 1929, pp.62-71 et passim; J.B. Danquah, Akan Laws and Customs, Routledge, London, 1928, pp.243-244 and K.A. Busia, The Position of the Chief in the Modern Political System of Ashanti, Oxford University Press, London, 1951, pp. 85-86.

clan" of Jumapo in New Juaben cannot establish any blood relationship between himself and another member of that clan in Mampongten in Ashanti or even in Effiduasi in the same New Juaben. The Akan "clan" is in effect only a sort of fraternity traversing political boundaries and having local chapters in the multitude of settlements in the Akan area. It is, therefore, inappropriate to apply the same terminology to what the Ewe call saa. For, among the Ewe, members of the same saa live close to each other in the same sector of the division.

Among the Ewe, the saa is a unit which has kinship and political facets in a harmonious combination. In its political aspect, it is the major component into which every division or duta is broken for political administration. For this reason, each saa has political officers answerable to the divisional chief; for the Ewe saa is organised only within the territorial limits of a division of a chiefdom. In this sense it obviously bears no resemblance to the "clan" in the Akan sense of a dispersed membership throughout all Akan areas and without any political functionaries devoted to clan affairs.

In the kinship aspect of its organisation, the saa, in a rather superficial sense, is likely to be taken to resemble the "clan" of the Akans. The reason is that the basis of the organisation of the Ewe saa is the descent of all its members from a common ancester. The difference, however, is that while the Akan theory of common descent is mystical, the common

descent of members of the saa in Eweland is real. There is no Akan citizen who can relate his genealogical connection with the founding ancestors of his "clan". On the other hand, among the Ewe, even if some of the connecting links are missing, the important personalities of the past can all be named, thus forming a coherent line of descent traced to the founding ancestor of the saa. While the "clan" of the Akan is totemistic, the Ewe saa is devoid of totemism and is usually named after its founding ancestor. As examples, the saawo known as Asedukluvi and Wodevi in Gbi Kpeme in Gbi were founded by Aseduklu and Wode respectively. The suffix "-vi", which here means "children of", is added to the name of the founder to denote the name of the saa. To take the example of the Asedukluvi saa of Gbi-Kpeme in Gbi, the originator of the unit was Asedu. The only son of Asedu was Klu, who was, therefore, known as Aseduklu or "Klu, the son of Asedu". The man Aseduklu became very important for the group because he was the forebear of the three great grandfathers who mark the point at which the families crystallised. Members of this saa are, therefore, known as "Asedukluviewo" or "Asedukluvitowo", which means "the children of Aseduklu".

Continuing with the Asedukluvi saa, we are told that after Aseduklu we come to his descendants known as Amega Edze, Katsriku and Atifufu. These three are the founders of the three families or dzotinuwo constituting the saa. Taking it from these great grandfathers, each member of the Asedukluvi

saa can trace his descent directly to the present generation through one of the three family heads. Amega Edze, with his paternal brother Ativoe, gave birth to Ave, Ave-Klu, Ave-Klutse, Edze Kosi, Kondobre, Eko, Dogbe, Nuvor, Gbogblovor and others. These and their patrilineal descendants are known as Amega Edzeviwo. The Katsriku-viwo include such names as Kudzi, Osai, Dade, Yordor, Kotoku and others; and Atifufuviwo are Dan~~a~~tsu, Agbodo, Soklitor, Akator and others. In the Asedukluvi saa, Amega Edze founded a stool and became the sub-divisional chief or saamefia of all Asedukluvi. The descendants of Amega Edze, or Amega Edzeviwo, are, therefore, the ruling house of the Asedukluvi sub-division.

It is suggested that this scheme of direct relationship of members of the saa is typical of all the Northern Ewe-speaking people of Ghana. The same neat and coherent genealogical line was related to me in all places in my personal interviews.

These are not the only points at which the Ewe saa differs from the Akan "clan". Membership of the saa usually implies common local residence in a part of the territorial area of a division. In each division it is normally possible to identify the saa or sub-division physically; for it used to be the rule that all members of the same saa built closely near each other. So, in Gbi-Kpeme in Gbi, for example, one can say "I am going to Asedukluvi" or Wodevi; similarly in Gbi-Hohoe one may say "I am just returning from Ahado, and will pass Tsevi before I get to my house in Tokoni". Such territorial integrity is not

associated with the Akan-type "clan".

Since the members of the saa are, as a rule, to be found occupying specific areas of each division, one may wish to call the unit a "quarter" in English. This is the term that Ollennu uses in describing the Ga political and social organisation. As far as the Ewe are concerned the only objection to its use is that the term "quarter" does not adequately portray the political aspect of the unit as part of a division. It is proposed, therefore, to call the saa a "sub-division" in English, to emphasise that it is the major component of the division.

The saa or "sub-division", because it is, in addition to its kinship nature, also a political unit, has certain political offices. The first is that it is headed, as a rule, by a chief, though of a lesser authority, known as saamefia (i.e. chief of the saa). We may call him "sub-divisional chief" or "divisional sub-chief". As the sub-division is the unit through which the divisional chief rules his division, the saamefia or sub-divisional chief owes a direct allegiance to the divisional chief or fia. A few of the sub-divisions have no sub-divisional chiefs; but, as pointed out earlier, such sub-divisions have other traditional offices in lieu of chieftainship.

The sub-divisional chief or saamefia has a stool and is enstooled in almost exactly the same manner as the superior chiefs. A sub-divisional chief, however, is the lowest grade of chief known to the Ewe. His stool is the lowest in the hierarchy. Nevertheless, the saamefia is also addressed by

the same title of Togbe which is used for the divisional and head chiefs. The rank and position of a chief addressed as "Togbe So-and-So" can, therefore, only be revealed by enquiry.

In addition to the saamefia or sub-divisional chief, there is also another functionary who partakes in the administration of the sub-division. He is the ametsitsi, or properly saame' metsitsi, which means "the elder of the sub-division". The ametsitsi is not a chief, but an elder; therefore he has no stool and there is no formal ceremony of induction for him. The office rotates among the families or dzotinuwo which constitute the sub-division. He is in the position of a "father" to the whole membership of the sub-division, rather by an appeal to kinship ties than to the political allegiance that is due to a chief.

The sub-division or saa itself, though the smallest political unit, is not indivisible. For every sub-division is composed of a number of families, known in places as dzoti or dzotinu. The families or dzotinuwo are kinship and not political units, each of which is headed by an elder who is directly responsible for its members' protection and welfare. This unit and its elder will be referred to again in our discussion on the family and property.

The Position Of The Chief

The political as well as social organisation of the Northern Ewe-speaking people of Ghana hinges on the institution of chieftaincy. The symbol of office of an Ewe chief is the stool (kpukpo or zikpui), as among the neighbouring Akan of Ghana. The stool is known as kpukpo or reverently as togbe kpukpo.[1] Sometimes it is called fia kpukpo; however, as kpukpo in Ewe means "a seat" or "a stool", this is likely to be confused with the actual stool on which the chief sits. The name togbe kpukpo, which really means "ancestral stool" is, therefore, the proper one for referring to the sacred symbol of office on which the chief actually never sits and which is, in fact, never exposed to public view. Every Ewe chief of whatever status must have a stool or togbe kpukpo.

The togbe kpukpo is considered as containing and symbolizing the soul of the people. Because of its identification with the great forebears and because the soul of the people is considered as enshrined in it, it is regarded as being of some spiritual potency. Hence, although it is wrong to equate it with fetish or tro, it has its own rituals. It is regarded as possessing the power of succour and protection for all who seek its refuge in times of adversity and to promote fertility

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1. Kpukpo is the dialect form for the Northern Ewe of Ghana. In the literary Ewe it is zikpui; so we would have fiazikpui and togbui zikpui.

in barren women, among other things. Persons embarking on distant journeys or hazardous enterprises, or those in quest of general prosperity, longevity or fertility, or requiring any type of spiritual intervention, say prayers by libation to the stool. Vows are made to it and are usually paid in sheep, fowls and eggs on the realization of one's wishes.

The office of chief at any level of the hierarchy is both hereditary and elective. It is hereditary in the sense that eligibility for election is determined solely by patrilineal membership of the ruling house by birth. The definition of the ruling house for this purpose, however, has not been without difficulty. Normally there is not much doubt about which saa or sub-division contains the ruling house; but there is often a dispute as to which family within the sub-division is entitled to fill the office. Often the substance of such disputes is that one of the families in the acknowledged sub-division claims an exclusive right to the stool, while others contend that succession to the office is on a rotatory basis within the families of the sub-division.[1] In view of the controversy in many areas on this point, all that can be said as a general proposition is that in certain chiefdoms a particular family in a sub-division constitutes the ruling house exclusively,

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1. Usually there are three or four families in each sub-division or saa, but this is variable.

while in others the ruling house consists of an entire sub-division or saa, so that each of the constituent families takes its turn in offering a candidate for the stool when a vacancy occurs through death, deposition or abdication.[1]

In addition to the hereditary element, the office of chief at all levels is elective, and there cannot, therefore, be an heir-apparent. Once a vacancy occurs on the stool, every male member of the entitled ruling house, adult as well as infant, is prima facie eligible for election to fill the vacancy. The final determinants are the general personal qualities of the individual as assessed according to the opinion of the "king-makers", who are the principal elders of the ruling house. Physical deformity as such is not a disqualification. The election itself is not a process involving the votes of all the subjects, nor even of all the members of the ruling house, but a secret choice by concensus among the king-makers. The choice is made at a secret meeting and the deliberations are not disclosed.[2] The electors do not assign reasons for preferring a particular candidate; but, depending

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1. In Larteh-Ahenease in Akwapim, where the Benkumhene of Akwapim comes from, the office rotates between Obrentiri, Owurae and Ntow families. See D.W. Brokensha, Social Change at Larteh, Ghana, Clarendon Press, Oxford, 1966, pp.109-110.

2. The election meeting is secret in Larteh also. See D.W. Brokensha, op.cit., pp.112-113. The secret process in Larteh and among the Ewe is in contrast with the open and public election of Chiefs in Ashanti and some other Akan areas as reported in e.g. K.A. Busia, op.cit., pp.9-13.

on the category of chief, the choice must be acceptable to the subordinate chiefs and elders of all the divisions, sub-divisions or families over which the chief is to rule. The leaders of the youth or sohewo are also consulted in secrecy. Because of the secrecy of the elective process it is difficult for ambitious individuals to canvass directly for their election, thus minimising the dangers inherent in open competition for election. The secrecy of the election also ensures that the chief-elect does not flee the realm; for, as a rule, there is unwillingness to hold the office of chief among the Ewe and candidates would run away on knowing of their choice for the office. The reasons for the unwillingness to serve include the fact that the exercise of the powers and functions of the office is very much circumscribed through control by the elders and other dignitaries. Furthermore, stool property among the Ewe is so meagre that the stool occupant cannot be sustained in comfortable circumstances from such property. The new chief is not made aware of his election until he is suddenly and forcibly seized and daubed with a traditionally sacred white clay.[1] He is then taken into customary confinement for the week-long installation ceremonies and rituals.

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1. Similar to the Larteh custom; but among the Ewe any part of the body, and not only the right arm, may be daubed with the white clay. See D.W. Brokensha, op.cit., pp.113, 114.

Because the Ewe chief occupies an ancestral stool in which are enshrined the soul of his people,[1] he stands between the living and the dead. For this reason his person is inviolate and sacred, and he has to observe some taboos and traditional avoidances. For this reason also he is connected with some rituals and ceremonial sacrifices, such as the purification of his ancestral stool; but his sacerdotal functions are minimal even if they exist at all.[2]

The chief combines in his person the legislative, executive and judicial functions of the realm. The Ewe chief, however, is not an autocrat; for on important issues he acts only on the advice of his traditionally constituted council. A chief who persistently refuses to heed such advice quickly risks the sanction of deposition. The chief, however, is not outside the council which "advises" him but personally presides over the sessions of that council in its deliberative, executive, legislative and judicial capacities.

Every Ewe chief has a spokesman or tsiami. The chief on all formal occasions addresses the public through his spokesman or tsiami.

In addition every chief has an official known as fiato, zikpuito or kpukpoto. He is legally the "owner of the stool" and stands in loco parentis to the chief. The stool is kept

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1. This notion existed among the Ewe in pre-Notsie days and before Akan contact. See, e.g. D.K. Fiawoo, op.cit., p.34.

2. A similar view is expressed in B.E. Ward, op.cit., pp. 242-243.

by him and he is responsible for the custody and administration of other stool property. For reasons unknown he has come to be referred to as "stool-father". When the stool is vacant or the chief is absent or incapable of discharging his functions, the "stool-father" becomes the locum tenens.

Women may not be chiefs in Eweland in the sense of ruling the whole realm including the men. The Ewe women, however, have a traditional office to themselves alone. We, therefore, have the nyonufia, which may be translated as the "chief of the women".[1] Often she is referred to in English as "queen mother", which she is not. Normally the nyonufia or "chief of the women" has no stool; but the office is both hereditary and elective in exactly the same sense as the office of a male chief. She is also installed with a specially adapted ceremonial formality as a chief. She has her own female tsiami or spokesman and, on proper occasions, is accompanied by a retinue of women.

The function of the nyonufia is that, subject to the authority of the male chief, she has jurisdiction over all the female members of the community as their chief and she represents them. There is, therefore, a nyonufia at all levels that we have male chiefs, that is at the chiefdom, divisional and sub-divisional levels. The hierarchical structure is exactly the same as for male chiefs so that the position of the

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1. Cf. the iyalode, the chief of women among the Yoruba of Nigeria. See A.K. Ajisafe, The Laws and Customs of the Yoruba People, Routledge and Sons, London, 1924, pp.19-20 and D. Westermann, The African Today and Tomorrow, International African Institute, London, 1934, p.110.

nyonufia at any level corresponds exactly to that of the male chief of her unit. This is because the same ruling house that provides the actual chief also provides the nyonufia. So if a nyonufia is from the family of the divisional chief, then she is of divisional status and will, therefore, have sub-divisional nyonufiawo under her.

The Ewe Legal System

As has been observed by many writers on the subject, there are many similarities in the essentials of customary laws throughout the entire African continent.[1] The laws of the Ewe are not an exception.

However, such generalizations about African customary laws, while true in-so-far as we consider only the essentials of the legal framework and the legal rules, can be misleading if pressed too far. Quite often, by a classification of the peoples of Africa on ethnic and linguistic bases, we hear of Akan, Yoruba or Ewe customary law. The tendency is to presume that "Yoruba customary law", for instance, would uniformly apply throughout the whole of the land peopled by the Yoruba. A closer examination would in most cases reveal that below the superficial appearance of similarity are concealed the divergencies and variations of detail. When, for instance, we examine the so-called "Ewe customary law", we realise that it

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1. See, e.g. T.O. Elias, The Nature of African Customary Law, Manchester University Press, 1956, pp.8-9 et passim.

is subject to local variations in the several areas. Particularly, as the Northern Ewe-speaking people of Ghana are not organised on large territorial basis like the Ashanti, their legal systems are more easily susceptible to local variations.

We may, therefore, ask ourselves whether we can legitimately speak of an Ewe customary law or an Ewe customary legal system. It is submitted that, in a sense, we cannot; for to think of "Ewe customary law" as a uniform body of ascertainable laws applying throughout all Eweland would be erroneous. What we have in Eweland, particularly in the northern part which lies in Ghana, are separate bodies of customary laws, albeit generally similar, which have been evolved, and are recognised, by the people in their respective chiefdoms.

Now, as we have tried to explain, the Northern Ewe-speaking people of Ghana are organised in politically centralised chiefdoms, each chiefdom, however small, constituting a traditional state with all the incidents of political sovereignty. As every Ewe chiefdom constitutes an autonomous traditional territorial state, it is regulated by its own system of laws. The du or chiefdom, then, is the entity which we may designate as a customary law area. For the du or chiefdom is the largest unit which is politically united under a Fiaga or Head Chief, who is not himself subject to any other political overlord. Consequently this is also the largest unit which is subject to the same regime of laws because political authority is combined with judicial and legislative power in the traditional Ewe

administration. We, therefore, have as many systems of law as there are chiefdoms or duwo. Hence, when we speak of the customary law in Eweland, it may often be necessary to identify with some certainty the area or locality within which a specified rule of law is applicable. This is a problem particularly encountered among the Northern Ewe-speaking people of Ghana because of the proliferation of small but independent and autonomous chiefdoms.

The Ewe express the political philosophy of the sovereignty of each chiefdom, and its corresponding right to determine its own set of laws, in the aphorism dusiadu kple efe koklo koko. This means literally that each chiefdom has its own mode of dressing its chicken for the table. Its underlying philosophy is that each du or chiefdom, being sovereign and autonomous, is unfettered in devising its own mechanism for the ordering of its political, social, economic and legal systems as well as its conventions and usages. This, of course, is only an early Ewe recognition of the essence of sovereignty in modern political thought.

We have tried to point out that, since the legal order is necessarily one facet of political sovereignty, among the Northern Ewe of Ghana who consist of a congeries of small, independent chiefdoms, we encounter a different set of customary law rules as we pass from one chiefdom to another. In other words, each customary law area in Ghana's Northern Eweland is co-terminous with a chiefdom. Insofar as the differences are

sufficiently pronounced in the opinion of the sages of old to justify the dictum of dusiadu kple efe koklo koko, it is submitted that we cannot speak of "Ewe customary law" as a corpus juris. Instead of "Ewe customary law" we have only Ewe customary laws.

It is realised that by emphasising the autonomous character of each of the Ewe chiefdoms, with its separate system of laws, the impression may be given that the Ewe people have nothing in common in their jurisprudence. Strictly and theoretically, it would be correct to accept such separateness and distinctiveness, because the authorities of one chiefdom have no legal power or other direct means to procure the enactment, repeal or amendment of laws in another area. However, since all Ewe enjoy a measure of cultural homogeneity and a similarity of social organisation, a broad similarity of rules is discernible. Customary law, perhaps more than any other type of law, is usually an expression of the mores of the people and their modes of life, and these are being continuously formulated and adapted to the changes resulting, inter alia, from intercourse with people in other areas. Linguistic ties and territorial contiguity make contact between Northern Ewe people of different chiefdoms a matter of course, and this naturally generates a unifying process in the evolution of their customary laws. As a natural result, certain customary law rules are of general application in Eweland. An example is the one of common

knowledge that, generally, succession to property and traditional offices among the Ewe people is along the patrilineal line of descent. In this sense we can speak of "Ewe customary law" when we employ that expression in contradistinction to the laws of, say, the Akan or the Ga of Ghana, in order to demarcate a broad area for an applicable law. Otherwise we can only speak of Ewe customary laws.

The Legislative and Judicial Process

The chief combines in himself not only political authority but also legislative, judicial and executive functions. The chief, however, is only a personification of the sovereignty of the state. As such, he is not a personal ruler who can decree laws or hand down decisions according to his own personal wishes alone. For, in the discharge of his functions, he is advised by a council consisting of certain officials, the principal elders and members representing the main political units and families within his domain. More often than not, the decrees promulgated by the chief, and verdicts delivered by him in his judicial capacity, are those decided by him and his council. We may even state it in more practical terms that the chief acts only in accordance with the advice tendered by his council. Decisions taken or orders issued by the chief may, therefore, properly be regarded as having been taken or issued by the "chief-in-council".

The chief-in-council may on occasion promulgate specific legislation. This is a form of direct legislation, and tradition sometimes ascribes certain laws to particular chiefs of the past. Legislation of this type, when approved by the chief-in-council is publicly proclaimed by the sounding of the "gong-gong" to announce the new law. Owing to the principle of consultation between members of the chief's council and those whom they represent, such legislation hardly takes the people by surprise. The "gong-gong" then is a formality almost equivalent to publication in the Government Gazette to constitute public and official notification of the enactment. With central government interfering in most of the fields of activity in modern times, the volume and frequency of such direct legislation has been very severely curtailed. These days it is more common to hear the announcement of specific orders, such as an order by the local chief requiring all the inhabitants to clear the footpath leading to the village's source of water supply on a specified day. Such an order, though apt to be confused with direct legislation, is not one; it may be regarded as approaching executive orders in a modern state. The legislative and executive functions are carried out by virtually the same personnel acting in different capacities.

The chief is the supreme judge of his people; but, again, he discharges his judicial functions with the assistance of his council of practically the same composition. In addition, on most occasions when the chief sits in his judicial capacity,

most of the important male personalities, whether members of the chief's council or not, join in the deliberations. Because almost the whole of the adult male population would be partaking in the adjudication upon the issue being tried, it is difficult to mis-state the law. When a miscarriage of justice does occur, it is usually in relation to the acceptance of the facts or the application of the law thereto; scarcely can it arise from the exposition of the law, because the Ewe law does not lie only in "the bosom" of the chief.

The presence of the entire population and the members of the chief's council does not detract from the chief's position as the custodian of the judicial power of the people. Charges and complaints are lodged through the appropriate channels to him personally. The issues are not merely tried by judicial officers exercising the chief's authority as do the Queen's judges in England. The Ewe chief must be personally present and physically preside over the trial or settlement, which would take place in his courtyard or the open place reserved for public gatherings (call it "market place" if you like). A wise chief, however, reserves his own personal views on the merits until most people have expressed their views so that, after consulting silently with his principal advisers, his verdict reflects a consensus of opinion at the tribunal.

The judicial power of the traditional chief has been substantially eroded away by the imposition of colonial rule and

the resulting emergence of the modern state of Ghana. As a result of a series of Courts Acts,[1] the tribunal of the chief has been reduced to the status of an arbitral tribunal because it lies outside the hierarchy of the statutory courts established under these enactments.[2] Much as one regrets it, it may cause confusion if the chief's tribunal is still referred to as a court. To avoid such confusion, the judicial sessions of the chief-in-council may be referred to as a "tribunal", being a somewhat neutral word.

The great bulk of Ewe customary laws emerge from the sessions of the chief's tribunals rather than through a series of direct promulgations of specific pieces of legislation. The tribunal normally conducts its sessions in public. Practically every adult male citizen, not necessarily a member of the chief's council, is entitled to attend the important sessions

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1. At first the Courts Ordinances, then the Courts Act, 1960, and now the Courts Decree, 1966 (N.L.C. Decree No. 84).

2. This is not a problem of only the Ewe but of all Ghana. The power of a chief in arbitration in Ghana is contained in Section 5 of the Chieftaincy Act, 1961 (Act 81) which says simply that "The power of any chief to act extra-judicially as an arbitrator under customary law in any dispute in respect of which the parties thereto consent is hereby preserved". If consent be the basis of a chief's power of arbitration, then the Section is hardly necessary because any person in Ghana, whether a chief or not, may act as arbitrator if the parties consent to his so acting. The fallacy of the Section, however, is that the "power" of a chief "under customary law" was not of "arbitration" but of an enforceable determination of disputes which was not conditional on the voluntary submission of the defendant.

and examine parties and witnesses. Every citizen of any sex and age may attend and listen to the proceedings. Precedent plays a very important role, and the tribunal is always anxious to examine cases in the light of the rules and directives handed down from the great grandfathers.[1] Where no known rule exists in the customary law area, or where an existing rule manifestly works injustice, the tribunal is guided by the methods of solution adopted elsewhere. New rules are formulated in this way, and existing ones are thus being constantly reviewed and adapted to changing circumstances, novel situations and factual problems through a process of "legislation by adjudication". By this process, which is almost equivalent to the English law doctrine of "judicial precedent", an exposition of the law on a variety of subjects is publicly made regularly, and the younger generation goes through its traditional form of free legal education.

In the same manner that there is a pyramidal organisation of the political power structure, there is also in Ewe law a hierarchy of tribunals. In practice, the services of any reputable person may be requested for the settlement of any dispute or misunderstanding. This may not be a judicial proceeding in the strict sense; otherwise it should be the base of the pyramid. The next is the tribunal of the ametsitsi

1. The Ewe say xoxoa nu wogbina yeyea do, that is "the new is grafted onto the old and fashioned after it".

(also known as saame'metsitsi) or the elder of the sub-division. The ametsitsi is not a chief, but his power to hold tribunals is indisputable. The next in the hierarchy is the tribunal of the sub-divisional chief or saamefia. Above the sub-divisional chief is the divisional chief's tribunal. Finally we come to the tribunal of the Fiaga or Head Chief, which is the highest tribunal of the land.

The right of appeal lies normally from a lower tribunal to a higher one, so that a citizen aggrieved by the decision of, say, the divisional chief of Anfoega-Dzana may appeal to the Fiaga's tribunal at Anfoega-Akukome. In practice, however, almost all the appellate tribunals have both appellate and original jurisdictions of a concurrent nature. Hence a citizen of the division of Kpando-Dzigbe may elect either to sue directly in the tribunal of the divisional chief, Togbe Asumadu, or come there by way of an appeal from a decision of his saamefia or sub-divisional chief. Similarly, in certain cases, especially in serious cases, the matter may be brought directly to the tribunal of the Fiaga, the highest tribunal in the land, without a journey through the lower tribunals. Indeed it seems to be the rule that where it is a serious offence such as murder, the lower tribunals have no jurisdiction and the matter must be brought directly and immediately to the tribunal of the Fiaga who only has the power vitae necisque. In the same way, certain types of cases are above the jurisdiction of both the sub-divisional chief and the sub-divisional elder or ametsitsi, so

that they can only be started in the divisional chief's tribunal as a tribunal of first instance.

The Ewe method of legislation by adjudication is not a peculiar one. It is common to most of Africa, and this was the foundation process for the development of the English common law. However, as already mentioned, when it is coupled with the fact of the smallness of the sizes of the agglomeration of independent chiefdoms that inhabit the Northern Eweland of Ghana, we have a large number of customary law areas marked out from each other. Our study of the customary laws of the Northern Ewe-speaking people of Ghana will, therefore, impose on us the difficult task of often identifying our propositions with particular areas. Attempts will be made to state general propositions of the law; but, over such a large land area, local variations exist which we may have to take into account.

CHAPTER III

THE FAMILY

The Nature of the Ewe Family

The family is the central institution in the customary laws of Ghana. It permeates every branch of the customary law, ranging from marriage, domestic authority, legal transactions and legal proceedings to succession and rights in property of all kinds. In all these cases the family features prominently. In particular, in any discussion of the law of property in Ghana, the family is a very important unit because of the concept of family property. Although the notion of family property is not very developed among the Ewe, yet the composition and nature of the family as well as its interest in property, whether ancestral or self-acquired, is very relevant to the Ewe law of property. For, whether the property is family property or one in which the family has a vested or contingent interest, may profoundly affect or even determine the individual's interest therein, as well as his power of alienation inter vivos and his testamentary capacity.

In English law the family is of a comparatively minor importance. Perhaps this accounts for the uncertainties about the meaning of the term "family", both in law and in non-technical

usage. The ordinary, non-legal meaning of "family" in English, what we may call the dictionary meaning, is that it embraces only a man and his wife and their children, possibly adding domestic servants.[1] In some cases this comes very close to the legal definition of the family, especially in the construction of wills. For instance in Re Terry's Will, Romilly, M.R., said:

> I have looked into the authorities, which have confirmed the opinion which I entertained during the argument, that the primary meaning of the word 'family' is 'children', and that there must be some peculiar circumstances, arising either on the will itself or from the situation of the parties, to prevent that construction being given to it. In ordinary parlance, the word 'family' means children. [2]

In other cases, however, it has been held that the word "family" when used in English law is susceptible of a wider interpretation to include brothers and sisters,[3] illegitimate children[4] and others.[5] In family arrangements under English law it has been held that the family is a wide one which includes illegitimate members and persons yet to be born.[6]

In most recent English statutes the word "family" appears to be avoided; thus in legislation for such purposes as income tax, immigration, intestate estates and family provisions there

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1. The Shorter Oxford English Dictionary.
2. Re Terry's Will, (1854) 19 Beav. 580, 581.
3. Price v. Gould, (1930) 143 L.T. 333, 334.
4. Humble v. Bowman, (1877) 47 L.J. Ch. 62, 65.
5. Blackwell v. Bull, (1836) 1 Keen 176, 181.
6. Stapilton v. Stapilton, (1739) 1 Atk. 2, 5; Re New, (1901) 2 Ch. 534.

seems to be a preference for specific references to "husband", "wife", "son" and "daughter". Where the word "family" is used, its statutory definition varies from Act to Act. In the Workmen's Compensation Act, 1925, for instance, the statute gave the family an exhaustive list of members by providing that:

> member of a family means wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister. 1

In legislation covering family allowances the statutory definition says:

> A family consists of a man and his wife living together, any child or children being the issue of both or either of them, and any child or children being maintained by them. 2

This is a much narrower meaning than under the Workmen's Compensation Act, 1925. In contrast to all these, however, is the wide meaning given to the word "family" in other cases. As an example, it was held that in an Order-in-Council to discontinue burials in a churchyard except to "members of families of parishioners", "families" was equivalent to descendants.[3]

The term "family law" in English law, however, primarily covers the husband-wife relationship, together with the children of the union. Because of these differences in meaning, in his

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1. Section 4 of the Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c.84).
2. Section 3(1) of the Family Allowances Act, 1965 (Eliz. 2, c.59).
3. Re Sargent, (1890) 15 P.D. 168.

work on English family law, Bromley says:

> The word 'family' is one which it is difficult, if not impossible, to define precisely. In one sense it means all blood relations who are descended from a common ancestor; in another it means all the members of a household, including husband and wife, children, servants and even lodgers. But for the present purpose both these definitions are far too wide ... 1

Bromley, therefore, decided on a narrower definition and is content to say that for his purposes the family may be regarded as:

> a basic social unit which consists normally of a husband and wife and their children. 2

This view of English family law concentrates on the law of marriage and domestic relations, including marital duties, rights and obligations, divorce, legitimacy, adoption, and custody of children and similar matters. To most people, therefore, family law means the law of domestic relations.

Most Africans, and certainly the Ewe, do not understand the family to mean "a man, his wife and children". The concept of a family consisting of just a man, his wife and children does not exist among the Ewe. It is not surprising, therefore, that the Ewe language has no single word for the "family" in the ordinary dictionary meaning of that English word. The only accurate way to express the ordinary, non-legal English meaning of "family" to an illiterate Ewe without misleading him is to give the composition of the unit by saying nutsu, esro kple

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1. P.M. Bromley, Family Law, Butterworths, London, 1966, p.1.
2. Ibid.

eviawo, that is "a man, his wife and children". However, the word "family" is commonly used in Ghana, both in law and in social relations, and the meaning ascribed to it seems to vary according to each community. Among the Northern Ewe-speaking people of Ghana the unit known as the family is the dzotinu. Members of the dzotinu are in principle descended patrilineally from a common ancestor and they constitute a corporate entity in Ewe law for the purposes of title to certain property, entitlement to hereditary offices and some other privileges and obligations. This is generally a large unit. In all cases it consists of a number of households or sections, and it is far larger than a group consisting of just a man, his wife and children. It is such a large unit that members of the same dzotinu or family may inter-marry.

This wide but special meaning of the term "family" is not confined to the Ewe but applies generally throughout Ghana. The word "family", therefore, has become a term of art in Ghanaian law. However, there is a great confusion about the ambit of the term. Often one finds that neither the Ghanaian courts nor the Ghanaian lawyers are clear in their minds when they use the term "family". In different circumstances they seem to ascribe different meanings to the word even in the same context of succession to interests in property. Sometimes it is used to refer to only the children and descendants of a living or a deceased person, thus embracing only several persons.[1]

1. E.g. In re Eburahim, (1953) 3 W.A.L.R. 317; Ennin v. Prah, (1959) G.L.R. 44 and Larkai v. Amorkor, (1933) 1 W.A.C.A. 323.

At other times the word "family" is used in reference to a much larger group of persons, the descendants of a remote ancestor.[1] Perhaps this is because the "family" has a different meaning in every community, so that the Ga conception is different from, say, the Akan, the Dagbani or Ewe conception. This is the source of the bewildering confusion of attempting to draw a distinction between the so-called "immediate" and "wider" families. The composition of the unit, therefore, is not clear when in Ghanaian law mention is made of the "family". There should, however, be no confusion in Ewe law if it is borne in mind that among the Ewe the family is the dzotinu.

In saying that the family is the dzotinu among the Ewe, we are giving the word "family" a special meaning. It is not the family within the context of the law of domestic relations. We are, therefore, excluding from our consideration such issues as marriage and divorce and matrimonial rights and obligations. We are concerned here with the family as a unit for the purposes of rights in property and succession to hereditary offices, related issues which are often considered together in Ewe law. More important for our purpose, however, is the family as a unit in relation to property. Within this context, therefore, the Ewe family is known as dzotinu.

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1. E.g. Amarfio v. Ayorkor, (1954) 14 W.A.C.A. 554 and Krakue v. Krabah, Unreported, Supreme Court, Accra, 24th June, 1963.

Ollennu describes the "family" in Ghana as "the social group into which a person is born", and then he goes on to say that the Ewe call it fome or xome or hlo.[1] It is apparent, although he does not say so, that Ollennu was relying on Westermann[2] who was quoted by both Ward[3] and Manoukian.[4] The two ladies interpret fome as a patrilineage, and it seems that it is this view that the learned Judge had adopted. The error is the familiar one that sometimes arises from undue dependence on anthropological sources in a legal work.

As far as the Ewe word hlo is concerned, it seems to have different meanings in the several dialects of the Ewe language; but in none does it mean "family". Among the Anlo Ewe, it seems that it means a "clan" of the Akan type, which is totemic, non-cognatic and of presumed rather than demonstrable relationship, with its members scattered over the whole of the Anlo area. In this form it would appear to be incapable of holding interests in property as an entity because of the dispersed membership. However, we have it on the authority of Nukunya, the Ewe anthropologist, that "Land, palm groves and fishing creeks are

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1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, Sweet & Maxwell, London, 1966, p.71.

2. D. Westermann, Die Glidyi-Ewe in Togo, Berlin, 1935, p. 133.

3. B.E. Ward, The Social Organisation of the Ewe-Speaking People, Unpublished M.A. Thesis, University of London, 1949, p.70.

4. M. Manoukian, The Ewe-speaking People of Togoland and the Gold Coast, International African Institute, London, 1952, p.22.

owned by clans. They have appointed leaders in whom are vested legal and ritual powers".[1] Among the Northern Ewe-speaking people of Ghana, the hlo seems to be the same unit as that which we have referred to as the saa or sub-division.[2] That is why Westermann was told by an informant from the Anlo Ewe area that,

> Hlo is not the same thing as fome; fome is different from hlo. Hlo is a larger unit than fome, because several fomewo constitute one hlo. 3

It is submitted that this information is correct, and that the hlo is not the "family" as Ollennu suggests.

The other synonym given by Ollennu is xome. The word xome, however, in this sense of its usage, is the dialect of the Ewe of Glidzi in the Republic of Togo, with whom Westermann was primarily concerned in his book, Die Glidyi-Ewe in Togo. The word is not known to be used by any of the Ghana Ewe; certainly it is not used by the Northern Ewe-speaking people of Ghana. Among the Ghana Ewe, xome means "a room" and just that. We shall, therefore, not be detained by this word.

The other Ewe term which is usually given (e.g. by Ollennu) as a translation of "family" is fome. Among the Northern Ewe-speaking people of Ghana, fome properly only means "relations".[4]

1. G.K. Nukunya, Kinship, Marriage and Family: A Study of Contemporary Social Changes in an Ewe Tribe, Unpublished Ph.D. thesis, University of London, 1964, p.34.

2. See pp.61-63 supra.

3. D. Westermann, Die Glidyi-Ewe in Togo, p.143. This is a literal translation from the Ewe text recorded by Westermann.

4. It seems, however, that, among the Anlo Ewe, fome is sometimes used to denote the "family".

It comprehends an indeterminate circle of persons related by consanguinity on both the maternal and paternal sides and extends to relations of any remove. A member of this circle of relations is known as fometo (pl. fometowo), which means "a relative". The expression do fome means the state of being related. The Ewe, therefore, say Medo fome kple Ativoe to mean "Ativoe and I are relatives". If Ametorxewu's great-grandmother Maabo came from Abutia nearly a hundred years ago, Ametorxewu and his descendants in Gbefi would regard Maabo and her ascendants and descendants in Abutia and elsewhere as fometowo and they would be of the same fome. So Ametorxewu can say Amu fometowo le Abutia, meaning "People of my fome (i.e. some of my relatives) are in Abutia". All relations, both agnatic and cognatic, are known as fometowo, and this may, and often does, include persons in different chiefdoms. As to which set of relations is meant by the referents fome and fometowo on any occasion, one has to consider the context in which the word is used and perhaps request a further explanation. We cannot, therefore, strictly refer to the fome as a unit unless we emphasise that it is protean in form and assumes different shapes and sizes in different contexts. The word fome is essentially a kinship, and, therefore, a social terminology. It would only be appropriate if we were simply concerned with "the social group into which a person is born";[1] for the word fome is too imprecise to employ in legal terminology.

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1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.71.

In legal usage, the unit which may be referred to as "family" among the Northern Ewe-speaking people of Ghana is generally known as dzotinu. This is the word used in most areas, including Gbi, Aveme, Anfoega, Peki, Kpando and Ho. In some places the same unit is known as togbevime, meaning literally "grandfather's children". In Matse, it is known as avadzidzi. The Matse word avadzidi is a more precise, even if somewhat inelegant word, which means persons of the same male descent. The word dzotinu, however, is preferred because it seems to be used over a wider area.

What is dzotinu? The word dzoti literally means "a burning piece of firewood", that is "a firebrand". The symbolism here is that it is the commencement of a thing that continues to expand for ever. The word dzotinu is a derivative from dzoti, and it is the designation of what is the Ewe "family".

The dzotinu or family originates from a remote male ancestor whose name the unit usually bears, though this need not necessarily be so. Even where it is not specifically named after the founding ancestor, his name is never forgotten by the members of the unit. When the unit is named after its founder, its name usually consists of the ancestor's name with the suffix viwo. Thus, "Atifufuviwo" are members of the dzotinu originating from Atifufu. In the Atifufuviwo would be the main grandfathers who were themselves children of Atifufu, such as Soklitor, Danutsu, Akator and Agbodo. Their children and children's children ad infinitum would constitute the family or dzotinu

known as Atifufuviwo. This group of descendants in the male line constitutes a single unit recognised in Eweland as having the legal capacity to hold the paramount interest in ancestral property, particularly land, and to be entitled to offer its members for traditional offices vested in it on a hereditary basis. They are, therefore, known as nu deka dulawo or "the group of people who eat one thing". To say of a set of persons that they are nu deka dulawo is another way of saying that they are members of the same dzotinu or family. A person belongs to different sets of fome or relations, depending on the relative with respect to whom he is considered in any context or circumstances. But every person in Eweland belongs to only one dzotinu or family, and one only. The dzotinu or family is constantly changing its membership through death and the procreation of new members; but, as a legal entity, it has a permanent existence and the right of perpetually holding the interests in property which are vested in it.

Every family or dzotinu has a head, known as dozotinu' metsitsi (a contraction of dozotinu fe ametsitsi) or "the elder of the dzotinu". The position of the head of the family will be discussed later in some detail,[1] but at this stage, we may say that he represents the legal personality of the family or dzotinu. The dzotinu'metsitsi is also sometimes referred to simply as ametsitsi or "the elder"; but the dzotinu'metsitsi or head of family should not be confused with the saame 'metsitsi

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1. See Chapter IV infra.

or sub-divisional elder.

The dzotinu or family may be seen within the context of the Ewe political structure as a whole. We have already explained that the chiefdom consists of divisions which in turn are composed of sub-divisions or saawo. The sub-division or saa is a kinship unit inasmuch as it embraces persons claiming a common descent, although it is also a political unit as a major administrative component of the division or duta. When we examine the composition of the sub-division or saa, it is noticed that it is composed of families or dzotinuwo. Generally the saa or sub-division is constituted by two or three, but sometimes more, dzotinuwo. As a rule, it is the dzotinuwo which take their turns in providing the sub-divisional elder or saame 'metsitsi, and the general rule is that the dzotinu 'metsitsi or head of family automatically becomes saame 'metsitsi or sub-divisional elder when it comes to the turn of his dzotinu. Every saame 'metsitsi or sub-divisional elder thus holds a dual office of dzotinu 'metsitsi or head of family as well; but not every dzotinu 'metsitsi is a saame 'metsitsi.

In considering the composition of the dzotinu or family, we may start with a man and his children. In the patrilineal Ewe community, the wife is excluded because she does not belong to her husband's family. This group of persons, consisting of a man and his children, is what anthropologists tend to term

the "elementary family" or "nuclear family".[1] Most Ghanaian jurists would call it the "immediate family". It is, however, neither necessary nor relevant to classify this group in Ewe law as a legal entity; for such a group does not possess a legal personality in Ewe law. It is only part of a family and not a family of whatever description in its own right. The man and his brothers, together with their children, form a wider group. We may continue enlarging the circle until we come to the family unit, but none of the composite segments is in itself a family. By tracing the genealogical tree in that manner, we discern the clear existence of branches within the family or dzotinu. Indeed every dzotinu is composed of such branches. In our example of the family known as Atifufuviwo, we can identify a branch consisting of the lineal descendants of Agbodo or of Soklitor. This group of descendants of Soklitor, or any sub-branch thereof, does not possess any legal personality in Ewe law. It cannot hold the paramount title to ancestral property, nor have any hereditary offices vested in it, as a unit. There is no legal right, duty or privilege in relation to which such a unit may be described as a family within the context of Ewe customary law. If self-acquired property is held in Ewe law to be inheritable by a man's children, it is not because such children constitute a "family" but because by right of birth they succeed to rights in the property in a position somewhat

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1. See, e.g. A.R. Radcliffe-Brown in A.R. Radcliffe-Brown & D. Forde, African Systems of Kinship and Marriage, O.U.P., London, 1950, pp.4-5.

analogous to that of a next-of-kin in English law.

The authorities, however, seem to point in a different direction. These authorities were not specifically formulated in relation to the Ewe situation; but the generality of the propositions makes it obvious that they are intended to be applicable throughout all Ghana. Ollennu, for instance, says:

> Each man in a patrilineal family area starts a family and each woman in a matrilineal family area starts a family. The family which originated from a remote ancestor or ancestress is called the ancestral family; it is sometimes called the wider or the trunk family. Within that ancestral, wider or trunk family are a number of smaller families originating from descendants of the common remote ancestor or ancestress. Those smaller families are called the immediate, the narrow or the branch families. 1

Ollennu based this proposition on the case of Serwah v. Kesse[2] which was decided by himself in the then Land Court and was confirmed on appeal by the Supreme Court. The effect of that decision in the context of the devolution of self-acquired property is more relevant to the discussion of the law of succession. On its proposition that there are immediate, as contrasted with ancestral families, the significant point is that the learned Judge, when he spoke ex cathedra in his judgment in Serwah v. Kesse, was concerned with a matrilineal family area of New Juaben and he did not, by his choice of words, purport

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, Sweet & Maxwell, London, 1962, p.151.

2. Serwah v. Kesse, Unreported, Land Court, Accra, 10th April, 1959. Reproduced in Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.201-207.

to lay down any general proposition of law for all the areas of Ghana. If it was his intention that the proposition should apply to all areas of the country, including the patrilineal Ewe, it is respectfully submitted that he did not say so. It is later in his work, Principles of Customary Land Law in Ghana, that Ollennu attempts to extend the proposition in Serwah v. Kesse to the patrilineal societies as well, and it is submitted that this is not a binding legal authority.

Ollennu himself points out quite rightly that his decision in Serwah v. Kesse was later confirmed by the Supreme Court. In generally confirming the decision in Serwah v. Kesse, however, the appellate court only gave a limited confirmation of Mr. Justice Ollennu's dictum on the existence of immediate or smaller families. The Supreme Court indeed relied on Mills v. Addy,[1] also another decision of Ollennu, J., which had been confirmed on appeal. But, as regards the existence of immediate families, van Lare, J.S.C., delivering the judgment of the Supreme Court, said:

> This decision is in accordance with the principle of our customary law that among the Akans the immediate beneficial interest in a woman's self-acquired property descends to her children and their children - children's children meaning the children of daughters only. 2

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1. Mills v. Addy, (1958) 3 W.A.L.R. 357.

2. Serwah v. Kesse, (1960) G.L.R. 227, 228. Emphasis supplied.

The decision in Serwah v. Kesse must, therefore, be confined to the Akan communities with which it was concerned. There is no doubt that Mr. Justice van Lare, being himself an Ewe, was anxious that the proposition should not be extended beyond the Akan areas and he said so, even if only ex abundanti cautela.

Insofar as Ollennu confines himself to the matrilineal communities he may be right. His own exposition of the law in Mills v. Addy when he said "Every woman becomes the originator of a family" and that "the family she so originates is a branch of the mother's or grandmother's family" was confirmed and adopted by the Court of Appeal.[1] This is also the view of Bentsi-Enchill.[2] Moreover, there are other decisions to this effect on the matrilineal communities.[3]

Although Bentsi-Enchill says that "like the woman in matrilineal communities, each man in a patrilineal community is a potential apex or originator of a family",[4] he does not rely on any authority from the Northern Ewe area. He only thinks that it "can be stated with confidence". When, indeed, Bentsi-Enchill comes to identify the so-called "immediate family", he

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1. Mills v. Addy, (1958) 3 W.A.L.R. 357.

2. K. Bentsi-Enchill, Ghana Land Law, Sweet & Maxwell, London, 1964, pp.141-157.

3. E.g. Ghamson v. Wobill, (1947) 12 W.A.C.A. 181; Amarfio v. Ayorkor, (1954) 14 W.A.C.A. 554; Re Eburahin, Ansah v. Ankrah, (1958) 3 W.A.L.R. 317; and Ennin v. Prah, (1959) G.L.R. 44.

4. K. Bentsi-Enchill, op.cit., p.157.

runs into immediate difficulty because he ends up with what is the same as the wider or ancestral family. At first he says, "We can say then that the expression 'immediate family' or immediate next-of-kin means in the first instance the deceased's children."[1] By constituting a man's children alone into a "family", we would get a family in an even narrower sense than the English one. That certainly is not the view of Ewe law. We may contrast this with the more comprehensive and meaningful definition of the "immediate" matrilineal family by the same author. He says the "immediate family" in matrilineal communities is "a man's mother, uterine mothers and sisters, and the issue of such sisters".[2] When Bentsi-Enchill himself realised the difficulty with patrilineal areas, he tried to get round it by saying of the so-called "immediate" patrilineal family that,

> clearly it can include the deceased's paternal brothers and sisters and his father. Failing these, those in line of succession to him come from within an ever widening circle of relations traced patrilineally through deceased's grandfather, then his great-grandfather, and so on. 3

This latter rider makes the so-called "immediate family" co-extensive with the so-called "ancestral family" and shows that there is no justification for such a distinction.

In the light of the authorities, it is submitted that, while the idea of an immediate family may exist among the matrilineal communities of Ghana, it certainly cannot be said

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1. K. Bentsi-Enchill, op.cit., p.158.
2. K. Bentsi-Enchill, op.cit., p.141.
3. K. Bentsi-Enchill, op.cit., p.158. Emphasis supplied.

to exist among the patrilineal Ewe. The Ewe have only one type of family. That is the dzotinu.

As will be clear in the discussion on land and the succession to interests in property generally, the legal concept of "family" among the Northern Ewe of Ghana, apart from the obligations it imposes, is meaningful only within the context of land holding and succession to rights in property and traditional hereditary offices. Within this context, every adult Ewe is clear in his mind about what is the family or dzotinu. When an Ewe is told that some property is family property, it has only one meaning for him; it belongs to the dzotinu as an entity. He will not ask whether it belongs to the "immediate family","nuclear family", "wider family", "extended family", "trunk family", "ancestral family", "wider ancestral family" or "what-not family". It will not be necessary, as it was for instance for the West African Court of Appeal in Amarfio v. Ayorkor, to say that "the first enquiry must be to what family did Ayiku belong during his lifetime".[1] The branches or segments of the family are not regarded as legal entitles among the Ewe. It is the attempt by the judiciary of the statutory courts and text-writers to raise

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1. Amarfio v. Ayorkor, (1954) 14 W.A.C.A. 554, 556. See also the Fanti case of Ghamson v. Wobill, (1947) 12 W.A.C.A. 181, and another Ga case of Mills v. Addy, (1958) 3 W.A.L.R. 357, and other cases, when the court had to decide whether an intestate was a member of the "immediate" or "wider" family.

these composite segments to the level of "family" that is causing confusion and uncertainty. If the Ewe law is properly interpreted, there can be no question of what family an intestate belonged to; for there is only one family known to Ewe law, and that is the dzotinu. It is a strain on the meaning of the word to refer to each of these segments of families as a family, thus carving a multiple of "families" out of each family. Ollennu's metaphor is that the ancestral family may be likened to the trunk of a tree, with the immediate families as its branches. To carry the metaphor further, it would be patently wrong to refer to every branch and bough as a trunk. With this type of terminology, the word "family" would be devoid of meaning in Ewe law. For only the dzotinu may be referred to as "family" in the laws of the Northern Ewe-speaking people of Ghana. Among the Ewe, succession to property by the so-called immediate family means nothing more than a right of succession by the next-of-kin within the family in a predetermined order of precedence, an order which is, however, subject to variation by the family for good cause.

We cannot fail to point out that, even as regards the matrilineal communities, the Courts are becoming apprehensive of the dangers of the application of the notion of the "immediate family". In a recent Akan case in which the issue was raised, Blay, J.S.C., sounded a cautionary note in the Supreme Court when he said:

> It seems to me that this so-called doctrine of the immediate family ... if allowed to be extended unchecked, the whole of our family system would be in jeopardy. 1

It is hoped that this warning from the Supreme Court will be heeded, particularly to avoid the extension of the doctrine of immediate family to areas like Eweland where it does not really exist.

Membership of the Family

Having tried to identify the unit which we may refer to as "family" among the Northern Ewe-speaking people of Ghana, our next issue is to determine how its membership may be acquired.

The general rule is that a person belongs to his or her family as an incident of birth. In other words, barring the rare exceptions to which we shall presently advert, birth is the criterion for the determination of membership of an Ewe family. However, we have to determine to which family a person is ascribed, that is whether it is his father's family or that of his mother.

The Ewe are a patrilineal people. This implies both patri-descent and patri-succession among the Northern Ewe-speaking people of Ghana. The principle of patri-descent means that a

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1. Pobee v. Arhin III, Unreported, Supreme Court, Accra, 27th January, 1964. Reproduced in Ollennu, The Law of Testate and Intestate Succession in Ghana, Sweet & Maxwell, London, 1966, p.122.

person belongs to his or her father's family which is traced unilineally through the male line only. This may be termed the political aspect of patrilineage. It is the nationality principle in patrilineal descent. As the family is the unit of which the sub-division is composed, and the sub-divisions constitute the divisions which form the chiefdom, it is only through membership of a specific family on the principle of patri-descent that we can say that a person is a citizen of the chiefdom of Peki, Abutia, Ho or Alavanyo. It is thus the means by which we determine the chief to whom a person owes allegiance. That also determines his personal law or the system of customary law to which he is ordinarily subject.

The principle of patri-succession means that the right to succeed to and enjoy rights in property or hereditary office is derived from membership of the family traced through the male line. A people may be patrilineal in the sense of patri-descent only, while at the same time they practice matri-succession or succession to hereditary offices and interests in property through the female line. The Anlo Ewe are patrilineal in the sense of patri-descent; the Anlo Ewe are also patrilineal with respect to ancestral property generally, but succession to the Anlo Paramount Stool is open also to certain matrilineal descendants. It seems that it is this mixture of patri-descent and patri-succession to property with matri-succession to the Paramount Stool that has probably led many to

think that the Anlo Ewe are matrilineal.[1] As far as the Northern Ewe-speaking people of Ghana are concerned, however, they are patrilineal in the senses of both patri-descent and patri-succession to property and hereditary offices.

This would seem to be indisputable, and it would be suggested that the principle of tracing a person's family unilineally through the male line is applicable to all Ewe-speaking people of Ghana. However, a decision of the High Court suggests that the unit is wider and includes even persons only maternally connected with the family. This case did not come from any of the chiefdoms in the Northern Ewe area of Ghana, but it is from the Anlo Ewe and there is no reason to suppose that it was not intended to apply to all Ewe people. This is the case of Nunekpeku v. Ametefe.[2]

In Nunekpeku v. Ametefe, the defendant (Ametefe) occupied a portion of Bawe land belonging to the Agbeve family. While in such occupation, the defendant and another junior member of the Agbeve family alienated a portion of the said land to a stranger, without the knowledge or consent of the head and principal members of the Agbeve family. The head of the Agbeve family and its principal members were displeased and sought inter alia to eject the defendant even from the portion of the said Bawe land that he still occupied, on the ground

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1. See, e.g. M. Manoukian, op.cit., p.24.
2. Nunekpeku v. Ametefe, (1961) G.L.R. 301.

that the said defendant was not a member of the Agbeve family which held the paramount title to the land and that the defendant was, therefore, only a licensee of the Agbeve family. The evidence was uncontradicted that the defendant's only connection with the Agbeve family was through his mother. The South Anlo Local Court "A", therefore, found that the defendant was not a member of the Agbeve family and accordingly granted the order for his ejection. From that decision the defendant appealed to the High Court at Ho.

It was held by Prempeh, J., as regards the question of membership of the family, that on the evidence on record it was clearly established that the defendant belonged to the Agbeve family through his mother. For this and other reasons, he allowed the appeal. Prempeh, J., explained:

> In the second paragraph of the particulars of claim, the respondents claimed that the appellant was not a member of the Agbeve family, but in giving evidence for and on behalf of the other respondents, the second plaintiff-respondent admitted that the defendant was a member of the Agbeve family on the maternal side, and it is not insignificant to observe that the second plaintiff himself admitted that he was a member of the said Agbeve family on the maternal side.
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> It having been established that the appellant is a member of the Agbeve family, whether it be of the wider or immediate family, it is my view that he is entitled to occupy any available part of the Agbeve family land, and that once he has occupied that portion, he has a limited right to it, and cannot be ejected therefrom at the will of the individual members of the family.
>
> It has been contended on behalf of the respondents that the appellant was a licensee of the respondents,

> but I am unable to accede to that argument since as a member of the family he has limited rights to the family land. 1

It is respectfully submitted that the learned Judge was wrong. The Ewe law on this point is so clear and so settled that the surprise is that a contrary view could have been taken at all by the High Court. Among the Ewe, unlike the Akan, descent is patrilineal. Although a person's maternal connections with a family are highly valued, this can never be a legal basis for membership of the mother's family. Accordingly, it is submitted that the defendant (Ametefe) belonged in law to his own father's family and not to the Agbeve family with which he was only maternally connected. It is further submitted respectfully, therefore, that the plaintiff-respondents were right in contending that the defendant-appellant was only a licensee of the Agbeve family without any inherent right of occupation of that family's lands. Whether his conduct justified a revocation of the licence of occupation in those circumstances is a different issue on which it is not necessary to express an opinion here.

Prempeh, J., emphasised the fact that one of the plaintiff-respondents was also a person connected with the Agbeve family through only his mother, and this fact seems to have weighed heavily on the mind of the learned Judge in

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1. Nunekpeku v. Ametefe, (1961) G.L.R. 301, 303-304.

deciding that the defendant was also a member of the Agbeve family. The argument seemed to be that if the second plaintiff-respondent sued with the other plaintiff-respondents when he in fact had only a maternal connection with the Agbeve family, then it followed that the defendant's own membership could also be established through a similar maternal connection therewith. It is respectfully submitted that this argument is fallacious. If, as the second plaintiff-respondent himself admitted, he was connected with the Agbeve family but only through his mother, then the only course open to the learned Judge in law was to declare that even he the second plaintiff-respondent was not a member of the Agbeve family and then nonsuit him because he had no locus standi, unless he could show that he had been specifically and specially authorised by the Agbeve family in that behalf.

The Nunekpeku case also underlines the danger of equating the family and fome, the word suggested as a translation by Ward, Manoukian and Ollennu. If we regard the family as fome then there is no doubt that the defendant (Ametefe) belonged to the "Agbeve fome"; for, as we have said, fome embraces both agnatic and cognatic relations of any degree. Accordingly, if in the course of the proceedings a witness was asked whether the defendant was a member of the "Agbeve family", and this was translated to him in the Ewe as "Agbeve fome", the witness was bound to give an affirmative answer. If, however, it was

explained to the witness that by family was meant that unit which held the paramount title to the land, the witness would immediately say that the defendant was not a member of the Agbeve family in that sense. The maxim is Ewe meduna nyroe nu o: to nu Ewe duna, which means, "The Ewe do not inherit on the mother side: they inherit on the father side".

Such cases are understandably rare among the Ewe because the principle of patrilineal entitlement to ancestral property is hardly ever questioned. In one case when the issue arose before the Asogli Native Appeal Court at Ho, the Native Appeal Court, contrary to the decision of the High Court in Nunekpeku v. Ametefe, had no difficulty in stating the law that maternal connection with the family does not create an inherent right to family property. In Agblevoe v. Dankradi, a case from Abutia, the Asogli Native Appeal Court said:

> It has also been agreed in evidence on record that the Defendant-Respondent maternally belongs to the Plaintiff's family which, in accordance with the native customary law among the Ewe-speaking people, gives no absolute right to the Respondent over the disputed land. 1

The disputed land was family land of the defendant's mother's family. The above dictum is in the same terms as the decision of the South Anlo Local Court in Nunekpeku v. Ametefe. For in Agblevoe v. Dankradi also the defendant based his entitlement to the family land on his connection with the family through only his mother. It is submitted with respect that the Asogli

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1. Agblevoe v. Dankradi, Unreported, Asogli Native Appeal Court, Ho, 4th September, 1952, at p.17 of Civil Appeal Record Book.

Native Appeal Court was right in Agblevoe v. Dankradi and that the decision in that case, rather than that of the High Court in Nunekpeku v. Ametefe, represents a correct statement of Ewe law.

It is to be hoped that Nunekpeku v. Ametefe will be rejected as having been wrongly decided. No doubt this erroneous decision raises a legal problem. On the principle of stare decisis the decision in Nunekpeku v. Ametefe is strictly the law, until over-ruled by a superior court. However, fortunately it is only a High Court decision and one may hope that, as other High Court Judges are not bound by the decision of another High Court, Nunekpeku v. Ametefe will be dissented from by the other Judges. As regards the Court of Appeal it is hoped that it will seize the earliest opportunity to correct the law. Such erroneous decisions of the higher courts are regrettable because they result in the crystallisation of rules of judicial customary law which are patently at variance with the practised customary law. It is a platitude that the Ewe are a patrilineal community, and contrary decisions of this type only tend to create confusion and uncertainty in the areas where the law is settled.

The Child With a Father From a Matrilineal Community.

Since the Ewe are patrilineal, it means that the expansion of the family tree ends with its female members, because a female member's child would belong to the child's father's

family. To this general deduction there are certain exceptions.

The first exception is in the case of a child born of an Ewe mother, but with a father from a community like the Akan of Ghana where descent is traced matrilineally. If the Akan accept such a child as one of them, the matter rests there and the Ewe community cannot lay any claim to him. What happens, however, if, as is often the case, by the application of their own law, the Akan do not regard him as belonging to the Akan family? All my informants are unanimous in stating that, in such a situation, the child is absorbed into the mother's own patrilineal family as a full member in the eyes of Ewe law. For the rule is that no person may be without a family. The legal position then is that such a child is regarded as a son of his maternal grandfather and so he becomes in law a brother to his mother and a brother to his maternal uncles and aunts. He would thus enjoy most of the benefits and privileges and assume all the responsibilities of the membership of his mother's family, such as the right to the occupation and use of the family land, like any other member of the family.

However, in the matter of hereditary offices, such as occupation of a chiefly stool, such a child and his descendants are excluded because they are not strictly of the patrilineal line of descent. It seems, however, that such a child and his descendants may hold the office of head of family.

The Child With a Mother From a Matrilineal Community

The situation converse to the above, is where a child is born of an Ewe father and an Akan mother. Such a child would appear to be in a particularly favourable position of belonging to two families. The Akan would regard him as an Akan because he would rightly belong to their matrilineal family as a full member, entitled to succeed to offices and interests in property vested in that family. Similarly the Ewe would also regard him as an Ewe belonging to his father's family, since the Ewe descent is patrilineal.

The answer given to such a situation in most areas is that such a child is prima facie a full member of the patrilineal Ewe family for all purposes. This means that he is regarded as a member of the Ewe patrilineal family unless by his mode of living it can be unequivocally concluded that he intends to be regarded as a member of his matrilineal Akan family only. It is suggested that even in such a case his rights of membership in the Ewe family do not lapse but remain in abeyance; for the Ewe have no power or process for depriving a person of the rights of membership of his patrilineal family. Accordingly, such a child, notwithstanding his other rights and connections with the maternal Akan family, can always assert his rights of membership of the paternal Ewe family on the sole ground of his paternity.

In Gbi, Peki and Anfoega the child's membership of the patrilineal Ewe family is an absolute one which does not depend on whether he elects to settle in the Ewe community. Therefore, such a child, though living with the Akan family, can properly be elected to occupy any stool or other hereditary office in the Ewe family. When it was pointed out that on the same principle the lucky child could occupy two stools simultaneously, one in the Akan family and the other in the Ewe family, the Peki solution was that in that event he would be put to the choice of abdicating one, otherwise he would be deposed. The argument is that he could be deposed because, by accepting the Akan stool and swearing to be always available to answer the call of that community, he would by implication have violated a similar oath to be always available to the Ewe community as well; for a man cannot always be available for the service of two different communities separated by distance and which may on occasion be at war with each other. In practice, however, the two families settle by negotiation the question of which stool the child may occupy, so that anomalous situations of this type are unlikely to occur.

Effect of Marriage on Family Membership

Marriage has no effect on a woman's membership of her family in Ewe customary law. A woman does not, by virtue of her marriage, become a member of her husband's family. She

retains the membership of her own family even on marriage and she, therefore, remains a citizen of her native chiefdom. Hence, even if a woman from Matse is married to a man from Abutia and settles in Abutia for the rest of her life, she is still regarded as a Matse woman. This principle is carried so far in some areas that a married woman who dies in her marital home abroad is brought to her native home for burial.

In the traditional view, a married female retains her original surname, (i.e. her maiden name). Today, European influences have induced literate married women to adopt their husband's surnames; but most of those married under the customary law frown upon such a change of name.

A man's marriage does not affect the membership of his own family; for he does not adopt the family of his wife.

Paternity and Legitimacy: Mother Unmarried

The Ewe law is that marriage is not necessary for the paternity or legitimacy of a child.[1] If a man and a woman, both of whom are unmarried, have a sexual relationship which results in the birth of a child, that man is the father of the child and the child is perfectly legitimate, provided his paternity is duly acknowledged. The child is automatically,

1. This is also the ratio decidendi of In Re Adadevoh, (1951) 13 W.A.C.A. 304, and Akeke v. Pratt, (1955) 15 W.A.C.A. 20.

by the fact of birth, a legitimate member of his father's family in Ewe law. This is so even though the child's mother and father do not eventually marry each other. For legitimacy is conferred by the mere acknowledgment of paternity, so that there is no need for the application of the canon law and Roman law procedure of legitimation per subsequens matrimonium which has also been introduced into English law.[1]

Writing on the Akan law, however, Danquah has stated that "Marriage is necessary to make a child legitimate".[2] For that reason he went on to say that if a child was born of unmarried parents, he would become legitimate only on the subsequent marriage of his parents. In this sense he saw a parallel between the Akan procedure and the Roman law process of legitimatio per subsequens matrimonium. It is highly doubtful if Danquay's statement of the Akan law on this point is correct. If Danquay is right then Akan law of legitimacy differs from Ewe law.

The Ewe child is still legitimate even if the man is married to a different woman, and no complications arise if the child's mother is herself unmarried. The child is legitimate even if the father is married to another woman under the Marriage Ordinance,[3] although such a child suffers

1. By virtue of Section I of the Legitimation Act, 1926 (16 & 17 Geo. 5, c.60).
2. J.B. Danquah, Akan Laws and Customs, Routledge, London, 1928, p.186.
3. Cap. 127 of the 1951 Edition of Laws of the Gold Coast, Vol. III.

certain disabilities under the said Ordinance. In particular, such a child is not regarded as legitimate as regards entitlement to a share of the two-third portion of the estate of his father which, under the Ordinance, is distributable in accordance with the provisions of the law in force in England on 19th November, 1884.[1] He is, however, legitimate for all other purposes, including the right to share in the remaining portion of the intestate's estate which devolves on members of the family under the Ordinance. This is adequately explained in the case of Coleman v. Shang,[2] which has become the locus classicus on the point. That case itself involved the application of the rule earlier enunciated in the Nigerian case of Bamgbose v. Daniel[3] that children may be legitimate even if procreated in adultery by a man married under the Marriage Ordinance, because the question of legitimacy is decided by the lex domicilii and the Nigerian lex domicilii, including the customary law, accords the status of legitimacy to such children.

In Coleman v. Shang, the intestate had three children by a customary law marriage but, after the termination of the customary law marriage, he married another woman under the Marriage Ordinance. The plaintiff was the sole survivor as

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1. The Statute of Distribution, 1670 (22 & 23 Car. 2, c.10), read with the Administration of Estates Act, 1685 (1 Jac. 2, c.17) and Sec. 24 of the Statute of Frauds, 1677 (29 Car.2, c.3).
2. Coleman v. Shang, (1961) A.C. 481.
3. Bamgbose v. Daniel, (1954) 3 All E.R. 263.

an issue of the Ordinance marriage. During the subsistence of the Ordinance marriage, the intestate had ten children by a different woman whom he later married under customary law after the death of the Ordinance wife. On the intestate's death, the plaintiff, as the only surviving issue of the Ordinance Marriage, contended that he was the only legitimate child of the deceased and so claimed exclusive right to succeed to the two-thirds of the estate under the provisions of Section 48 of the Marriage Ordinance. The Privy Council upheld the decision of the Court of Appeal of Ghana that this contention was wrong. It was held that the first three children of the customary law marriage, prior to the marriage under the Ordinance, were perfectly legitimate and entitled to equal shares in the two-thirds portion with the plaintiff. As regards the ten children of the adulterous relations during the pendency of the Ordinance Marriage, they were held to be not entitled to share in the two-third portion under the Statute of Distribution; but they were held to be legitimate children who, together with other members of the family, were entitled to succeed to the one-third portion of the estate which, under the Ordinance, devolved on members of the family under the customary law. The reason for this decision is that legitimacy and illegitimacy are questions of status for the lex domicilii, and since the Ghanaian lex domicilii regarded the children as legitimate by virtue of

the applicable customary law, they were legitimate for all purposes, save the disability which they incurred under a statutory enactment.

In its decision on the matter, the Ghana Court of Appeal said:

> Under the Statute of Distribution a 'wife' means a 'lawful wife', and child means 'a lawful child'. The question of 'lawful wife' and 'legitimate' child are questions of status to be decided by the law of the domicil. Therefore, if a marriage between a man and a woman is by the law of their domicil a valid marriage, the 'wife' is a lawful wife for the purposes of the Statute no matter whether or not the marriage is invalid by the law of England or of any other place. Similarly, if a child is legitimate by the law of the country where at the date of its birth its parents were domiciled, he is a legitimate child for the purposes of the Statute, no matter whether or not that child would be illegitimate by English law. 1

This would appear to be a decision only within the meaning of the Statute of Distribution, but the Court of Appeal clearly expressed that it intended it to be a general proposition on legitimacy and referred particularly to Re Goodman's Trust, where Cotton, L.J., had said:

> If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is, on his domicil of origin, I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognises and acts on the status thus declared by the law of the domicil. 2

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1. Coleman v. Shang, (1959) G.L.R. 390, 406.
2. Re Goodman's Trust, (1887) 17 Ch.D. 266, 292.

Then, in the course of its judgment, referring to that part of the intestate's estate which under Section 48(1) of the Marriage Ordinance devolved in accordance with the relevant customary law, the Ghana Court of Appeal said:

> Again, by customary law, all children, however born, are entitled to enjoy equally. Consequently, all the three sets of children ... are part and parcel of his family entitled to share in the personal property and to continue the enjoyment of the real property ... 1

In dismissing the plaintiff-appellant's appeal against this decision of Ghana's Court of Appeal, the Privy Council made no direct comment on the legitimacy of the ten children procreated in extra-marital relations during the subsistence of the Ordinance marriage. It must be taken, therefore, that the Court of Appeal stated the law correctly. The position in Ghana common law, therefore, is that stated by the Ghana Court of Appeal that children born in adultery by a man married under the Marriage Ordinance are nevertheless legitimate, because legitimacy is conferred by the customary law as part of the lex domicilii of Ghana.

Coleman v. Shang was a Ga case from Osu, which is a patrilineal family area. It is submitted that a similar conclusion would have been reached if it had been a case from the Ewe area. Children born out of extra-marital relations to a married man are fully legitimate by Ewe law on acknowledgment of their paternity and are accepted as

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1. Coleman v. Shang, (1959) G.L.R. 390, 409.

full members of the father's family. Such children are fully entitled to the enjoyment of family property and are eligible for traditional and hereditary offices reserved to their father's family of which they are members. The Ewe law makes no distinction between them and the children born in lawful wedlock. The rationale of the rule is that in Ewe law a married man is entitled to take other wives, and his sexual relations with a woman other than his wife are strictly not acts of "adultery" but a mere "extra-marital relationship" which the customary law permits.

In the case of a child of an unmarried mother, therefore, the only criterion for determining the child's legitimacy is the acknowledgment of paternity by the putative father. The Ewe law of legitimacy is thus different from that of the Tswana of Botswana where the child is not a legitimate child of its father unless the marriage consideration, the bogadi, consisting of cattle, has been paid to the mother's family.[1] It also differs from other southern African tribes where the similar payment of the lobola is necessary for legitimacy. It is wholly immaterial in Ewe law that the putative father is already married to a different woman under customary law or under the Marriage Ordinance.

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1. I. Schapera, A Handbook of Tswana Law and Custom, International African Institute, London, 1955, p.139.

It follows that the only case which may produce a difficulty in Ewe law is where the child is without a known father. The father may be "unknown" in either of two senses. One sense is where the biological father is factually known but is not legally acknowledged; and the other case is where the biological father is not known either in fact or in law.

The first case is where the physiological father is factually known but, while the said physiological father is both willing and prepared to be officially recognised as father, the child's mother's family frustrate his intentions by declining to accept him. For where the mother's parents or family feel that their family pride has been wounded by a pre-marital deflowering of their daughter, or where the girl had been promised to another man but the intruder had lured her away, or where the mother's parents consider the putative father as unacceptable socially, or for any other reason, they may refuse to acknowledge the putative father as father. Such a refusal of recognition of the putative father would render the child technically "fatherless".

The child's mother's family are able to frustrate the intentions of the putative father because the formal acts of recognition are inextricably connected with the mother's family. Ordinarily, in Ewe law, the acknowledgment of paternity of a child consists in the putative father naming the child or performing the "outdooring ceremony" or in some way assuming responsibility for the maintenance of the child. It

is the prerogative of the father of a child to name his child and the ceremony is performed by the child's father or authorised members of his family; but it must be in the presence of the child's mother and her family and with their co-operation and involvement. The "outdooring ceremony" or videde de go is an occasion for merry-making to welcome the arrival of a new member of the family and the community. Its real purpose, however, is the formal presentation to the mother of the baby's clothing, toilet articles, the mother's clothing, some money and other requisites essential for the weaning of the new baby. These items are presented to the mother through her own family, and their acceptance constitutes recognition from the mother's family. To be able to name the child or perform its outdooring ceremony, therefore, the putative father must first have introduced himself to the family of his lover, and this is done with a pot of palm wine (but today this has changed to imported drinks like schnapps and whisky). This is preferably done when the mother is still pregnant and before the delivery of the child. If this preliminary move is rebuffed by the mother's family, the putative father will be unable to name the child or perform the "outdooring ceremony" for it. This is how the child's mother's family can refuse to regonise the putative father.

In describing the position, Ollennu says that, in naming the child, there must be given to the child "a name of his

father, his paternal uncle, his paternal sister, paternal grandfather, in short, the name of a paternal relation".[1] He continued that "whatever other name a child may bear, it must bear a paternal family name, what may be called his ntoro name".[2] Ollennu relied mainly on Rattray and Sarbah for this statement.[3] It is also said by Field that family names are imperative among the Ga[4] and it is not unlikely that Ollennu was influenced by his own Ga experience. We may point out here that the idea of ntoro is a matrilineal Akan notion which is unknown to the Ewe society, and the Ewe, therefore, have no "ntoro name". Furthermore, we must point out that among the Northern Ewe-speaking people of Ghana, the father of a child is unfettered in the choice of a name for his child. Although it is the indisputable prerogative of the father to choose a name for the child, the better practice today is to discuss it with its mother. In the event, the child may, if the parents so desire, bear any name and even the name of its mother's relations, especially if it is a female child. The only name that a child must have from his father's side is the "surname"; but this is not a name given to the child at its naming ceremony/and it is assumed as a name only later in official

1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.206.
2. Ibid.
3. R.S. Rattray, Ashanti, Clarendon Press, Oxford, 1923, pp. 43-54; and J.M. Sarbah, op.cit., p.54.
4. M.J. Field, Social Organisation of the Ga People, Crown Agents, London, 1940, pp.1-2.

matters. Moreover, a "surname" in its present form seems to have come only with European rule.

Ollennu has also made the general proposition that, "To become recognised as the father of a child, a man must perform the naming ceremony on the eighth day of its birth or on a subsequent day."[1] We would qualify this proposition by saying that such recognition as father may be subsequently conferred on a father who did not name his child and did not perform its "outdooring ceremony", if he properly introduces himself afterwards to the mother's family and is accepted or if he can otherwise establish his paternity. We would further dissent from the categorical tone of that statement and say that, while in any dispute as to paternity the fact of naming the child is a vital issue, the naming of a child is not a sine qua non to the recognition of paternity; it is only of an evidentiary value, though a strong one at that. In other words, if paternity can be otherwise established, then the mere failure to name the child would not be fatal. It is the same with the performance of the "outdooring ceremony". It was held, for instance, in the Nigerian case of Akerele v. Balogun[2] that notwithstanding the fact that the naming ceremony of the child did not take place in the intestate's house as Yoruba law requires, it was a sufficient acknowledgment of paternity that the child's birth

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1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.206. Emphasis supplied.

2. Akerele v. Balogun, (1964) L.L.R.99.

certificate bearing the intestate's name was obtained by him or on his instructions. This was so even though the birth of the child had been kept as a secret by the intestate from the members of his family. It is submitted that this is also true of the Ewe.

The naming of a child and the performance of its "outdooring ceremony" only raise a presumption of paternity which may, however, be rebutted with appropriate evidence. It is not unknown among the Ewe for a man who has named and outdoored a child to be subsequently deprived of paternity. In Kpatey v. Hiadzi,[1] for instance, a husband had named his wife's child, performed the "outdooring ceremony" or videde de go and maintained the child for about thirteen years. Nevertheless, against the mother's evidence, paternity was awarded to another man because the evidence satisfied the Court that the other man was the father. The trial Native Court rightly said on this point:

> Defendant's /i.e. the mother's/ contention that Plaintiff's child is not with her for he never performed any delivery custom is vague; for in accordance with Plaintiff's witnesses it would never be possible for Plaintiff to approach Defendant's parents for such customary performances, as they alleged of receiving the conception from him /sic/; as such this unperformed custom did not mean that the Plaintiff was never the conceiver of Defendant /sic/ ... 2

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1. Kpatey v. Hiadzi, Unreported, Asogli Native Court "B", Ho, 22nd September, 1959, at p.228 of Civil Record Book. See pp. 150-152 infra for the facts.

2. Kpatey v. Hiadzi, supra.

In such a case, the man so deprived of paternity may be reimbursed the cost of the ceremonies if the circumstances, particularly his own innocence of the facts, justify it.

Returning to the main question of a child whose paternity is "unknown" because the mother's family decline to recognise the putative father, the position is that the mother's father performs the naming and "outdooring" ceremonies and the child is absorbed into the mother's family. Field says of the Ga that:

> The kpodziemo, or naming ceremony of a child, necessitates a 'father', but this father need not be the child's progenitor. The man in whose name the ceremony is done claims the child as his lawful issue.
>
> The most usual person to father the child of a husbandless mother is her own father ... the child's maternal grandfather does its kpodziemo ceremony and names it as **his** own son or daughter. It now counts as his own child in all matters of inheritance and succession. Even if he be a mantse it is eligible to succeed him. 1

Similarly, Ollennu also says:

> Should the father's family fail to perform the naming ceremony, or should they be denied the right to perform it, the ceremony will be performed for the child by the mother's father or the mother's paternal family. 2

He adds that in that case the child will legally become the child of the mother's father.

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1. M.J. Field, Social Organisation of the Ga People, Crown Agents, London, 1940, p.24.

2. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.207.

It is submitted that Ollennu's exposition is correct. We would also agree with Field until she says that such a "fatherless" child is eligible to succeed his maternal grandfather even if he is a mantse, that is, a chief.[1] In Ewe law, a child so absorbed into his mother's family is entitled to most of the rights and privileges flowing from membership of the family, but he is regarded as ineligible for succession to a hereditary office such as that of a chief. Owing to such disabilities, in practice, hardly any child today remains in this anomalous legal status after coming of age. In practically all cases, the adult child goes to his father, regardless of whether his mother's father concurs or not. Because of the awareness that such a child would in any case eventually go to his actual father, parents today rarely persist in their refusal to recognise the fathers of their daughters' children. The threat of refusal of recognition is, therefore, only held out these days in terrorem, to compel the putative father to make a formal approach for the marriage of his child's mother.

The other situation when a child's father is unknown is when the father is not actually known as a matter of fact. Such a situation may arise from a rare case when the mother is unable or unwilling to name the father. The more usual case is that a man is named as the father but he denies paternity.

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1. Notwithstanding that Field states that she had seen historical records of Ga stools occupied by such absorbed children, The answer may be that the Ga rules differ in this respect.

The refusal of a man, once named, to accept paternity, was rare in the olden days. The maxim of the law was and still is nyonu mefoa aka na ame wonyina gbona o, which means that it is practically impossible for a man to extricate himself from the responsibility once he is taxed with paternity by the mother. It finds a parallel in the modern notion that "mothers know best". The presumption of paternity arising from the mention of a man by the mother was, however, not irrebuttable. The onus of dislodging the presumption was a heavy one in the eyes of the old Ewe law; but, if proper evidence could be led in disproof, the presumption could be destroyed, because its basis was the assumed truthfulness of the mother.

Today the rule is not enforced in its old form, and the courts have gone as far as to have recourse to blood tests to determine issues involving the paternity of children. The old rule was formulated within the context of the old social phenomena, in which moral laxity and sexual liberty in women were highly reprehensible and promiscuity was unknown. Furthermore, there was a general belief, rooted in superstition, that a woman who failed to make a full disclosure, or who deliberately lied about who impregnated her, would not have an easy delivery and might even die at child-birth. Today, however, new ideas, new social values and different moral standards prevail in the Ewe society. Moral laxity and promiscuity are certainly on the increase. The threat of a supernatural sanction which may be visited upon women guilty of infidelity is less effective today,

especially among the literate class of women who have found that they can be safely delivered of their babies at the midwife's home even with falsehoods locked up in their bosom. For these reasons, the weight attached to a woman's evidence today is not so great. In some cases, as in Kpatey v. Hiadzi,[1] the Court may even reject the mother's evidence and award paternity to the proper man on the evidence adduced before it.

When a child's father is unknown, either because the mother does not name anybody or because the man named denies paternity, the child is absorbed into the mother's family, in exactly the same way as that whose father is factually known but is denied the legal parental status.

A problem of entitlement to property arises when a fatherless child is later properly claimed by his father. Since the child, before his paternity was determined, was regarded as a member of his mother's family, he was entitled, as of legal right, to the use and enjoyment of that family's property. He may, therefore, have made farms on that family's land. What happens to the farms on his change of paternity when he ceases to belong to his mother's family? If the farms contain only foodstuffs or annual crops, he is fully entitled to harvest those already grown by him; but he has no legal right thereafter to use those plots of land unless he is permitted by the maternal family to continue

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1. Kpatey v. Hiadzi, Unreported, Asogli Native Court "B", Ho, 22nd September, 1959, at p.228 of Civil Record Book.

in their use and occupation. The real problem is when there is a farm planted with permanent cash crops like cocoa, coffee or palm trees. The making of such farms means in effect that the land is permanently tied to the planter and his successors. If the child is permitted to keep the farm, therefore, it will devolve, according to the Ewe law of succession, on his children and their children in the new paternal family. This means that the land is practically lost to the maternal family; for even though there is the legal argument that the child's interest is limited to only the trees, the fact is that the land will not revert to the mother's family because the child will not allow the farm to die out without replanting it with new trees.

One view is that when the fatherless child is claimed by his father, the farm of permanent crops cultivated by him on his mother's family land is forfeited to the mother's family, to be treated as belonging to his mother's father. This is the view expressed particularly in Peki, Aveme, Gbi, and Abutia, though it was agreed that some basis of sharing was possible. In Taviefe and Matse and some other areas, it is the view that the farm is physically divided into three parts with one part to the child and two parts to his mother's father; in Awudome the division is suggested in equal halves. Even in the areas where the farm is divided, it is emphasised that only the crops are given to the child. The legal result of this provision is that the paramount title of the family to the land is unaffected

so that, in the unlikely event of all the present trees dying out or being destroyed, the right to use the land itself reverts to the mother's family; but the more practical legal implication is that, while the child enjoys the fruits of his farm, he has no rights over the palm trees or odum trees or other timber naturally growing on the land or any minerals or treasure trove that may be discovered on the land. Furthermore, while perhaps the child may alienate his interest in the farm, he cannot in any way alienate title to the land itself.

In a recent case at Gbi-Kpeme in Gbi in about 1961, the whole farm was forfeited to the maternal grandfather when the fatherless adult child moved into his proper patrilineal family. The right of forfeiture was not disputed either by the child himself or by his paternal family. The maternal grandfather, however, did not insist on the refund to him of his expenses in the up-bringing of the child who had been through elementary school. The paternal family provided a sheep and drinks as an expression of gratitude and to mark the formal assumption of paternity.

It is suggested that, as a general rule, where a fatherless child makes a farm of permanent crops on his mother's family land as a member of that family, but his paternity is subsequently acknowledged so that he becomes a member of another family, the farm so made by him is, in strict Ewe law, liable to forfeiture to the mother's father, but the practice is to give such a child

a portion of the farm. In any event, it is in the discretion of the maternal family to make an absolute gift of the whole farm tc the child, and it seems that this is normally the case if the acknowledgment of paternity and the change are effected smoothly. Even when such a "gift" is made, unless expressly provided otherwise, the paramount title to the land is not thereby conveyed to the child but remains vested in the family of his mother.

In the early Ewe law, a distinction was drawn between a child who was procreated in lawful wedlock and that whose birth was a result of an irregular union, or a mere sexual relationship. A child born in lawful wedlock, by which is meant a full ceremonial marriage, was in a privileged position with respect to succession to his father's interests in property. The position was similar to that of the children of a "six-cloth" marriage among the Ga people of Ghana.[1] A child in Eweland whose mother was not properly married to his father before his birth, was known as gbomevi, asikevi or ahasivi. The gbomevi, asikevi or ahasivi, because his mother was not joined to his father by the conjugal bond, was not regarded as fully "legitimate". Not only did he incur some social discrimination, but his right to inherit his father's self-acquired property was not recognised, so that a child of a married mother was entitled to most of the property. Nevertheless, we cannot say the gbomevi was not

1. As shown in Ga cases like Solomon v. Botchway, (1943) 9 W.A.C.A. 127, and Amarfio v. Ayorker, (1954) 14 W.A.C.A.554.

"legitimate", because he was a full member of his father's family, he had an inherent right of use and occupation of the family land, and was eligible for all hereditary offices enjoyed by the family, including a chiefly stool. It was an anomalous situation, not very different in conception from the position of the ten children procreated in adultery in Coleman v. Shang:[1] they were held to be legitimate for all purposes, save as regards succession to two-thirds portion of the intestate estate under Section 48 of the Marriage Ordinance.

The distinction between the children of married and unmarried mothers has now disappeared in Ewe law. The information in virtually all areas is that, in the present state of the law, all children, however born, are fully legitimate, once their paternity is duly acknowledged, and they are all equally entitled to succeed to their father's interests in self-acquired property. This change has already been reflected in a Nigerian case of apparently similar circumstances. In the Nigerian (Yoruba) case of Savage v. MacFoy[2], it was contended that only the children of a customary law marriage were legitimate and entitled to the intestate's property, as against other children whose mother was never properly married to the intestate. This contention was rejected by Osborne, C.J., who said:

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1. Coleman v. Shang, (1959) G.L.R. 390.

2. Savage v. MacFoy, (1909) Ren.504. See also In Re Sapara, (1911) Ren.606.

> In this respect there appears to be no difference between children born in native wedlock and the offspring of fortuitous connection, provided that paternity has been acknowledged. 1

The learned Chief Justice, in deciding as he did, relied on the evidence of a native chief "who, as a chief, has had practical experience in administering the native law". I respectfully concur in this statement of the law and submit that it also represents the Ewe law. That is why I also agree with the dictum of Ollennu, J., in Carboo v. Carbòo that:

> In Ghana, except for the purposes of succession to two-thirds of a person's estate under the Marriage Ordinance, every child of a man, however born, is his child, unless the child's paternity was not proved, or unless during his life-time the man did not recognise that child as his child. 2

It should be stated, however, that the terms gbomevi, asikevi, ahasivi and similar ones are still retained, even if only as terms of social distinction and devoid of any legal consequences. The Yoruba of Nigeria, for instance, also call such a child of an unmarried woman omo ale.[3] Coker attempts to draw a distinction between the omo ale and a child born in wedlock because the latter is legitimate from birth while the former is not legitimate unless his paternity is acknowledged.[4] As far as succession to hereditary offices and property rights are concerned, however, it is a distinction without a difference once paternity is acknowledged.

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1. Savage v. MacFoy, (1909), Ren.504, 508.
2. Carboo v. Carboo, (1961) G.L.R. 83, 87.
3. See G.B.A. Coker, Family Property Among the Yorubas, Sweet & Maxwell, London, 1966, p.266.
4. Ibid.

Among some patrilineal tribes, a man without a male child to raise issue for his line of descent may designate one of his daughters to remain a spinster, so that any children born by her would become legally the children of her father. Rattray, for instance, has written of the practice among the Nankanse people of Ghana where a daughter may be made "a stayed at home" (i.e. unmarried), so that her child, known as yie-bie (meaning "house child" or "sister's child") may be regarded as her father's child.[1] Rattray, however, says that the "stayed at home" daughter is "laughed at" and "The children, too, have not the same status as the 'legitimate sons' ... e.g. they may never become heads of sections".[2] Ollennu criticises Rattray's assessment of the status and standing of the "stayed at home" daughter and her children.[3] From the very sketchy treatment that Rattray gave the subject, it is not possible to justify his conclusions. There is no doubt, however, that if the institution were to be found among the Ewe, the position would be approximately that given by Rattray; for total absorption within the Ewe family through one's mother is not possible without some practical disabilities. Apparently Ollennu criticised Rattray because he found a close similarity between the yie-bie of Nankanse and

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1. R.S. Rattray, Tribes of the Ashanti Hinterland, Clarendon Press, Oxford, 1932, Vol. 1., pp.51, 265.
2. Ibid., p.265.
3. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp.209-210.

the pla bi of the Ga-Adangbe of the Eastern Region of Ghana. It seems to be a fairly common practice among the Krobo and other Adangbe people where, although the girl may not be expressly requested to remain a spinster for this purpose, the child of an unmarried girl is sometimes retained in the girl's family. Such a child is known as pla bi; but the term is also applied to a child of any unmarried woman, even if the child's paternity is acknowledged. The difference between the two types of pla bi is that that retained in the mother's family later becomes yo bi and fully entitled to succeed to property and hereditary offices in his mother's patrilineal family. The other type of pla bi is similar to the ahasivi, asikevi, or gbomevi in Eweland; he belongs to his own father's family as a legitimate member, so that the term is only a social indication that he was not procreated in lawful wedlock. The practice of keeping one's daughter as a spinster for the deliberate purpose that she should raise seed to her father is not known among the Ewe. If ever it was, it has disappeared. In any case, as already suggested, it seems impossible among the Ewe to achieve a fully legitimate status for a child so absorbed into his mother's family; he would be subject to certain disabilities, especially as regards succession to hereditary offices.

Paternity and Legitimacy: Mother Married

Although marriage is not necessary for the legitimacy of an Ewe child, the rule of Ewe law was that any child of a married woman belonged to her husband as a legitimate child.[1] Evidence of the husband's biological paternity was excluded because it was an absolute presumption of law that the child was a legitimate issue of the mother's husband. Therefore, in order to determine the paternity of a child, it was enough to establish the subsistence of a valid customary law marriage between the mother and her husband at the birth of the child; all other enquiries, such as would be appropriate in the case of an unmarried woman, were precluded. There was a marriage for this purpose if formal drinks in contemplation of marriage had been accepted by way of betrothal, even if the actual public celebration of the union had not occurred. There was also a valid subsisting marriage even if the couple were separated, provided that the marriage consideration or tanu had not been repaid to the husband to effect a formal dissolution of the marriage.

It was this rigid rule of the old Ewe law that was applied

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1. The old Ewe rule is similar to the Tswana law where the child of a married woman, without further enquiry, belongs to the man on whose behalf the marriage consideration or ~~bogadi~~ bogadi was paid. See I. Schapera, A Handbook of Tswana Law and Custom, 1955, p.139.

in Agbovi v. Adatsi.[1] In this case, originating in Goviefe-Kowu, the defendant-appellant had had sexual intercourse with a woman who was separated from her husband but whose marriage consideration or tanu had not been fully repaid to the estranged husband. As a result a child was born. The plaintiff-respondent, as the woman's husband, contended that the child was his son because, although the customary law marriage had been dissolved, the marriage consideration or tanu and expenses were still outstanding. The Woadje Native Tribunal decided in favour of the plaintiff and held that, so long as there had not been a full return of the marriage consideration, the marriage technically subsisted and, therefore, the plaintiff husband was the father of the child of his separated wife. The defendant paramour appealed to the Native Court of Appeal for Akpini State at Kpando, but the appeal was dismissed.[2] In the determination of this case, the sole criterion was the subsistence of a marriage between the plaintiff-respondent and his wife, although there was no suggestion of sexual intercourse between them, such as could have resulted in the birth of the child.

About a year before Agbovi v. Adatsi, however, another Native Tribunal, the Native Tribunal of Kpando, also under the

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1. Agbovi v. Adatsi, Unreported, Native Court of Appeal for Akpini State, Kpando, 1944, at p.340 of Civil Appeal Record Book.
2. The information, however, is that the child nevertheless went to the defendant-appellant, so that the Court's assigning of such an artificial paternity remains only on paper.

jurisdiction of the same Native Court of Appeal for Akpini State, had been faced with a converse situation. If the law is that the husband is the father of every child born of his wife, then the converse must also be true that, even if the husband is unwilling to accept it, the wife can hold him responsible as father of any child she bears while he is away. That is why the case of Ebenezer Kofi v. Cecilia Akosua,[1] of Kpando Tsakpe, is interesting in this regard. In that case the defendant had been married to the plaintiff but, after the birth of five children, difficulties arose and the couple separated; but there was no formal dissolution of the marriage. On her own admission, the defendant wife, after the separation, left the town and became a prostitute elsewhere. As a result of promiscuous sexual relations with other men in the course of her prostitution, the defendant wife conceived a child whose father she did not know. Apparently the plaintiff husband must have felt unhappy about this position. He eventually sued his wife claiming damages from her for asking him to accept the paternity of the baby then still in her womb, whereas they had been separated without any sexual relations for about sixteen months prior to the conception. In her evidence in defence, the defendant wife denied ever mentioning the plaintiff (her

1. Ebenezer Kofi v. Cecilia Akosua, Unreported, Native Tribunal of Kpando, Kpando, 7th April, 1943, at p.151 of Civil Record Book.

husband) as the father of the baby in her womb and said that, even though she could not name its father, yet the plaintiff husband was definitely not the father. The Native Tribunal accepted the evidence of the defendant wife that she had not taxed her estranged husband with the paternity of her child and accordingly dismissed the plaintiff's claim. Said the Native Tribunal:

> In the opinion of this Tribunal, the claim by the Plaintiff against the Defendant is dubious since there is no evidence in support of the Plaintiff's statement that ... the Defendant did ask the Plaintiff to own the said conception ... Judgment is, therefore, entered against the Plaintiff. 1

The reasoning of the Native Tribunal seems quite clear. The action was dismissed because the allegation was not proved.

Unfortunately, Ebenezer Kofi v. Cecilia Akosua was not taken on appeal to the Akpini Native Court of Appeal. By implication the Native Tribunal of Kpando in this case rejects the proposition of law that the husband is always the father of his wife's child, however and whenever conceived. If this proposition were not rejected by the Tribunal, then the husband's claim could simply have been dismissed on the ground that no claim would lie even if the defendant wife had named him as father of the child; for in that case the wife would have only been stating what was an absolute presumption of law.

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1. Ibid.

In that event, whether the wife did name her husband as father of the child or not would not seriously be in issue. This, however, was not the case here. The wife was at great pains to deny that she ever mentioned her husband as father of her child, and even went as far as to expressly exclude him as a possible father. The Tribunal itself emphasised that it rejected the plaintiff husband's claim because he could not substantiate his allegation that he had been mentioned as father of the child, which leaves the impression that the husband could have succeeded if he could prove that he had in fact been so mentioned. What we might ask is whether the plaintiff husband could have succeeded in his action if the defendant wife had maintained in court that the baby in her womb belonged to the plaintiff because the plaintiff was still legally her husband. Could the plaintiff husband have rejected paternity in spite of the technically subsisting customary law marriage? It seems that, from the tenor of the Native Tribunal's judgment, the husband would have been allowed to reject the paternity. What we cannot directly infer from the judgment of the Native Tribunal is whether it would have upheld the claim of the husband, if the husband had claimed paternity of the child conceived by his wife in the course of prostitution and after sixteen months of separation without any sexual relations. It appears, however, that the Tribunal would have rejected such a claim.

It seems that the decision in Ebenezer Kofi v. Cecilia Akosua is a reflection of modern changes in the Ewe law of paternity. The irrebuttable presumption of the old law was that, without any further enquiry being allowed into the facts, a husband was the father of any child of his wife. Accordingly, even where a wife was carried away into captivity during the Ashanti-Ewe war, children brought home by the liberated wife belonged to her husband who had been completely out of touch with her for many years.[1] In the old rule, even if the paramour was openly cohabiting with the woman, the children legally belonged to the woman's lawful husband if the marriage consideration or tanu had not been repaid before the procreation of the children. The Ewe say fiafito bofo mele esi o, that is, "a thief cannot own the products of a farm", because the paramour has no right to another man's wife and is in that sense a thief violating another person's rights. This meant that the Ewe "father" was not always the biological originator of his child's conception. It was only a position of a legal relationship which might not coincide with the biological facts. This was not peculiar to the Ewe. The dictum of Roman law was pater est quem nuptiae demonstrant; and it is said among the Arabs that "children belong to the man to whom the bed belongs". Most

1. The Ashanti invasion of Eweland was in about 1868-69 and it was successfully repulsed. Examples of descendants of such captured wives were given, but, for obvious reasons, without permission to publish them.

patrilineal African peoples had rules of similar effect, even if of different formulation.[1] Even in the modern law, whether of the Ewe, the English or the Chinese, we cannot say that a child's "genitor" is always his "pater".

Recent decisions and interviews with many people show that the old rule that a husband, simply because a husband, is legally the father of his wife's child, has been changed among the Ewe. The issue of paternity is now decided on the basis of physiological fatherhood as established from all the available evidence, including, of course, the position of a man as a husband. It was suggested in one or two areas that it was the Germans who changed the law.[2] Most people attribute the change to the British colonial authorities. In any event, in their mind, it was the "white man" who came to change the law. It seems they are right to attribute the change to European rule; for such changes have been brought about by the colonial administration in Ghana and elsewhere.

An example of such a change arising from European rule is in the decision of a Nigerian case to which we may refer. In the Nigerian (Efik) case of Edet v. Essien,[3] the facts

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1. E.g. the Tswana and the Bantu generally where the payment of bogadi or lobola determines paternity.

2. Most of the area was part of the German colony of Togo until 1914.

3. Edet v. Essien, (1932) 11 N.L.R. 47.

are only slightly different from Agbovi v. Adatsi.[1] In Edet v. Essien, the defendant-appellant (Essien) was deserted by his wife but the marriage consideration had not been refunded before the wife went to live with another man who was the plaintiff-respondent in this case. In the customary law the woman remained a wife to the plaintiff for as long as the marriage consideration was not refunded. The defendant-appellant (Essien), therefore, sought to claim the two children procreated through the relations between his separated wife and the plaintiff-respondent (Edet) on the ground that, under Efik law, he was entitled to any children born by the woman since she had not refunded the marriage consideration. The Calabar Provincial Court did not allow the claim because the native law on the point was not proved to its satisfaction. The claim was also rejected on an appeal to the Divisional Court. In rejecting the appeal in the Divisional Court, Carey, J., said:

> Assuming that the native law and custom as alleged by the appellant had been definitely established, I am inclined to think it should properly have been overruled in this case as being repugnant to natural justice, equity and good conscience having regard to the circumstances. [2]

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1. Agbovi v. Adatsi, supra.

2. Edet v. Essien, (1932) 11 N.L.R. 47, 48.

It seems that it is through decisions of this nature, applying the well-known "repugnancy clause", as well as executive and administrative action, that changes in Ewe law have resulted from European rule.

When the old Ewe law on paternity is stripped of its harshness and rigidity, excluding the absurd instances where there is a complete impossibility of sexual ingress, it is realised that the old Ewe rule is essentially the same as the present English law on the subject. It is, therefore, not easy to understand why the British colonial administration should have induced a change in the opposite direction.

The rule of English law, as stated in the Banbury Peerage Case, is that a child is presumed to be a legitimate child of its parents, if it was either conceived or born in lawful wedlock, unless it can be proved that sexual intercourse did not take place in such circumstances as could lead to the birth of the child.[1] This was also stated by the Lord Chancellor in Head v. Head thus:

> A child born of a married woman, whose husband is within the four seas, is always to be presumed to be legitimate, unless there is evidence of a satisfactory character that sexual intercourse did not take place at any time when, in the course of nature, the husband might have been the father of the child. [2]

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1. Banbury Peerage Case, (1811) 1 Sim. & St. 153; 57 E.R.62.
2. Head v. Head, (1823) 1 Sim. & St. 150; 37 E.R. 1049.

This principle has been extended and is applied in England in a manner no less absurd than the extreme Ewe cases. Thus it has been said in the House of Lords that:

> So strong is the legal presumption of legitimacy that in the case of a white woman having a mulatto child, although the husband is also white, and the supposed paramour black, the child is to be presumed to be legitimate, if there was any opportunity for intercourse. 1

One social reason for the presumption of legitimacy in English law must be to exclude impossible and embarrassing enquiries and to preserve the stability of the family and the sanctity of the institution of marriage. There is no reason why the same reasoning cannot apply to sustain the old Ewe rule, perhaps trimmed of its absurdities, even though the Ewe institution of marriage is polygamous. That the social implications of the Ewe rule have not been appreciated, with the result of a drastic change in the law, has led in a spate of paternity disputes, in which, to the embarrassment of families and the discredit of marriage as an institution, enquiry into biological paternity has been over-emphasised. We may look at one or two paternity cases that have been before the Ewe native courts.

In Dansu v. Na-Dja,[2] a case from Agbesia, the plaintiff-respondent was the husband of the defendant-appellant (Madam Na-Dja), to whom he was married, apparently under customary law.

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1. Piers v. Piers, (1849) 13 Jur. 569.

2. Dansu v. Na-Dja, Unreported, Native Court of Appeal for Akpini State, Kpando, 15th March, 1944, at p.335 of Civil Appeal Record Book.

Both of them were living together when a male child was born by the wife. The child was regarded as a legitimate child of the plaintiff-respondent (Kwami Dansu). When the child was about 15 years old, however, the defendant wife named a different man, one Kwasi Ablewu of Aveme-Danyigba, as his father. The plaintiff husband sued his wife for naming another person as the child's father. The trial Native Tribunal of Aveme found that the plaintiff-respondent, who was the husband of the child's mother, was the father and accordingly awarded him paternity. The wife appealed to the Native Court of Appeal for Akpini State at Kpando. At the hearing the Native Court of Appeal felt it was in doubt and so decided to call the boy himself to give fresh evidence. The disputed boy, in his evidence, stated that the information he believed from his mother (the defendant-appellant) was that the plaintiff-respondent was not his father and that one Kwasi Ablewu was his father. On the strength of this evidence, the Native Court of Appeal reversed the judgment of the trial Native Tribunal of Aveme and declared that the husband was not the father of the boy born by his wife while they were living together as man and wife.

Here we see the case of a child born in wedlock when his father and mother were cohabiting and yet the Native Court of Appeal declared that his father was not his mother's husband.

This goes beyond the rule in the English cases because there existed the opportunity for sexual intercourse which could have resulted in the birth of the child. It is an extreme case, though the rationale is to base legal paternity on physiological fatherhood, which by itself is good law. The difficulty here, of course, was the enquiry into the biological origin of the child, a task which the Native Court of Appeal was not equipped to perform. In the event, it could do no better than rely on what amounts to no more than the mother's evidence alone, for the boy could not corroborate his mother as he was only reproducing what his mother had told him. If the court had balanced the mother's evidence against the rebuttable presumption of paternity in the husband, perhaps its decision might have been different. In any case, the Court was also heavily swayed by the disputed child's own statement rejecting his mother's husband as his father.

Another case was decided by the Asogli Native Court "B" at Ho. It is Kpatey v. Hiadzi,[1] both parties coming from Tanyigbe. In this case the plaintiff (Seth Kpatey) claimed to be the father of a girl named Akosua, then aged about 13. At the time the girl Akosua was born, her mother was married to one Tsetse Amevor and not to the plaintiff. She was, therefore,

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1. Kpatey v. Hiadzi, Unreported, Asogli Native Court "B", Ho, 22nd September, 1959, at p.232 of Civil Record Book.

born in lawful wedlock, though the evidence did not show that she was conceived in that wedlock. It was Tsetse Amevor, the husband of Akosua's mother, who named the child, performed the outdooring ceremony and other birth rites, and had been looking after the child and had been generally regarded all along as the father of Akosua.

The plaintiff's case was that Akosua's mother had been his lover and that their relations continued until they were terminated by the marriage of the woman to Tsetse Amevor. The plaintiff claimed that the defendant mother had conceived Akosua through sexual intercourse with him before she married Tsetse Amevor and that Amevor could, therefore, not be the father of the girl. The plaintiff deposed that he had even been ordered by arbitrators to pay some money and to provide two bottles of rum to the defendant's father for putting the defendant in the family way and that he had complied.

One witness, a member of the defendant's family, said:

> We received the £2 and wine from the Plaintiff for having spoilt Defendant by conceiving her. Though we knew Plaintiff to be the conceiver [sic] of Defendant, yet we gave her and the conception to Tsetse as this was our usual practice by then in our clan ... 1

The defendant, Akosua's mother, said in her evidence that the plaintiff was not Akosua's father.

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1. Ibid.

The Native Court held that the plaintiff (Seth Kpatey) was the father of Akosua although he did not name the child at birth or perform any other custom in respect of her, and in spite of Akosua's own mother's evidence to the contrary. In its judgment the trial Native Court said:

> The first witness for the Plaintiff alleged that they were fully aware of Plaintiff's conceiving of Defendant, but as it was and is a general practice for them of never permitting the conceivers [sic] of their daughters to go with such conceptions hence they gave out Defendant with the conception to their brother Tsetse Amevor for marriage on the third day of arbitration ... Defendant's contention that Plaintiff's child is not with her for he never performed any delivery custom is vague; for in accordance with Plaintiff's witnesses it would never be possible for Plaintiff to approach Defendant's parents for such customary performances, as they alleged of receiving the conception from him [sic]; as such this unperformed custom did not mean that the Plaintiff was never the conceiver of Defendant [sic] ... 1

This is a case which is remarkable for the propositions of law that may be deduced from it. We may take it as authority for the proposition that, even though a child may be born in wedlock, that fact alone cannot be held to raise an irrebuttable presumption that its father is the mother's husband. One reason why the law presumes that birth in wedlock presupposes paternity in the husband is that the mother may have conceived in pre-marital courtship with her intending husband; for it is very improbable that a man would enter into marriage with a woman having another person's baby in her womb. The Native Court was,

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1. Kpatey v. Hiadzi, supra, at p.232 of Civil Record Book.

therefore, right in rejecting this presumption when the evidence was clear that the woman had taken seed from another man prior to the marriage. It was, however, a hard decision because, in arriving at the conclusion that it did, the Native Court not only rejected the mother's own evidence on paternity but also excused the plaintiff's non-performance of customary rites at the time of the birth of the child. In doing so, it also contradicted the suggestion by Ollennu that "to become recognised as the father of a child, a man must perform the naming ceremony".[1] The evidence of the mother and the failure to perform the customary rites at birth were properly treated, as they should be, as only part of the totality of the evidence, though entitled to great weight, and the issue was decided on the preponderance of the evidence as a whole. It is submitted that this was rightly decided.

Another paternity case is X and Y v. Z.[2] In this case the defendant, Z, had approached X and told X that he was X's father. Therefore X and his reputed father, Y, sued Z in damages for defamation.

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1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.206.

2. This is civil suit No. 59/58, unreported decision of the Gbi-Hohoe Native Court, Hohoe, delivered on 17th April, 1958, at p.418 of the Civil Record Book. The names of the parties are withheld.

At the trial the defendant, Z, admitted making the statement to X, the first plaintiff, and maintained his contention that he was X's father, for which reason he counterclaimed for a declaration of paternity in his favour. The defendant deposed that he was in fact the biological father of the child X, because X was conceived as a result of his (defendant's) sexual intercourse with the mother when he was a school boy. The defendant called evidence that he was dismissed from school in those days because of his relations with X's mother at the material time, and he produced a youthful photograph of himself in an effort to establish physical resemblance between himself and the child X. The defendant admitted that he had never maintained either the mother or the child, who was then over 21 years old.

The case for the Plaintiffs was that the 2nd plaintiff, Y, was the husband of S, the mother of X, at the time X was born. The 2nd plaintiff stated that X's mother, S, had been customarily engaged to him some years earlier, and he had been performing the marriage customs over a period of time before the formal marriage. The marriage actually took place before the birth of the disputed child, so that at the time X was born both the 2nd plaintiff and X's mother were married and were cohabiting as man and wife. The 2nd plaintiff asserted that he was the father. The defendant's answer to this was that, regardless of the alleged engagement, he had put X's mother in the family

way so that, at the time X's mother went to live with the 2nd plaintiff as wife, she was already pregnant. The mother, S, gave evidence for the plaintiffs and stated that her child's father was the 2nd plaintiff, Y; but the mother was described by the Court as an untruthful witness.

In its judgment, the trial Native Court dismissed the action by the disputed child, X, the 1st plaintiff therein, against the defendant. The ground on which the action by the disputed child, X, was dismissed was that, X's own paternity being the substantive matter in issue, X was not competent to sue because he was not in existence at the time of the facts into which the Court was enquiring, so that everything which he said was a hearsay.

As between the 2nd plaintiff, Y, who was X's reputed father, and the defendant, Z, the Native Court entered judgment in favour of Y, the 2nd plaintiff, and awarded him the paternity of the child X. The reasons given by the Court are, however, interesting. It said:

> According to the evidence before us, it seems that S took the seed from the Defendant, but the Defendant did not at all look after the conception ... The Defendant did not perform any outdooring ceremony at the time 1st Plaintiff /i.e. X/ was born and had waited for about 22 years now when he comes to claim the 1st Plaintiff to be his son. It was rather the 2nd Plaintiff /i.e. Y/ that performed the outdooring ceremony and had been looking after the child till now as his son, and S also told the Court that she took the seed from the 2nd Plaintiff, though Defendant's picture (Exhibit 'A') appears to be 1st Plaintiff's /i.e. X's/ This Court

> enters judgment for the 2nd Plaintiff and against the Defendant for paternity of the 1st Plaintiff /i.e. X/ ... 1

This decision is difficult to reconcile with the Ewe law as to paternity. In the first place, the Native Court could have disposed of the case and decided in favour of the 2nd plaintiff by applying the old Ewe rule that, as husband of X's mother, he was presumed in law to be X's father. In that case no onus would lie on the 2nd plaintiff to establish his physiological paternity, once the marriage was proved. Alternatively, the Native Court could treat the presumption that the husband is father of his wife's child as a rebuttable presumption. In this latter case, the burden would be on the defendant to rebut the presumption by appropriate evidence to the effect that the plaintiff husband could not have been the child's physiological father. Neither course was adopted, and the trial Native Court did not seem to have adverted its attention at all to the position of the 2nd plaintiff as a husband. We may take it, then, that the Native Court regarded the fact of marriage as irrelevant to the determination of the issue and was applying the Ewe customary law in its modern form of deciding solely on the criterion of biological fatherhood. If so, this would be in line with the general trend of other decisions.

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1. X and Y v. Z, supra.

We cannot, however, say that the Native Court's decision was based on the fact of biological paternity. On the contrary, the Native Court made a finding of fact on that issue but consciously decided that that was not legally conclusive. The Court said, "According to the evidence before us, it seems that S took the seed from the Defendant". Then it went on to say that the defendant's picture appeared to be that of the disputed child. It was in the teeth of these findings that the Native Court nevertheless decided that in the circumstances the defendant could not be awarded paternity. If the Native Court was of the opinion that the defendant was the disputed child's biological father, and even reinforced this with physical resemblance, why then did it enter judgment against the defendant?

The Native Court's answer is that, although the defendant appeared to be the biological father, yet he lost the legal fatherhood because he neither performed the child's outdooring ceremony nor maintained him. In so deciding, the Native Court was not relying on the strength of the plaintiff's own case of physiological paternity, but only on the evidence of his performance of customary rites at birth and maintenance there-after. We may, therefore, ask whether it is the Ewe law that a person can succeed in a claim of paternity by the mere facts of naming a child, performing its customary outdooring ceremony and maintaining it thereafter. It is submitted that that is not the law. If paternity cannot be established on the facts of the case,

assumption of parental responsibilities alone cannot confer it; for that is only part of the totality of the evidence. There is in Ewe law no rule of "legitimation per subsequent maintenance"; nor does there exist any "prescriptive right of paternity". That is why in the Tanyigbe case of Kpatey v. Hiadzi,[1] decided by the Asogli Native Court "B" at Ho, it was decided that the biological father was entitled to paternity, notwithstanding that he did not name the child nor perform its outdooring ceremony and had never maintained the child. That is also why, in an otherwise bad case, the Native Court of Appeal for Akpini State at Kpando, in Dansu v. Na-Dja[2] applied the correct principle, albeit with startling consequences, and awarded paternity to the biological father, although the child was conceived as well as born in wedlock and had been maintained for 15 years by the mother's husband. It is submitted that the law laid down in Kpatey v. Hiadzi and Dansu v. Na-Dja is to be preferred, even if we do not fully agree with the application of the law to the facts in each case.

We may, therefore, sum up the position thus. Under the old Ewe law, there was an irrebuttable presumption of law that the husband of a married woman was the father of any child born by such a woman, and this was so even if there was no possibility of sexual access to the woman. This, however, has been changed.

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1. Kpatey v. Hiadzi, supra.
2. Dansu v. Na-Dja, supra.

Therefore, under the current Ewe law, biological paternity is the sole criterion, so that paternity will be awarded to him who establishes physiological fatherhood: Ebenezer Kofi v. Cecilia Akosua, Dansu v. Na-Dja and Kpatey v. Hiadzi. Relevant for the determination of biological paternity are such facts as marriage between a claimant and the child's mother at the time of conception or birth, the naming of the child and performance of the outdooring ceremony by the claimant, maintenance of the child by the claimant, and the mother's own testimony. Each of these, however, is only part of the evidence by which biological paternity may be established, so that neither of them is per se conclusive of the issue one way or the other. They each raise a presumption in favour of paternity, but in each case it is only a rebuttable presumption which can be displaced by such other evidence that may be forthcoming.

We may here advert our attention briefly to the general question of why a man should want to claim the paternity of a child. In one sense the rearing of children is no more than an onerous responsibility which some men are happy to shirk. For the Ewe, however, claiming one's child is a sacred duty. It has the sentimental reason of the satisfaction derived from having, as belonging to oneself, that which is priceless. The Ewe say ame wu ga or "a human being is more valuable than money". The sentimental attitude probably also has part of its

origin in the traditional desire by members of a family or dzotinu to increase their number. The birth of a child was greeted with joy by the family because that made it easier for the unit to fulfil its obligations to its members in matters requiring mutual assistance, such as clearing of farm lands and building of houses. Numbers also increased the general standing of the family in the community because that was indicative of the potential contribution of the family to the general weal. These feelings are retained even today. Hence, however reluctant the individual may be, his family would insist on claiming any child of which he is the father. The sentimental feeling is also expressed in the reasoning that a child being of one's "blood", should not be lost to another person or family. More practically, an Ewe man naturally wishes to be survived by his own children and descendants to perpetuate his memory. Similarly a man would like to have as his heirs his own children on whom his interests in property should devolve on his death. Another practical reason is that a man desires children who would serve him at home and assist him on his farm or in his trade or business, and who would maintain and care for him in his old age. The combination of these considerations may explain the vigour and determination with which paternity disputes are contested today among the Ewe. It is for these reasons that it is often said that procreation is the chief aim of marriage among most African peoples. Hence if the woman is barren it is considered

that a primary objective of the marriage has not been realised. For a childless man feels that a major purpose of his life has been frustrated.

Paternity and Legitimacy: The Mother A Widow

It has been strongly urged by some authorities that a widow remains married to her husband's family even after the death of her real husband. Some writers have said this of other tribes of Ghana, but not of the Ewe specifically. As far as the Ewe are concerned, because the marriage does not subsist after the husband's death, a child of a widow, unless conceived before the death of the husband and as a result of sexual intercourse with the husband, belongs to its physiological father.

Field, for instance, says that if, after the death of her husband, his successor does not wish to marry the widow in Akim-Kotoku, then the successor must divorce her in the appropriate manner that a husband would divorce his wife, and if the widow decides to go away she must return the marriage consideration.[1] The applicability of this rule is extended by Ollennu who says that what Field says of Akim Kotoku "is in substance the same as the law which obtains in all the different tribes throughout Ghana".[2] This will be taken up at the appropriate place in discussing succession.[3] We may explain here, however, that as

1. M.J. Field, Akim-Kotoku, Crown Agents, London, 1958, p.115.
2. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.226.
3. See pp.717 -725 infra.

a general rule male children succeed their father in Ewe law, and none of such children is permitted to marry his own mother or any other wife of his deceased father. Although the Ewe recognise a form of levirate which consists in finding a new husband for the widow within the family of her deceased husband, there is no legal obligation on the family to find such a new husband for the widow, nor is the widow legally obliged to accept any person from her former husband's family. Whatever may have been the Ewe law in the past, the law now is that there is no rule which retains the matrimonial bond even after the death of one spouse. Accordingly, in Ewe law, at any rate at present, a widow is practically in the position of a feme sole. She is, however, entitled to support and maintenance from her deceased husband's successor or from other members of the family if she decides to remain single.

It follows that a widow in Eweland is free to marry anybody she pleases without having to refund the marriage consideration of her deceased husband. As a corollary to this, a widow is free also to enter into sexual relations with any person of her own choice. Therefore, any child she bears, while still a widow and, therefore, a feme sole, will have its paternity determined by the normal rules applicable to the child of an unmarried woman. Such a child is not, and there is no presumption that it is, a member of the deceased husband's family, unless biological paternity can be traced to a member of that family.

Choice of Father by an Adult Child

Among the Ewe a child who is of age may decide not to recognise his reputed father any longer as father and may choose a new father. This he may do by renouncing his previous paternity and physically moving away to reside with his new father or his family. Probably the child would normally do this only on his mother's advice.

At what age a child may be regarded as being of age and competent to take such a fundamental decision is not specified. It seems that a child can take such a decision at any time that he possesses a sufficient degree of understanding to appreciate the consequences of such an action. There are instances when persons have changed their paternity before attaining 21 years; but others have done so at a much older age.

If the intended new father should reject paternity, the effect would be to bastardise the child in the sense of being fatherless, with all its legal consequences, unless the old father consents to take him back. Such a rejection is, however, rare in practice because there is always a prior consultation and agreement, so that the eventual public declaration of the new paternity is only a formal act and the presentation to the public of a fait accompli.

The acceptance of paternity by the new father consists in physically accepting the body of the child when he moves into the new paternal family. If the new father is of a different

political unit, that is if of a different sub-division, division or chiefdom, the traditional drums are sounded to proclaim his acceptance into the new family. In all cases a sheep is slaughtered and prayers are said for the prosperity of the new child and to signify a change in paternity. This is usually followed by a general merry-making which may take several days.

It seems that a man who has been so rejected by his reputed child has no remedial action open to him now in Ewe law, whereby he can re-assert his position. The present Ewe law has no provision for preventing developments of this type. Therefore, even though the former father may obtain a declaration of paternity in his favour, there is no means by which the child can these days be compelled to return to him. It has been stated that the right of a child to choose his own father is a relatively recent innovation. It was stated that in the past, if the child was born in wedlock, he could not renounce his paternity, because he would be ordered to remain with his mother's husband as father. The position has now changed and, even if it is a rule of a comparatively recent origin, it has now crystallised into a rule of the Ewe customary law that a child may determine who is his father.

The information in the case of X and Y v. Z,[1] for instance, is that, although the Native Court awarded paternity to Y, the

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1. X and Y v. Z, supra.

disputed child thereafter in his own judgment went to the defendant who had lost the case; but, after a while, he returned to the formerly reputed father and he was accepted back again. As can be seen from the post-trial history of X and Y v. Z, the unfettered right of a child to choose his own father renders nugatory any award of paternity made by arbitrators or even a court of law. In X and Y v. Z, the defendant lost the action in court but won the child extra-judicially, whereas the 2nd plaintiff won the court case and lost the child. It was only at the child's own wish that he again reversed the position.

The awareness of the Native Courts that a child could, in spite of a court's award, choose his own father, seems to have influenced them in paternity suits. For example, in Dansu v. Na-Dja,[1] the Native Court of Appeal for Akpini State at Kpando was in doubt on the evidence before it. It, therefore, decided to call for fresh evidence and invited the disputed child, then a boy aged about 15, to give evidence in the matter. The boy stated that the information he believed from his mother was that his mother's husband was not his father. In law this could not amount to a corroboration of his mother's evidence because it was only a repetition of what the mother had told her son. But the Native Court of Appeal could not have been unaware that, if it decided against the boy's expressed belief, the boy might

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1. Dansu v. Na-Dja, supra.

still go to the man he believed to be his father, thus reducing the court's decision to an ineffective paper declaration. The Native Court of Appeal, therefore, took a practical (even if not a legal) decision by concluding that this was a piece of corroborative evidence which tilted the balance. It is submitted that this is perhaps the only explanation of the decision in that case when the Native Court of Appeal said:

> Upon the facts as maintained on record from the boy himself who is now in his formative years, choosing his own father according to law, this Native Court of Appeal sees no reason why judgment of the Aveme Tribunal should not be reversed. The appeal is, therefore, allowed ... Fatherhood of the said boy to be vested in the originator of the conception as contended by the Defendant-Appellant and corroborated by the boy in question ... 1

In the case of X and Y v. Z,[2] however, it seems that the principle did not receive approval from the Court that an adult child could choose his own father. In that case the disputed child, X, had joined his reputed father as plaintiff in suing the defendant. Although the child's right to sue was not challenged by the defendant, the Gbi-Hohoe Native Court, Hohoe, on its own initiative, non-suited the plaintiff child on the ground that he had not been brought into existence at the time of the facts which had to be proved. This is an ingenious argument, insofar as everything that the disputed child himself could say

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1. Dansu v. NaDja, supra.
2. supra.

on his paternity would only amount to hearsay evidence. Nevertheless the trial Native Court had ignored the current trend of the customary law which recognises the right of the child to declare who is his father.

Other native courts have taken a contrary position to that decided in X and Y v. Z.[1] The case of X and Y v. Z was decided by the Gbi-Hohoe Native Court sitting at Hohoe. Only about 22 miles away, the Native Court of Appeal for Akpini State at Kpando had enunciated a different rule. In Agbosu v. Kuanor,[2] a case from Gbefi, the plaintiff (Agbosu) sued the defendant in damages because the defendant had published concerning him that his father was not Kondogoloku Agbosu of Gbefi who had been recognised as his father. The defendant was alleged to have said that the plaintiff's real father was a different man from Leklebi. The plaintiff stated that the publication was defamatory of him because he was born in wedlock, his mother being married to his father under the customary law at both the time of his conception and birth. The trial Native Court found for the plaintiff, and the defendant appealed to the Native Court of Appeal for Akpini State.

In his grounds of appeal, the defendant-appellant argued inter alia, that "Plaintiff-Respondent should not have been the right man to sue him for the alleged defamatory words, rather

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1. supra.

2. Agbosu v. Kuanor, Unreported, Native Court of Appeal for Akpini State, Kpando, 4th October, 1944 at p.358 of Civil Appeal Record Book.

his parents". The Native Court of Appeal rejected the argument and said:

> In the opinion of this Native Court of Appeal, Plaintiff-Respondent is of ripe age and therefore knows of the origination of his conception and recognises Kondogoloku Agbosu of Gbefi as his legitimate father and not any Lekleki man or other person as alleged by Defendant-Appellant. His action as instituted in the Tribunal below should hold good. 1

It seems that the Native Court of Appeal for Akpini State was quite consistent in its decisions which gave practical effect to the current customary law rule that a child can choose its own father. The decision in Agbosu v. Kuanor was an application of the principle in Dansu v. Na-Dja,[2] also decided by the same Native Court of Appeal. While its consequences may in certain cases be unpleasant, the rule is now established.

It may be pointed out that Ewe law is not the only one that accords the right to an adult child to decide who is his father. This right is recognised in the laws of many countries of Europe and elsewhere. For instance, the Portuguese Civil Code provides that a child, on attainment of majority, can unilaterally decide who is his father.[3]

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1. Agbosu v. Kuanor, supra.
2. Kwami Dansu v. Na-Dja, supra.
3. See Article 126 of the Codigo Civil Portugues (Portuguese Civil Code).

Persons Absorbed Into the Family

The discussion so far has mainly proceeded on the basic assumption that membership of the Ewe family is an irreversible incident of birth and of birth alone. The Ewe being a patrilineal community, this would mean that membership of the family is only conferred by blood descent exclusively through the male line. However, as we have seen, there are cases when a person becomes a member of a family by virtue of maternal connections only, which are really the cases of the failure to accept or recognise paternity. Even in such a case, the membership of the family is an incident of birth, though an exception is made by allowing membership through the female line.

There are, however, other cases when a person is deemed to be a member of a family with which he has no blood connection whatsoever. Such persons are either slaves or descendants of slaves, naturalised persons, or foundlings. Because the membership of the family by such persons cannot be traced to any blood relationship, such members are here described as absorbed persons; for the only legal basis of their membership is absorption into the family. We may look at the categories of persons comprising this group.

The Slave: It does not appear that the position of the slave or the descendant of a slave in Eweland is materially different

from that in the other tribes of Ghana. At present slaves and descendants of former slaves are regarded in the eyes of Ewe law as full members of the families of the original slave masters.

In the past, a slave was a person who was bought by another person. As such, the slave belonged to his master and became a member, though an inferior one, of his master's family. In the uncommon cases when a woman bought a slave, such a slave did not acquire the status of a "child" of the female purchaser. The slave was regarded as only an item of her self-acquired property. Accordingly, whether the woman was married or not, a slave bought by her belonged to her own patrilineal family; the slave would not be regarded as a child of her husband even if the female purchaser was married.

In the matrilineal Akan areas of Ghana, it would appear that there had been some uncertainty about the legal status of slaves and their descendants because of the emancipation of slaves in the past century. Eventually the trial Judge in Santeng v. Darkwa settled the controversy on the issue when he said:

> I find it proved that the custom is that the child of a slave woman is considered for purposes of succession and otherwise to be a member of the father's family. 1

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1. Santeng v. Darkwa, (1940) 6 W.A.C.A. 52, 54.

This dictum was approved on appeal by the West African Court of Appeal.[1] Rattray, however, says that in Ashanti the children of a slave woman, whether conceived in union with another slave or a free man, belonged to the slave woman's master.[2]

It does not appear that the issue had been in dispute among the Ewe. The Slaves' Emancipation Ordinance[3] has not altered the Ewe customary law in this respect. The Ewe position then remains that a former slave and his descendants in the male line are members of the patrilineal family of the person who bought the original slave. It is in this connection immaterial whether the original purchaser was a man, an unmarried woman or a married woman. A person who is a descendant of a slave through only his mother presents no problem because he legitimately belongs to his father's patrilineal family by birth.

Today it is illegal in Ewe customary law to refer openly to the slave ancestry of any person. To do so is a customary law offence for which, among other things, the offender will be ordered to pay a fine of a sheep and a big pot of palm wine. In the eyes of the law and of society, former slaves and descendants of slaves are full and legitimate members of the families

1. Ibid.
2. R.S. Rattray, Ashanti Law and Constitution, 1929, pp.38-39.
3. Cap. 108 of Laws of the Gold Coast, 1951. The Ordinance was originally passed in 1872.

into which they have been absorbed through the unfortunate institution of slavery. As such members of the family, they incur all the responsibilities of membership of the family and are entitled to practically all the rights and privileges arising therefrom. Their right to occupy or use the family land and other family property is unquestionable.

Nevertheless, an almost unconcealed disability attaches to the descendants of slaves even today as regards succession to hereditary offices. The old rule was that a slave could not become a chief, but his child could become one "because he would not escape with the stool". Since hardly any slaves are still alive today, one would have thought that by the operation of this rule all descendants of slaves should now be equally eligible for succession to stools and other traditional hereditary offices. Indeed this is the technical legal position. In practice, however, the disability exists, which bars and excludes descendants of slaves from succession to stools and other important hereditary offices. This can be done notwithstanding the prohibition on the disclosure of a person's slave ancestry, because the Ewe process of election to a chiefly office is conducted in a secret deliberation, and no reasons are assigned for the choice or rejection of a candidate. So strict is the insistence on the purity of the royal blood that, even among the patrilineal Ewe, a person with slave blood from only his maternal line is not considered desirable for the stool.

These considerations, however, are not disqualifications resulting in ineligibility. They are practical facts which eliminate otherwise acceptable candidates.

Even though the law confers a full status on former slaves and their descendants, their social standing is still quite low. A slave background is still a social stigma and many persons are, therefore, careful to conceal such origins.

Naturalised Persons: The Ewe seem to have had an ancient form of absorbing strangers into the family. When the Ewe communities were still settling down as political units, it seems that strangers were readily absorbed either individually or en masse. Now, however, society is fairly stable, so that absolute integration of a total stranger into a foreign family is hardly possible today. The word "naturalisation" is, therefore, used only as a near-equivalent for today's process of absorption.

Today, a stranger may express his desire to be absorbed into the community among whom he has lived for a considerable time. He may thus be absorbed through incorporation into the family with which he had been connected during his sojourn. The Ewe rule is that every stranger or amedzro must have an afeto, that is a person who is to him in loco parentis. In all legal and official relations with him, such as when a claim is laid by or against him, it must be through his afeto; if the stranger commits any delict and runs away, the afeto is answerable. We might describe the afeto in this context as a "patron" or

"sponsor" because he is officially responsible for the stranger during the latter's sojourn in the community. Some interpret afeto as landlord; but he is strictly not a "landlord" because the stranger need not reside physically in the premises of the afeto or be his tenant at all. When eventually the amedzro or stranger decides to be absorbed into the community, it is into his afeto's family that he will be absorbed.

The formal procedure is for the stranger seeking absorption to approach his patronising family with a sheep and some drinks manifesting his desire. The sheep is slaughtered and libation is poured, thereby seeking the consent of the departed members of the family for the incorporation of the new member. Unless this is done, a long period of residence alone will not result in the absorption of the stranger.

Once the formalities have been satisfied, the stranger technically ceases to be a stranger. He acquires most of the rights and privileges of family membership and incurs all the liabilities. He may farm on the family land and attend family meetings, and the family will be responsible for him and his welfare and will perform his funeral on his death. But he cannot become a full member of the family on the same footing as a member by right of birth. He can never succeed to any hereditary office, and neither can his descendants. He is still referred to sometimes as amedzro or stranger, though he has technically ceased to be one. More often he is contemptuously referred to as amedzro zu afee, meaning "a stranger who has become a citizen".

A man who naturalises in this way commits only himself. His children may refuse to be incorporated into the new family, in which case they retain the membership of the father's original family. If, however, as is usually the case, the children elect to follow their father, no further formalities will be required in their case. Children cannot follow their mother in being absorbed into a new family because they do not belong to the mother's original family.

Original relatives of a person who is so absorbed into a different family have no claim on his estate on intestacy. The effect of the naturalisation is to disinherit former relations, thereby creating the rights of succession in members of the absorbing new family.

Foundlings: Foundlings are not common in Eweland. In the rare cases that a child is found abandoned, the foundling is deemed to become a member of the family of its finder. If the finder is a man, it acquires a status of a son or daughter to him. If it is found by an unmarried woman, it is regarded as a son or daughter of that woman's father and is absorbed into the finding woman's paternal family. If, however, the foundling is found by a married woman, it is regarded as her child and her husband becomes its father; should the husband decline to become its father, it will belong to the female finder's own paternal family.

It seems, therefore, that in Eweland also there will apply mutatis mutandis the dictum of Adumua-Bossman, J., in Poh v. Konamba when, speaking of a female foundling in a matrilineal community, he said:

> Her finder or discoverer became her owner or mother into whose family she became absorbed, and from or through whom her family relationship had to be traced according to native customary law. 1

In the patrilineal Ewe society, the family will be traced through the male line of the finder, unless the finder is a married woman and her husband accepts the foundling as his own child.

It should not be forgotten, however, that a foundling, though absorbed into a family, suffers considerable social discrimination. Such a person and his descendants cannot, for instance, become chiefs, though they are generally entitled to the use of family land and other family property.

Adoption: Adoption in the modern sense is unknown to Ewe law. A couple or an individual may take over another person's child and maintain him for an unlimited period; but this cannot legally change the child's paternity or maternity. It cannot alter or even merely affect the child's membership of his family of origin.

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1. Poh v. Konamba, (1957) 3 W.A.L.R. 74, 80.

Incidents of Family Membership.

The family is not only a legal entity. It is also a kinship unit. Indeed we may say that the family started as a kinship unit before it acquired its legal personality. Therefore, as a kinship unit, it is also a social organisation which embraces persons of a certain common patrilineal descent. Many of its functions, objectives and purposes can, therefore, be explained, or be better appreciated, within the context of its social organisation. We are here, however, concerned primarily with the legal incidents of membership of the family; but, law itself being an instrument for social organisation, we cannot divorce the legal incidents from the social implications.

The incidents of membership of the family are only briefly mentioned because some of them are discussed in the appropriate places in this work.

Insofar as the status of membership is concerned, sex and age are immaterial. Both male and female members are full members. The theory then is that a male member of the family has the same rights of user to, say, the family land as has a female member. Accordingly, the right of enjoyment of a woman cannot be denied on the ground of her sex alone. However, the practical position is that women enjoy a generally inferior

position in the exercise of the rights of membership, a reflection of the female position in many traditional African social organisations. Therefore, as between a male and a female, all other things being equal, the male member of the family has precedence over the female. This can be seen in the use of land and other property generally. Similarly, the woman has a less effective say in the general decisions of the family, so that women are not even counted as principal members of the family.

Infants, because of infancy, do not normally exercise property rights; but they are nevertheless members of the family. There is no fixed age limit for infancy. Until the age of puberty a child is definitely an infant. After puberty he may quickly attain the status of an adult if his father is dead and he has no elder brothers living; otherwise it may be many years afterwards before he is regarded as an adult.

The departed souls, who are in fact the majority, though silenced by death, are always regarded as members of the family, especially as regards ancestral family property. Membership of the family by the departed souls may, however, be regarded as largely sentimental; but it has a restraining influence on the family, especially as regards the control, use and alienation of family property.

The marriage of a female member does not affect her membership of the family. No change occurs in law because she does not through marriage become a member of her husband's family.

In practice, however, a married woman's role in the affairs of her family are greatly diminished on marriage. Marriage is viri-local, the married woman normally moving into her matrimonial home away from her own family. She would accompany her husband to his farm, so that she is unlikely to wish to till her own family land; but today women strive to obtain portions of the family land for the cultivation of permanent cash crops like cocoa and coffee. The physical separation of a married woman from her own kin means that she is not able to be involved in the day to day affairs of the unit.

Membership of the family is the basis of nationality. Every person who claims to be a citizen of a chiefdom must derive such citizenship from the membership of a family. The family is the unit of which the saa or sub-division is composed; it is the sub-divisions which constitute the division or duta; and the divisions form the chiefdom or du. Family membership is thus the basis of political allegiance, determining to which chief the allegiance is due.

It is by right of membership that a person may attend the meetings of the family and participate in the formulation of its decisions. More appropriately we may say that this right is also in the nature of a duty. Sex, however, limits the role of women in this respect because only men usually attend these meetings and take decisions. That is why women are not regarded as among the principal members of the family. Age is also a

relevant factor. Children and young adults are not entitled as of right to attend family meetings unless they are very open ones on general issues. We can, however, say that every member of the family, including women and younger persons, has a legal right of representation, either personally or through an elder, in the councils of the family, whether in its deliberative, arbitral or advisory capacity. The right of personal participation and the effectiveness of one's role, therefore, increase with age and generation.

Where there is a hereditary office vested in the family, it is only by right of membership of that family that a person becomes eligible to be elected to that office. The most important such offices are those of a chief in its various grades, the sub-divisional elder or saame'metsitsi and the head of family or dzotinu'metsitsi.

As the paramount title to practically all ancestral lands in the Northern Ewe-speaking area of Ghana is vested in the respective families, it is only by virtue of membership of the family that a person can have the inherent right of user of family lands. Indeed the right of user is inherent in and flows automatically from membership of the family. Its implications will, however, receive a more detailed treatment later.[1]

Hardly any item of self-acquired property devolves on the family as such on the death intestate of any of its members.

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1. See pp. 307-327 infra.

When this does occur, the right of enjoyment of such family property is primarily conditional on membership of the family. Most of the personal articles of a deceased person are usually distributed in Eweland and, while it is the members of the deceased's patrilineal family that mainly benefit from the distribution, other relations or fometowo, on even the maternal side, are considered.

Membership of the family does not only confer rights and privileges. It also imposes obligations on members. Every member of the family is under a duty to defend and protect the ancestral property belonging to the family and such property, in the Northern Ewe sense, consists mainly of land. Every member of the family must contribute all available resources to preserve the property belonging to his family and to redeem it if encumbered. Today such a duty generally means an obligation to make a financial contribution to the cost of litigation of title to the property or its redemption when encumbered.

Traditionally every member of the family is his "brother's keeper". Therefore, personal obligations and liabilities incurred by a fellow member in his life-time are the concern of all other members of the family. Members are expected to defend and preserve the property belonging to each other, and to contribute to the relief of a member in his indebtedness. Members of a family are generally responsible for the torts

of any member, not within the principle of vicarious liability as such, but within the concept of a corporate obligation to assist every member out of his difficulties. For this reason any member of a defaulter's family could in the past be seized and held ransom for the satisfaction of any liability or obligation on the defaulter. It is because of this that delinquent members who were a perpetual liability on the family were in the olden days sold into slavery if they persisted in wrong-doing.

For the same reason of corporate responsibility, infant members are entitled to the support and protection of the whole family. Even when their parents are still alive, the family recognises its responsibilities towards the children. As soon as a child loses his father, the family appoints another "father" for him, who must be his father's brother or another close male member of the family. The child is thus never without a "father". This is carried so far that even adult members have, as fathers, persons who officially stand in place of "father" to them at all times.

In the case of a serious illness, physical incapacity or mental infirmity, the family is generally responsible for the care, maintenance and treatment of its members. The responsibilities are primarily assumed by closer relations, but the family is ultimately responsible.

Death brings to an end the active mundane membership of the family. At this final stage, the family as a whole is under an obligation to give the deceased a decent burial and perform his funeral rites in due form. The deceased then joins the majority of members of the family who are on the other side of this life.

Cutting the Family Tie

The Northern Ewe-speaking people of Ghana do not have any legal or customary process whereby a person's connections or ties with the family as such can be severed or his membership terminated. A fission of families is also an unknown legal phenomenon. Although it is possible that in the past sections of a family could have broken away, such a fission of families is not known to recent memory. Even in the olden days of Ewe migration it is more probable that whole families moved away than that they split apart. Today some members of the family may move away physically to settle elsewhere; but they remain for all purposes part of the single family. An example occurred in Gbi in the 1930's. A considerable number of members of the Amega Edze family of the Asedukluvi sub-division of Gbi-Kpeme in Gbi moved away to settle with the members of the Tsevi sub-division who broke off to constitute themselves into a separate division of Gbi-Abansi. This physical separation has in no way affected or diminished the rights and obligations of the Gbi-

Abansi residents who are members of the Amega Edze family of Gbi-Kpeme. The physical separation means that the Abansi residents are not able to attend all family meetings. Every family property, however, remains intact and undivided and is equally enjoyed by the members of both the Gbi-Abansi and Gbi-Kpeme sections of the family. It is not a legal but only a physical separation.

A different account is given of the law among the Akan and the Ga. Among the Akan people there is a customary procedure whereby a person's ties with the family may be severed. Sarbah describes the Fanti procedure which he calls "Cutting Ekar".[1] Danquah writes of the Akan generally and gives it the name "Cutting Kahire".[2] Although Sarbah records the suggestion that the custom among the Fanti had been abolished in Cape Coast by Governor MacLean, recent cases before the courts show that there has not been an effective abolition.[3]

Ollennu says that the process among the Ga people for severing the family tie is known as "Tako Mlifoo", or cutting of the headkerchief.[4] A recent Ga example was reported in 1956;[5]

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1. J.M. Sarbah, Fanti Customary Laws, Clowes, London, 1904, pp. 33-34.

2. J.B. Danquah, op.cit., pp.193-196.

3. See, e.g. Amoabimaa v. Badu, (1956) 1 W.A.L.R. 227 and Fynn v. Kum, (1957) 2 W.A.L.R. 289.

4. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p. 104.

5. See Okaikor v. Opare, (1956) 1 W.A.L.R. 275.

but neither in that case nor in Ollennu's own work is the Ga procedure described. From the expression employed in Ga, however, the symbolic act of severance seems to be the partition of a headkerchief.

The account given by Sarbah certainly suggests that the cutting of ekar among the Fanti will only affect the relations between the individuals involved and not the family as such. Writing about cutting ekar the learned author said:

> As soon as this ceremony is completed, the two persons have no more share or portion in the property of each other. Where a man is disowned, it affects him alone; but in the case of a woman, her issue is included, for the saying is, the children follow the mother's condition. 1

Again the Ga linguist who gave evidence of the Ga custom in Okaikor v. Opare said:

> The persons who perform it sever their family connections and have nothing to do with each other's estate. They do not attend the funeral of each other. 2

These accounts suggest that both among the Fanti and the Ga, the process affects only the persons directly involved and perhaps their descendants as well. The impression given by Ollennu, however, is that it may also imply the dissolution of the bond which unites the individual and his family. A similar view is expressed by Danquah.[3] There is no information, however, as to

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1. J.M. Sarbah, op.cit., p.34.
2. Okaikor v. Opare, (1956) 1 W.A.L.R. 275, 277.
3. J.B. Danquah, op.cit., p.195.

whether such a severance of family ties among the Ga and the Akan leaves the person so cut off to become "family-less", a notion so foreign to African concepts. Similarly, it is not clear whether such a person retains his political allegiance to the chief, since political allegiance is through birth into a family within the political unit.

As has been stated earlier on, the Ewe have no customary process whereby a person's membership of the family as such can be terminated. Such severance of ties with the family as a unit is unknown to the Ewe who, therefore, say vivo madzi gbe, meaning that, however bad a child may be, he cannot be rejected or disowned. The principle being vivo madzi gbe, a member of the family, however bad he may be, once born into the family, remains a member of it. We may say, then, that the Ewe maxim of vivo madzi gbe means "once a member, always a member of the family". The membership of the family can never be ended and persists throughout life, except possibly in the case of naturalisation.

The only Ewe way of dealing with an incorrigible delinquent member of the family was to sell him into slavery. This was the means of relieving the family of responsibility for that member, not by the cutting of the family tie but by physical exclusion which rendered impossible the enforcement of the family rights, duties and obligations. The family tie itself, even in such a case, remained indissoluble throughout.

Accordingly, if the delinquent member by any means obtained his release from slavery and returned home, his rights which had only been in abeyance would be automatically revived. Slavery having been abolished, this way of disposing of a difficult member of the family has become both obsolete and impossible. It follows, therefore, that there is no way of cutting off a member from the Ewe family.

The Anlo Ewe had another method of dealing with delinquent persons. A delinquent person who proved impermeable to correction was given a secret trial and summarily executed at night. This was known as toko atolia or "the fifth landing stage". This procedure, again, did not cut off the family ties; it was a physical elimination of the individual member concerned. Toko atolia is also now a thing of the past.

The only procedure among the Northern Ewe-speaking people of Ghana for dissolving family relationships is on a personal basis. If two persons of the same family are involved in a serious feud which they consider impossible of being settled, they may decide to dissolve the family bonds which unite the two of them. This is done by repeating words manifesting the unequivocal decision of both parties to regard each other as no longer related in any way and to remain sworn adversaries. Accompanying these words must be the symbolic act of either tearing a piece of headkerchief or breaking a piece of roofing

thatch, known as ebe. The symbolic violent tearing asunder of a headkerchief is by each party pulling one end of it, in such a manner that it breaks in two. This is known as dukume tsotso or "the partition of the headkerchief". The other symbolic act which may accompany the words is the breaking into two parts of a piece of roofing thatch held at opposite ends by the two opposing parties. This latter process is beme tsotso or "the breaking of the roofing thatch". Both of them have the same effect.

The dukume tsotso or "partition of the headkerchief" seems to be similar to the Ga procedure of tako mlifoo because a headkerchief is rent asunder in both cases. According to Ollennu, however, the Ga ceremony cuts off a person's connections with his family. Among the Ewe, both dukume tsotso and beme tsotso affect only the individuals concerned and them only. It means that each of them still remains a full member of the same family. It is only the estranged individual members who do not retain their personal blood relationship. The family as such is unaffected.

Persons who perform the ceremony of cutting off their relations in Eweland, through dukume tsotso or beme tsotso, may not treat each other as any longer related by consanguinity. They may not talk to each other. One may not participate in or attend the burial or funeral of the other on his death. One may not inherit any item of property belonging to the other on that other's death.

The severance of relations does not legally affect the ascendants and descendants of the individuals who resort to it. However, since the occasion must have been an extremely serious one to call for such a drastic action, the relations between the ascendants and descendants of such "cut off" relations are not the best. Usually it disrupts the whole family organisation.

The ceremony of cutting off the personal relationship between members of a family, whether by dukume tsotso or by beme tsotso, is revocable. At any time before the death of either party the dispute may be settled and the relationship restored. In that case a sheep is slaughtered and libation is poured to the ancestors. The parties then recant their words and renounce their act of separation, which by a fiction is then ascribed to infantile ignorance. This is necessary because the majority of the members of the family are in the spirit world and they must be informed of the restoration of the personal blood relationship between the individuals concerned. Once this is done, the separation is nullified and the parties again become relatives in the former manner.

Even at any time after the death of one party, the deed of separation may be revoked. Prayers by way of libation are said in that case to both the dead party and the other deceased members of the family, to restore the family ties between the parties. Usually this is done immediately on the death of one of the parties, so as to enable the surviving person to participat

in the burial and funeral ceremonies. As a rule among the Northern Ewe, before a dead person is buried, there is a public enquiry into the circumstances of his death, how he had been cared for by his family and his personal relations with the members of his family. It is a sort of an "inquest" and is known as ku volu dodro or ku kodzo dodo, literally "a court to ascertain facts relating to the death". It is attended by all the elders of the division or duta and even women and children are usually present. It takes the form of a full scale trial of issues, the disclosure of facts being assured because of the fear of the spirit of the deceased. Penalties are imposed if any person is found guilty of unkindness or neglect. This is, therefore, an appropriate occasion to enquire into the circumstances which culminated in the severance of ties by dukume tsotso or beme tsotso, and a post-humous reconciliation may be effected. When the restoration of normal relations takes place after the death of one of the parties, the dead party is represented in the proceedings by another living relative.

Maternal Relations

The Northern Ewe are patrilineal, in the senses of both patri-descent and patri-succession. This means that a person belongs to his father's family and that the Ewe family is in

principle traced through the male line. The corollary is that a person does not belong to his mother's family, either for the determination of his citizenship and nationality or for the purposes of succession to hereditary office or rights in property.

The individual, however, also stands in a definite position of relationship to his maternal relations. The generality of the relations on the maternal side are also known as fometowo. As the word fome means "the womb" or "the stomach", and fometowo properly means "persons from the same womb", they seem to be most apposite terms for relations of the maternal side; but the term fometowo includes relations of any remove on both the paternal and maternal sides. The other Ewe word for relations is novi, an elliptical form of nonyevi, which means literally "my mother's child". Although sometimes applied in a classificatory sense to be synonymous with fometo or relations generally, the word novi is properly used to refer to closer relations on either the paternal or the maternal side. Accordingly, one's mother's child (i.e. uterine brother or sister) is novi; a mother's brother's child and a mother's sister's child (i.e. maternal first cousins) are each known as novi; and a father's brother's child as well as a father's sister's child (i.e. paternal first cousins) are each novi; even a father's child born of another woman (i.e. a paternal half-brother) is also called novi. Each of these senses of the

use of the term novi can only be understood within the context, or explained upon enquiry, when the exact relationship can be broken down to tovi (i.e. paternal half-brother) or toga-todevi (i.e. paternal first cousin) and so on. It is significant that, although the Ewe are a patrilineal community, yet their relationships are expressed in a terminology constructed around the mother. This may be a pointer to the suggestion that, perhaps at some earlier stage in the evolution of their society, the Ewe might have been matrilineal.

The Ewe terminology for expressing relationships, by emphasising the mother as a central figure, also expresses the Ewe emphasis on maternal relations. When we say that the Ewe are patrilineal, it is no more than an expression of a legal relationship which becomes crucial only as regards citizenship and succession to rights in property and accession to hereditary offices, as well as certain other obligations. Outside this strict legal relationship, the Ewe thinks of his relations on both his paternal and maternal sides simply as fometowo or novinyewo. For, although a man and his maternal aunt's child may belong to different families for the purposes of citizenship and succession to property and hereditary offices, their personal relationship may be closer and more meaningful than that between either of them and his distant relations within his patrilineal family.

In terms of Ewe law, one does not belong to one's mother's family and, therefore, maternal relationship per se does not confer any inherent right to enjoy or succeed to ancestral property or hereditary offices.[1] That is why we have respectfully submitted that the decision in Nunekpeku v. Ametefe[2] was wrongly decided, since it was based on the erroneous assumption that by his maternal connections alone the defendant-appellant became a member of his mother's family and had a right or an interest in that family's ancestral land. It is not unknown, however, that persons have benefited from their maternal relationship. Sometimes land is donated to maternal relations as an out and out gift in consideration of the blood relationship. Such a donee takes as a purchaser. On many occasions a man is allowed a user of the family land of his mother's family. Such a permission may be expressly given; but, as a practical proposition, a maternal relation can, almost as a matter of course, obtain such a permission even by a mere tacit acquiescence. A maternal relation in such occupation of the maternal family property does not enjoy the status of a purchaser or of a family member, irrespective of whether the permission was granted tacitly or expressly; he is, as contended by the plaintiff-respondants in Numekpeku v. Ametefe,[3] only a licensee

1. Agblevoe v. Dankradi, supra.
2. Nunekpeku v. Ametefe, (1961) G.L.R. 301.
3. Ibid.

of the maternal family. A man is usually welcome if he decides to reside with his maternal family and he may use their land and other property. But he has only a life interest therein which is subject to determination at any time by the maternal family and, unless permitted by the said maternal family, he cannot make any disposition of it either inter vivos or by testamentary disposition.

The individual relies heavily on his maternal family and actually looks up to them for support and protection on many occasions. The popular Ewe saying is amenyroewo dee vava le, meaning that "a person enjoys a special position of prestige and power in the maternal family". If a man feels that he is being unfairly treated by his paternal family, he calls on his maternal family for the assertion of his rights, and the maternal relations are recognised in the customary law as having the right to initiate proceedings towards this end. That is why the Ewe say that a child does not belong to its father alone.

A person's maternal connection is a real one. Thus, for example, when a woman is sought in marriage, one requirement of the formalities is that a large pot of palm wine must be presented to the mother's family. This is known as noha or "mother's drink". At some formal and ritual occasions, such as the purification of a stool, the relations traced through the female line have certain duties to perform and only they may enter the "holy of holies" to perform some of the sacred functions.

What it is sought to point out here is that a man has certain privileges in his maternal family. These, however, are only privileges not in the nature of legal rights, and they may be revoked by the maternal family for good reason.

Suggested Definition of The Family

Having endeavoured to analyse the nature and composition of the "family", we may now attempt a definition of the word in the context of Ewe law.

Anthropologists have offered a definition of the family as a social unit. Understandably the anthropologist's concern is generally different from that of the jurist, the former being concerned primarily with the social significance of the unit and the kinship organisation within which it exists. The anthropologists recognise varieties of family. What the anthropologists call the "elementary family" or "simple family" consists of a man, his wife and children.[1] This corresponds to the meaning in common, non-legal, English parlance. There is also the family consisting of the descendants traced through a known individual, which may not extend beyond a generation or two. This is what is referred to as the "immediate" or "nuclear" family. The wider unit, which in Ghanaian legal usage is also called the family, is usually referred to by the anthropologists

1. See, e.g. Notes and Queries on Anthropology, Routledge and Kegan Paul Ltd., London, 1951, p.70.

as a "lineage". For a lineage is defined as consisting of lineal descendants of a specified ancestor through a number of generations.[1] On this basis, however, the family or lineage as a unit is indeterminate and imprecise. This anthropological definition would include a large number of persons, not all of whom would be entitled to the beneficial enjoyment of the same ancestral property or succession to the same hereditary office. As a striking example, we have pointed out that normally all the members of the Ewe saa or sub-division are descended from a common ancestor in the male line. The members of a sub-division, however, are not all members of the same family; on the contrary it is a number of families which constitute the sub-division. Similarly the members of the Akan "clan", such as the "Asona clan", are all persons who claim descent from a common ancestress in the female line; but they do not all constitute one family in the Ghanaian context. The line must, therefore, be drawn somewhere, especially to identify the family as a unit for the purpose of legal usage.

Those lawyers who have written about the "family" in Ghanaian law have been mainly concerned with the matrilineal family of the Akan. When Sarbah, for instance, wrote about the family, he was writing only in terms of the Fanti (and Akan) customary laws and he did not pretend to include other tribes.

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1. Ibid., pp.88-89.

In any case, at the time Sarbah wrote his monumental work, practically all the Northern Ewe-speaking people of the modern Ghana were outside the Gold Coast and in the German colony of Togo. He could not, therefore, have had them in mind. Hence Sarbah says, "A Fanti family consists of all persons lineally descended through females from a common ancestress."[1] Not only is such a definition not very helpful, but obviously it cannot be intended to apply to the patrilineal Ewe.

The two recent legal writers who have offered definitions of the "family" for all Ghana are Ollennu and Bentsi-Enchill. As regards Ollennu, with the greatest respect, we would question whether he really intended to define the family for all Ghana or primarily for only the Akan and other matrilineal communities. For it turned out that Ollennu did not define a patrilineal family of the Ewe type, but an Akan-type patrilineal family which is not a unit for the purposes of property holding or succession. Referring to the patrilineal family, he says:

> This family, known to the Akans as 'Ntoro', is based upon the common sacred germ or spirit which conceives the child and is the dominant influence which directs his or her course through life. It cannot be transmitted through a woman: it therefore dies with each female member of that family. According to custom each person should bear the ancestral name of his paternal family. A son joins his father's army group (Asafo). 2

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1. J.M. Sarbah, op.cit., p.33.

2. N.A. Ollennu, The Law of Succession in Ghana, Presbyterian Book Depot Ltd., Accra, 1960, p5.

This is nothing more than a description of the paternal family of a community which is matrilineal. In his later work, Principles of Customary Land Law in Ghana, Ollennu merely repeated the "sacred germ" or ntoro theory of the family.[1] Similarly, in his Law of Testate and Intestate Succession in Ghana, Ollennu again thought of the family only in terms of the "sacred germ" or ntoro.[2] It may be remarked that the only authority that Ollennu cited for the constitution of the patrilineal family is Rattray's work, Ashanti. Rattray, however, was not writing on any patrilineal community but on the matrilineal Ashanti people! In the event, the learned Judge could not offer any other definition for the patrilineal family beyond saying, in each of his three works, that its basis is what is "known to the Akans as 'ntoro'", and that it "consists of a unit of all people, male and female, all of whom are direct descendants in the male line from a male common ancestor". He even brings in the anthropological confusion by adding in his latest work that the family is traced to the remotest ancestor.[3]

With the greatest respect, it is difficult to understand why Ollennu regards the ntoro or "sacred germ" theory as so vital and central to his definition of the family among patrilineal communities. The ntoro is a peculiar concept of the Akan

1. At pp. 141-142.
2. At pp. 78-79.
3. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.79.

tribes, and the Akan are not patrilineal communities. The Ewe and other patrilineal tribes do not share the concept of ntoro. Indeed the Ewe do not search for any such theory of a metaphysical justification for the constitution of the patrilineal family. There is no reason why one cannot define the patrilineal family of patrilineal communities without employing a concept known only to the matrilineal communities. It is respectfully submitted that, by adopting the anthropologist's ntoro theory and making it central to his definition, Ollennu's own definition of the family is not any more useful than that of the anthropologist for the purpose of legal analysis. By merely tracing the "sacred germ" or ntoro to a common male ancestor "however remote that ancestor may be",[1] though we might not get as far as Adam, the expanse of the unit would make the definition devoid of any legal significance.

The other definition of the Ghanaian family, designed to take account of the patrilineal societies as well, has come from Bentsi-Enchill. He says:

> The family is the group of persons, lineally descended from a common ancestor exclusively through males (in communities called patrilineal for this reason), or exclusively through females starting from the mother of such ancestor (in communities called matrilineal for this reason), and within which group succession to office and to property is based on this relationship. 2

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1. N.A.Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.79.

2. K. Bentsi-Enchill, op.cit., p.25.

It is submitted that Bentsi-Enchill's definition is to be preferred. Not only does it divest itself of the legally irrelevant anthropological concept of ntoro, but it does emphasise what is legally essential, that the family, apart from the descent line, can only be identified by reference to the legal relationship of the right to succeed to certain offices and property. Expunging that part of the definition referring to the matrilineal communities, Bentsi-Enchill's definition of the family in a patrilineal community is:

> ... the group of persons lineally descended from a common ancestor exclusively through males ... and within which group succession to office and property is based on this relationship.

Subject to the comments hereunder, it is suggested that this definition is applicable to the Ewe.

One point which should be noted in the definition of the Ewe family is that biological descent is not always certain and may only be a presumption of law. This problem does not face the matrilineal communities in the same form. Among the Akan and other matrilineal communities, the fact of lineal descent by blood is easily demonstrable, because it is scarcely ever in doubt as to which womb bore the child. In the matrilineal community, therefore, the biological fact normally coincides with the legal.[1] The extension of the criterion of pure lineal blood descent to the patrilineal community is naturally fraught with

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1. Excepting slaves, foundlings and naturalised persons and their descendants.

difficulty. In his defence of the matrilineal system of the Akan, Danquah observes that:

> Under a system of polygamy with its attendant easy means of divorce, it is possible for the paternity of a child to remain doubtful, perhaps problematical, never so its maternity. A child is easily identifiable with its mother, not so with the father. Hence, the Akan institution, following natural law with a slight superimposed social convention, adopts the female line of descent. 1

There are times when doubts and disputes arise as to paternity among the Ewe. The result of such doubts and disputes is that sometimes persons who are not necessarily of the biological line of descent through the male line are considered as legally belonging to the family. These are usually persons whose biological paternity is unknown or unacknowledged, and they become members of their mothers' families. The number of persons absorbed into their mothers' families because of the failure to establish paternity is admittedly very small; but it is a process which goes on even today and is significant enough for us to take account of it in our definition of the family. Others sometimes absorbed are those whose fathers come from matrilineal communities and who are, therefore, not accepted into their fathers' families. It is suggested, therefore, that in the definition of the Ewe family we should not limit ourselves to only persons "lineally descended from a common ancestor". Descent here should be understood in its legal

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1. J.B. Danquah, op.cit., p.181.

sense of being "legally recognised as descended from" or "deemed in law to be descended from". In the Ewe community, therefore, biological descent in the male line is a vital factor in the membership of the family, but it is not the only factor. We have not specifically mentioned slaves and their descendants because of the abolition of slavery; and foundlings and absorbed strangers are extremely rare, rare enough to be discounted.

It is also respectfully submitted that the legal referent of Bentsi-Enchill's definition is somewhat narrow inasmuch as it excludes certain other legal consequences of the membership of a family. It does not state that membership of the family is the basis of citizenship in the traditional state. Furthermore, membership of the family also imposes a duty to defend and protect the ancestral property. Members of the same family are responsible for the security and welfare of each other, so that in the olden days a member of the family could be seized for another member's debt or other liability, and one could be sold into slavery or be pawned to satisfy a debt incurred by another member of the family. The family as a whole also has an obligation to bury any of its deceased members and to give him a proper funeral. These and other incidents of family membership have no direct reference to "succession to office and property".

It is proposed, in the light of the foregoing, to offer a suggested definition of the Ewe family as that unit of persons, both male and female, who, in the contemplation of the law, are lineally descended from a common male ancestor, generally but not exclusively through males, and which group is identifiable as a legal entity by the conferment and imposition thereon of certain rights, privileges and obligations, including the determination of citizenship and political allegiance and succession to rights in property and hereditary offices exclusively belonging to or vested in the unit. Where the descent is not directly through a male member by birth, it must be referable to a person, usually a mother, who is of such a male line of descent by birth. This is the unit which is known among the Northern Ewe-speaking people of Ghana as dzotinu, togbevime or avadzidzi. It may well be that the definition attempted above will be applicable to all Ewe and to some other patrilineal communities of Ghana.

The definition attempted above identifies the family as a unit which has a legal personality in Ewe law. It is a juristic person of the indigenous law and as such is clothed with certain indicia of corporateness.[1] It has a name, such

1. These are based on A.N. Allott, Legal Personality In African Law, in M. Gluckman (ed.) Ideas and Procedures in African Law, O.U.P., London, 1969, pp.182-189.

as Amega Edzeviwo, Katsrikuviwo, Adomviwo or Kadrakeviwo, which refers to the legal entity as distinct from its constituent members. The Ewe family by our definition has a definable, if not defined, membership. Although no membership list is normally maintained, every individual knows to which family he belongs and members are identified or identifiable generally by tracing their descent unilineally through the male line. There is, therefore, never a doubt as to whether an individual is a member of a particular family, once his paternity has been determined. Membership of the family is also demonstrable by the common acknowledgment of the dzotinu'metsitsi as head of the family and by the right and obligation of participation or representation in the meetings of the family, enjoyment of property belonging to the unit and contribution to the funeral expenses of deceased members. The unit has a definite structure and government, in the sense that it has a governing body consisting of the principal elders representing every section of the family. There is usually no symbol of identity (such as a family stool or family fetish among the Akan); but the members of a family manifest their group solidarity by acting together in a concerted fashion as one entity at birth, funerals and other important occasions. Certain rights and duties are attributable to the entity, among which we may mention the right to hold property, especially land, and the exclusive right to select some of its members to fill certain hereditary

offices. As a legal person the family can institute and defend legal actions in its corporate capacity through authorised members. Finally it has permanency in the sense that it has perpetual existence. Although Allott considers that "permanency" is too strong a word to use here because of the possibility of extinction,[1] the possibility of such an eventuality in Ewe circumstances is so remote that it can be discounted. The Ewe family or dzotinu consists of such a large number of members that its extinction is hardly conceivable. Empirically it is not known that any dzotinu has ever disappeared or disintegrated. Therefore, not only is the Ewe family or dzotinu not transient but it is permanent in the sense that it endures ad infinitum, inasmuch as we can say that of any human institution. The other aspect is that a family as understood among the Northern Ewe cannot be created today. All the families have existed from time immemorial and new ones cannot be created today by a fission or fusion of families. The number of families in any community is, therefore, fixed and unalterable.

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1. Ibid., pp. 188-189.

CHAPTER IV

THE HEAD OF FAMILY

Who is Head of Family

The determination of who may be designated as "head of family" largely depends on our conception of the "family" in the context of Ghanaian legal usage. If the law is that "each man in a patrilineal family area starts a family and each woman in a matrilineal family area starts a family",[1] then there must be as many heads of families as there are men with children in Eweland. We have, however, suggested that this is not the law of the Northern Ewe and that among them the family is considered as consisting of persons generally descended through males from a common male ancestor and who constitute a legal unit for the purposes of certain legal relationships, such as succession to rights in property and hereditary offices. This unit we identified in the Ewe as dzotinu, for which some areas also use other terms like avadzidzi and togbevime.

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.151. Also Serwah v. Kesse, Unreported, Land Court, Accra, 10th April, 1959.

This being our view, it is further suggested that there does not exist in Northern Ewe law anything like a head of a nuclear family or head of an immediate family. There are no terms in the Northern Ewe language by which these are known. A position of leadership or being a primus inter pares is recognisable among the children or grandchildren of any man, but such a leader is not regarded as a head of family. The only person recognised among the Northern Ewe as "head of family" is the man who heads the family or dzotinu. In the Northern Ewe law, therefore, "head of family" means precisely "head of the dzotinu", and only that. Since every family or dzotinu must have one head and one only, it follows that the number of heads of families in the Northern Ewe community corresponds to the number of families or dzotinuwo.

The "head of family" or "head of the dzotinu" is known in Ewe as dzotinu be ametsitsi or dzotinu wo ametsitsi.[1] This is contracted to dzotinu'metsitsi. The correct English rendering is "the elder of the dzotinu" or "the elder of the family". In normal speech the dzotinu'metsitsi or "head of family" is also sometimes referred to simply as ametsitsi, which means "the elder". The ametsitsi as "head of family" or dzotinu'metsitsi, however, should not be confused with the "sub-divisional elder" or saame'metsitsi who is better known as ametsitsi.[2]

1. These are the dialect forms of the Northern Ewe of Ghana. In the literary or "standard" Ewe this would be dzotinu fe ametsitsi.
2. On the position of the "sub-divisional elder" or saame'metsitsi see pp.68-69 supra.

Succession to the Head of Family

Among the Northern Ewe of Ghana, as a general rule, the head of family or dzotinu'metsitsi is not elected. Succession to the office is automatic on the principle of seniority, the oldest male member of the senior generation becoming head of the family without a choice or an election.

The doctrine of the Ghana courts, however, is that there is no right of automatic succession to the office of head of family. The courts have always held that the head of family must be elected or appointed at a family meeting specifically convened for that purpose.

In Hervie v. Tamakloe,[1] the plaintiff sued as head of family, claiming certain properties from the defendants. The defendants denied that the plaintiff was head of the family or, indeed, that he even belonged to the family in the male line. The plaintiff could not satisfactorily establish his membership of the male line of the family, neither was his appointment as head of family proved to the satisfaction of the Court. For these reasons the plaintiff's action was rightly dismissed. However, the learned Judge, Ollennu, J., went on to state a sweeping proposition of the law which was not necessary for the determination of the issues before him. He said:

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1. (1958) 3 W.A.L.R. 342.

> By native custom a person does not automatically become head of family as of right. He must either be appointed - elected - by the principal elders of the family when the post becomes vacant by any means, or he must be acclaimed and acknowledged as such by the said principal members of the family, for example by the principal members supporting acts he performs as head. In the appointment of the head the family is not tied down to choose any particular person; they are entitled to appoint any eligible person in the family; thus in the non-Akan areas, such as Bator, where the family consists principally of descendants in the male line, the family can, if in their opinion there is no suitable candidate among the descendants in the direct male line, appoint a descendant in the female line; the principle is the same as that applicable to the appointment of a successor to a deceased person. 1

In saying that the principle is the same for both a successor to a head of family and the successor to the rights in property of an individual deceased person, the learned Judge referred to the decision of the West African Court of Appeal in Makata v. Ahorli.[2] In Makata v. Ahorli the West African Court of Appeal held that, if the family so desired, a distant relative could be chosen to succeed to the rights in the self-acquired property of a deceased member.[3] In that case a nephew, by a special dispensation, was chosen by the family to succeed to the estate of his maternal uncle because of the services he had rendered to the deceased in his lifetime. Such succession to property, however, does not ipso facto constitute the successor into a head of family.

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1. Hervie v. Tamakloe, (1958) 3 W.A.L.R. 342, 344.
2. Makata v. Ahorli, (1956) 1 W.A.L.R. 169. Just before his elevation to the Bench, Ollennu had been Counsel in Makata v. Ahorli.
3. This itself is a doubtful proposition if taken as a general statement of the law. An analysis of the effect and applicability of this proposition in Makata v. Ahorli is attempted in pp. 660-662 infra.

Obviously this confusion of the two positions was present in the mind of Ollennu, J., when he decided Hervie v. Tamakloe, for he elaborated this by saying elsewhere that

> The person who is appointed successor to a deceased in the family is, by virtue of his said office, the head of the immediate or branch family originating with the particular deceased person, his father or mother. 1

The reasoning here can only be explained by a failure to appreciate that the successors to the property rights of a deceased are not necessarily the head of family. Among the Ewe the successors to the rights in the self-acquired property of a deceased person (usually there are more than one successor) are different from the positional successor. The positional successor may succeed the deceased as head of family, if he was one, or as father to his children; but a positional succession does not carry with it any property rights. The converse is also true that succession to rights in self-acquired property does not necessarily imply positional succession.[2]

In another case, this time from the Ga area, coming before the same Judge, the defendants challenged the authority of the plaintiff who had sued as head of family to recover possession of certain deeds from them. The previous head having unexpectedly resigned, the plaintiff claimed that he was there and then elected head of the family by the principal members then present.

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.151.
2. The distinction between these two types of successor is elaborated upon in pp.595 -601 infra.

Ollennu, J., rejected the purported election of the plaintiff as head of the family and said:

> According to native custom the head of family is appointed at a meeting of all the accredited elders of the family summoned for that purpose. The meeting at which an appointment is to be made should be convened for that purpose and notice of it should be given to all members of the family entitled, by custom, to participate in the appointment. If then some elders stay away from the meeting, those who do attend can make an appointment in the absence of the former. Where notice given to the members of the family shows that some particular business is to be transacted at a meeting, for example the settlement of disputes, and a head is appointed at that particular meeting, that appointment of a head is null and void, prior notice of the appointment not having been given to all concerned. 1

Unfortunately the learned Judge does not say what would constitute adequate notice in the circumstances. My informants, who were elders in the Northern Ewe area, only reacted with amusement to this proposition when told that this was the law. In this area the affairs of the family are not ordered in such a formal manner; although notice is given to all elders and the principle of representativity is always observed, formal agenda are not issued for family meetings as though they were company board meetings.

Be that as it may, basing himself on the above cases decided by himself, Ollennu has stated in his book that

> No one has an inherent right to be appointed the head of his family. The appointment is made by the family at a family meeting. 2

1. Lartey v. Mensah, (1958) 3 W.A.L.R. 410, 411-412.
2. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.146.

Similarly Bentsi-Enchill also says:

> The head [i.e. head of family] is normally confirmed or elected by the principal members upon the death and at the funeral of the previous head, or upon the dismissal by such principal members, or upon the abdication of the previous head. 1

Both Ollennu and Bentsi-Enchill admittedly rely on Sarbah's statement of law,[2] which was intended for the matrilineal Fanti and other Akan areas.

Realising the difficulty in insisting on the formal election of the head of family, Ollennu admits that at times the head of family is chosen by mere acclamation or acknowledgment. The same admission is implied in Bentsi-Enchill's statement that the head may be "confirmed" in his office by the principal elders. The view of the authorities, however, is that such occasions are only exceptions to the rule that the head of family must be formally elected.

Although the court doctrine is that the head of family must be formally elected, it is respectfully submitted that this is not generally applicable to the Northern Ewe. Among the Northern Ewe-speaking people of Ghana, there is an automatic right of succession to the office of head of family according to a predetermined formula. The rule is that the oldest male member of the family automatically becomes head of the family in the case of a vacancy, and there is no need for a formal election or

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1. K. Bentsi-Enchill, Ghana Land Law, Sweet & Maxwell, London, 1964, p.26.
2. J.M. Sarbah, Fanti Customary Laws, Clowes, London, 1904, p.33.

acclamation. Because of the formula for automatic succession, there is always also a recognised deputy who immediately assumes the responsibilities of head of family automatically on the occurrence of the vacancy.

The Ewe term for the office of head of family makes clear the age principle involved. The expression dzotinu'metsitsi, which we translate as "head of family", actually means "the elder of the family". It does not mean "head" or "leader" but "the elder" of the family. He is in fact meant to be the elder, and on this principle succession is automatic. The basis on which the "elder" automatically succeeds is seniority, meaning seniority in terms of both generation and age in that order of importance. Thus the office runs on the basis of age through the oldest generation before it devolves on the next. The reason is that, although a person of a younger generation may in fact be older in age, yet in the classificatory sense he is a child of even a younger person belonging to an earlier generation.

It may well be that the principle of automatic succession as head of family is applicable to all Ewe. Nukunya, himself an Ewe, writing of the Anlo Ewe, says:

> The lineage head is usually its oldest surviving member both in terms of generation and age. Where age and generation conflict, the latter takes precedence, for the office runs through each generation completely before descending to the next. 1

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1. G.K. Nukunya, op.cit., p.41.

It must be assumed that by the "oldest surviving member" Nukunya means the oldest male member because Ewe women may not become heads of families. And "lineage head" is the term by which anthropologists sometimes refer to the head of family.

Before Nukunya, Ward had said of the Ewe that

> It seems clear enough that it is usually the most senior man in any lineage who is its head. Within the lineage, succession runs through each generation completely before descending to the next. 1

Similarly Manoukian also says of the Ewe:

> The lineage head is usually its most senior man and apparently succeeds automatically. Succession runs through each generation completely before descending to the next. In the case of the absence or incapacity of the titular head his duties are undertaken by the next most senior (classificatory) brother. 2

Both Ward and Manoukian relied on Spieth and Westerman.[3] It is submitted that these observations are correct and that, as a general rule, among the Ewe, succession to the office of head of family is automatic.

Recent interviews have confirmed that the principle of automatic succession to the office of head of family is the general rule among the Northern Ewe-speaking people of Ghana. This is the information from Gbi, Aveme, Kpando, Peki, Abutia, Taviefe, Kpedze, Matse, Awudome, Ho and most other places, where many chiefs and elders were interviewed.

1. B.E. Ward, The Social Organisation of the Ewe-speaking People, Unpublished M.A. thesis, University of London, 1949, p.81.
2. M. Manoukian, op.cit., p.23.
3. D. Westermann, Die Glidyi-Ewe in Togo, Berlin, 1935, p.135.

It is only in Anfoega that the information was given that the family normally meets to select its head when a vacancy occurs. According to the Anfoega informants, in Anfoega there is no right of automatic succession and the head of family is chosen primarily on the basis of the personal qualities of leadership and administrative ability. Even here, however, it is pointed out that age is an important factor, though not solely decisive, and it is conceded that statistically it is the oldest male members of the families who become their heads; but it is emphasised that this empirical generalisation has not crystallised into a rule of customary law in Anfoega.

It seems that the position in Anfoega can be reconciled with that of the other areas, when we consider the qualification on the right of automatic succession. Although the general rule is that the oldest male member of the family automatically becomes its head, the principal members of the family have the right and authority to by-pass the oldest member for good reason. If, for instance, the oldest male member of the family is a chief or holds some other important office, he will be required to waive his right of succession to the position of head of family and the next in seniority will succeed. On the other hand, if the oldest male member of the family is obviously not a man of the right calibre, either because he is demonstrably unreliable or is of an exceptionally bad character, he may not be allowed to succeed. In such a case the reason for rejecting the otherwise entitled elder must be very compelling; such instances are,

therefore, very rare. It seems that it is the rare exercise of the family's power to reject the entitled successor which is regarded in Anfoega as an election. It should be further explained that in any case where the oldest man is by-passed, the next in seniority in age succeeds without a competitive election. It is not correct, as Ollennu, J., states in Hervie v. Tamakloe,[1] that "the family is not tied down to choose any particular person" and that even descendants in the female line can head the family. That would make meaningless the patrilineal character of the Ewe community. If the family were so unfettered in its choice, we would have many examples of non-members of the family who are heads of families. No such example, however, exists anywhere among the Northern Ewe. It is submitted, therefore, that the Ewe family is not unfettered in its choice of a head and that the principle of seniority applies.

The important principle which must be noted is that the right of succession to head of family is automatic, being determined by generation and age. The cases in which this formula is not observed are rare exceptions which prove the general rule. The reasons for departing from the normal rule must be exceptionally strong, evidently compelling and notoriously incontrovertible. Hence, among the Ewe, unless it is to reject an otherwise entitled successor to the office, no formal meeting

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1. Hervie v. Tamakloe, (1958) 3 W.A.L.R. 342, 344.

is held for the purpose of considering succession to a head of family. Such instances are very rare and their rarity is indicative of the improbability of possible disqualifications for the office. If the entitled person for the position of head of family is already the holder of another important office, such as a chief, it is more accurate to say that he waives the right to succeed rather than that he is thereby disqualified. Mental infirmity is certainly a disqualification, so that an insane man or an imbecile cannot hold the office; but mere lack of intelligence is not a sufficient disqualification. Although a supervening physical infirmity may not be a good cause for deposition from the office, yet a serious physical incapacity which rules out participation in the deliberations of the family may bar a person from becoming the head of family. This may be the case, for instance, if the prospective successor to the office is bedridden with permanent paralysis or other serious disease or is suffering from a traditionally abominable disease like leprosy. There is no requirement as to the general physical condition of the office holder, such as that he must be a whole man with no part of his body blemished or missing. Circumcision is a general rule among the Ewe; but an uncircumcised man is not under any disability for the office of head of family. A slave origin is not a legal disqualification; similarly foundlings, naturalised persons and "fatherless" persons absorbed into the family and

their descendants are fully eligible for the office. Because it is not elective, unpopularity among members or the elders of the family cannot prevent accession to the office of head of family, although in actual fact such unpopularity may mean that the head is an ineffective leader. Exceptional bad character and a bad reputation in dealings with the family, such as a tendency to dissipate family property, is a theoretical disqualification; but this is in practice difficult to establish against individuals. Bad character in other respects, such as the propensity to commit adultery, selfishness, unkindness, indebtedness or malevolent practice of sorcery is not a disqualification.

Perhaps it is in the succession to the office of head of family that we see an example of the relationship between law and economics even in the traditional society. In the Akan areas where the head of family normally manages property of considerable value, it seems that the head is elected at a meeting specially convened for that purpose and is apparently easily removable. In contrast, among the Northern Ewe-speaking people of Ghana where, as will be hereafter explained, there is hardly any other family property apart from land, the head of family succeeds automatically by the right of seniority in generation and age and is irremovable.

This pattern is observable in some other African communities. In many African communities, notably the Bantu, the basic unit for the purposes of property is the household consisting of a man,

his wives and their children and descendants. In this unit the man, by virtue of his position as husband and father, is automatically the head. The Zulu kraal head, for example, automatically becomes head of the kraal because he is its founder. In the Bantu communities, however, family property in the Ghanaian sense is not common because individuals rather than families succeed to property. The head of the Bantu household controls the property of the household; but succession to interests in property, including land, is on individual basis, though succession to the entire estate on the principle of filioprimogeniture tends to keep the property intact. Among the Tswana, for example, there is individual succession to interests in property, whether land or cattle, the property being shared per matres. The head of the family-group[1] among the Tswana, known as mogolwane, succeeds automatically to the office on the basis of seniority in age.[2] It may be argued that among the Tswana the head of the household is automatically the husband of the wives of the household, although the household has property in the nature of land and cattle.[3] It would be more accurate, however, to say that the household property, such as household land, is property of the founder of the household and that his children and their descendants are entitled to succeed to his interest in such property, usually on a per matres basis. The same may be said of the

1. The Tswana "family-group" consists of households and resembles the so-called "wider family" in Ghana.
2. I. Schapera, A Handbook of Tswana Law and Custom, International African Institute, London, 1955, p.89.
3. Ibid., p.218.

Gusii[1] of Kenya and the Arusha[2] of Tanzania. Among the Suku[3] of Congo-Kinshasa also, just like the Ewe, the main type of family property is land because other items of property are distributed among the heirs. Although, unlike the Ewe, the Suku are a matrilineal community, the head of the matrilineage is automatically its oldest member. In West Africa also, we find a similar arrangement of automatic succession to head of family among the Yoruba[4] of Nigeria. Among the Yoruba, where land is the main type of family property, a man's interest in his self-acquired property is inheritable by his children. Here again there is an automatic right of succession to the position of head of family on the principle of seniority in age. Although these examples may not be enough to justify a generalisation for Africa, they indicate that automatic succession as head of family is often associated with the absence of substantial family property.

Powers and Functions of the Head of Family

The head of family or dzotinu 'metsitsi is not a chief and he does not, therefore, occupy any ancestral stool. In this respect, the position in the Northern Ewe area of Ghana is again different from that in other communities such as the Akan,

1. R.F. Gray and R.H. Gulliver, The Family Estate in Africa, Routledge & Kegan Paul, London, 1964, pp.66-67.
2. Ibid., pp.210-211.
3. Ibid., pp. 89, 91-95.
4. G.B.A. Coker, Family Property Among the Yorubas, Sweet & Maxwell, London, 1966, pp.169-170. Also P.C. Lloyd, Yoruba Land Law, O.U.P., London, 1962, p.83.

where there are family stools. The Northern Ewe of Ghana have no family stools properly so called. Wherever a stool in this area belongs to a particular family, it is a political office which constitutes that family into a ruling house over the chiefdom, the division or sub-division. There are no private stools for family purposes only. Therefore, there is no formal installation ceremony or formal presentation of the head of family on his assumption of office.[1] Indeed the general rule among the Northern Ewe is that a stool occupant or the incumbent of any other important hereditary office must waive his right of succession in favour of the next senior man as head of the family.

The Ewe head of family is primarily a kinship head. He is, therefore, not a political functionary, except insofar as the family exists within the framework of a political organisation and except that by virtue of his office he may become a councillor of a chief. He is the direct successor in office of the great-grandfather who founded the family and is, therefore, entitled to the respect due to that great ancestor. For that reason, the head of family is a "father" to all members of the family. Hence, even if there is a chief in the family, the chief submits to the authority of the head of the family in matters pertaining exclusively to the family. The main functions of the head of

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1. Cf. the Akan head of family who is formally installed and presented. See e.g. K.A. Busia, The Position of the Chief in the Modern Political System of Ashanti, O.U.P., London, 1951, pp. 7-8.

family in this respect are to ensure the welfare of all the members of the family and to foster the kinship solidarity of the unit.

As such kinship head, the head of family performs a ritual role. As successor to the founder of the family, he stands between the living and the dead. It is part of his duty, therefore, to communicate with the ancestors or togbewo on behalf of the living members of the family. Such communication takes the form of prayers by way of libation. At any time that any important decision is taken by the family, including the acquisition or alienation of any family property and the settlement of disputes, the head of family communicates the same to the ancestors through the pouring of libation, whereby he invokes their favourable intervention and approval. There is a similar duty on the head of family to communicate with the ancestors at the birth, marriage, death and funeral of members of the family. At any family gathering where drinks or aha are served, the head of family is first given a portion with which he prays, pouring part on the ground to be enjoyed by the ancestors and invoking their blessing. The head of family, however, is not a priest of any family god.[1] Family gods are indeed scarcely found among the Northern Ewe.

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1. Cf. M.J. Field, Social Organization of the Ga People, 1940, at p.2 where it is stated that the Ga head of family is the priest of the family god.

The head of family has general responsibility for the conduct and behaviour of members of the family. He must reprimand and discipline all members. So strong was this responsibility that in the past the head of family was answerable for the delicts of members of his family. Even today claims in customary law by customary procedure are laid against individuals through their heads of families.

Family meetings are normally convened by the head of family who personally presides over them. In his absence it is the responsibility of the deputy head, who is the man next in seniority by age and generation. A family meeting may be convened by the head of family on his own initiative or at the request of a reasonable number of the principal members of the family. A family meeting may be for an unlimited variety of purposes. It may be to discuss general issues and plan the welfare of the family, to admonish recalcitrant members or settle disputes between members. On other occasions it may be connected with the funerals of deceased members or relations of the family; at other times it may be to consider the acquisition of some new family property or to authorise the alienation of title to property vested in the family. The family may meet to consider proposed marriages or dissolution of marriages effecting some of its members.

On the death of any member of the family, the head of the family formally announces the death by sending messengers

personally to other heads of families in the division, and to other persons outside the division who are related to the family or the deceased. This is known as kutsitsi or "announcement of death". As information on the death of a family's relation is first conveyed to the head of the family, it is his duty to communicate the sad news to the members of his family. It is also the responsibility of the head of family to ensure that a deceased member is given a proper burial, followed by appropriate funeral rites. The expenses involved, however, are borne by the whole family, usually through direct contribution. Such contributions are assessed on per capita basis on all male adult members, and sometimes also on adult female members, of the family, the senior in age paying a little more than the junior; but proximity in relationship to the deceased may be an element in increasing the contribution by some individuals. The head of family, however, does not succeed to the interest in the self-acquired property of deceased members. Neither is he in charge of interim administration of the estate of deceased members on intestacy. In each case an individual is appointed for the purpose.

The head of family represents the legal personality of the family; for only he can legally bind the family. This, however, is only in a limited sense. The head of family can bind the family only if authorised in that behalf. He is, therefore, the official through whom the family as a corporate entity can legally

give effect to its will. Accordingly the head of family, for example, can and is the proper person to bind the family when duly authorised by the family to acquire, affect or alienate title to any family property. The usual language in which this is expressed is that the head of family may convey or alienate the title to family property "with the consent and concurrence" of the principal members of the family. This is strictly misleading as it creates the impression that the head of the family can enter into the transaction and thereafter obtain the approval of the family in order to perfect title. The family title vests in the family and not in its head. It is, therefore, only the family which can alienate its own title. The role of the head of family is only to give effect to the will of the family. Thus, although the head of family is indispensable to any valid alienation of title to family property,[1] he can only act on the authorisation of the family. What the head of family requires in any alienation of family title, or to bind the family in other respects, is not the "consent and concurrence of the principal members of the family" but the authority of the family. The authority of the family in this context is usually given by a decision by consensus of the principal members of the family; but at times the authority may be obtained even by informal consultations with the principal members of the family. If a

1. Allotey v. Abrahams, (1957) 3 W.A.L.R. 280; Mensah v. Ghana Commercial Bank, (1959) 3 W.A.L.R. 123.

consensus cannot be obtained, there is no authority; for a bare majority consent is not enough.

In the old law when writing was unknown and society was less complex, all the principal elders of the family were present and, under the leadership of the head of the family, took part in the negotiations resulting in the acquisition or alienation of any family property or other important transaction. This was a transaction in which the head of the family and the principal members jointly participated on behalf of the family. Such a transaction was not merely entered into by the head of the family with the consent and concurrence of the principal members of the family, but by the head of the family and his principal elders acting together on behalf of the family. The authorisation by the family was, therefore, easily demonstrable to the other party.

Today the problem is created by writing which makes it comparatively easy for individuals, purporting to act on behalf of the family, to attempt to bind the family. The modern expedient, therefore, is that the head of family must himself be a party to any transaction which binds the family, while the validity of his action is attested by some principal elders expressing their endorsement as evidence of having obtained the authority of the family.[1] The principle, however, it is submitted,

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1. Allotey v. Abrahams, (1957) 3 W.A.L.R. 280.

remains the same. The head of family alone, though purporting to represent the family, cannot bind the family unless authorized in that behalf by the family. To say that the head of family represents the family, therefore, essentially only means that the will of the family as a corporate personality in law is expressed through the head of the family.

The head of family is the proper person to sue and be sued in respect of any family property. He binds the family, therefore, by the outcome of the litigation which constitutes a res judicata as against the family. Even under the old Ewe law this was the rule. There seems to be here an implied authority given to the head of the family to litigate the family title because of the general obligation on the holder of the office to defend and preserve every item of family property. On occasions, however, express authority may be given by a meeting of the principal elders of the family. Whether such express authority is given or not, any litigation by the head of the family in his capacity as such head is a family litigation. Not only is the family bound by the result but it is submitted that the family as such is liable in costs arising from such litigation. It is further submitted, therefore, that the head of family is not personally liable and execution cannot be levied against him personally in respect of the award or costs in such proceedings undertaken on

behalf of the family.[1] It is not, however, necessary that the head of family should personally be a party to the proceedings on behalf of his family. The family itself or the head of family may delegate any member of the family to appear on behalf of the head and the family. This was quite common in litigation under the old law in the chief's tribunals and it has been retained. Particularly in cases of land litigation, the Ewe practice is to authorise the individual person in actual occupation of the disputed land to prosecute or defend the suit in the name of the family. For such an individual is more likely to know better the boundaries and facts associated with the land in dispute. Furthermore, as stated by the Court of Appeal, per van Lare, Ag. C.J., in Kwan v. Nyieni,[2] if the head of the family is unable or unwilling to defend or assert the rights of the family, any other member of the family may in such exceptional circumstances be authorised to prosecute or defend the action on behalf of the family.

The practical and most effective role of the Ewe head of family with respect to property is that he is the chief administrator of the family property. We must here hasten to explain, however, that as a rule practically the only property which is

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1. This is the view urged also by Ollennu in his The Law of Testate and Intestate Succession in Ghana, 1966, p.215. However, the West African Court of Appeal had taken a contrary decision in Hammond v. U.A.C. (1936) 3 W.A.C.A. 60, holding the head of family liable personally for the costs.

2. (1959) G.L.R. 67.

family property and is administered as such by the head of family among the Northern Ewe-speaking people of Ghana is the ancestral family land. The principle constantly enunciated in the Akan cases that the self-acquired property of an intestate automatically becomes family property on his death is inapplicable in Northern Eweland. All the heads of families interviewed were both unanimous and emphatic that there is no other family property apart from the ancestral land; for, as regards self-acquired property, the Ewe rules provide for succession as of right by children and other near relatives in order of precedence in a manner similar to the entitlement of next-of-kin. Accordingly, the only property in the hands of the head of family is the ancestral land. This however, does not preclude the acquisition today of new family property. In that case such property, like the ancestral family property, comes under the administration and management of the head of the family.

With this explanation on the extent of family property in the Northern Ewe area, it is also necessary to draw the distinction between positional succession and succession to an interest in property in Ewe law. The suggestion by Ollennu, based on the Ghanaian authorities, is that

> The person who is appointed successor to a deceased in the family is, by virtue of his said office, the head of the immediate or branch family originating with the particular deceased person, his father or mother. 1

1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.151.

It is submitted, with great respect, that this is not good Ewe law. In the first place, as already explained, the Northern Ewe of Ghana do not have so-called immediate families as recognised units. Secondly, and perhaps more important, succession to interests in property does not necessarily imply the assumption of the administrative and executive position of leadership of the family in all other matters. Similarly the person who becomes head of family succeeds to only the office. He does not acquire any interest in the property of his predecessor by virtue of such succession. The successor to property rights, who enters into the beneficial enjoyment of an intestate member's estate, does not thereby become head of any family originating from that intestate. Since Ewe law generally provides for plural succession by a group or class of heirs, such as the children who jointly succeed their deceased father, it would lead to an absurd result if one strictly applied such a purported rule, so that the co-heirs became joint heads of the family.

As the head of family among the Northern Ewe-speaking people of Ghana does not normally administer any substantial property apart from the ancestral lands, his self-acquired property does not in any circumstances merge into family property. Therefore, the rule in Antu v. Buedu[1] that, in order to avoid his self-acquired property merging with family property, on

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1. Antu v. Buedu, (1926-29) F.C. 474.

succeeding to the office of chief the incumbent must declare his self-acquired property, a rule which has been extended to the head of family, is not Ewe law. For the Ewe head of family succeeds to responsibilities rather than property.

We may conclude this section by adding that, in the discharge of his functions, the head of family is assisted by the elders who are the principal members of the family. In practice the decisions and acts of the head of family are those approved by the principal members. There is no voting, nor are decisions taken on the principle of a majority. The head of family has no "casting vote": but his opinion carries great weight. Decisions, however, are taken by a consensus of opinion. If there is such a serious disagreement that a consensus cannot be obtained, the proposal is deemed to be lost and is dropped.

There is hardly any personal benefit derived from the position of head of family, except the satisfaction of administering an ancestral trust. There is no official residence and the head of family lives in his own house. He may sell timber and palm trees naturally growing on the family land but proceeds from these are insignificant and, in any case, are usually shared with the principal members of the family. The only other benefit is that the head of family is entitled to a larger portion of meat or drinks shared by the family.

Accountability of the Head of Family

The general rule of Ewe law is that the head of family is accountable for family property under his management and administration. He accounts to the family of which he is the head, and this means the principal elders of the family as representing the entire membership. As the head of family is not the only beneficiary of the family property, he cannot apply any such property to his own use only. The only means of ensuring that the family property is for the general benefit of all the members is by holding the head of family to be accountable.

There has always been a reluctance to sue one's head of family. However, even in the old law, if the head of family declined to account for family property under his control, or if his accounting was unsatisfactory, members of the family could enforce the obligation to account by instituting proceedings in the tribunal of the sub-divisional chief (i.e. saamefia) or the divisional chief (i.e. fia). Such matters could also be enquired into by another head of family or any other respectable member of the community, if formal judicial proceedings were not contemplated. On the other hand, if the accounting dispute was serious enough, the matter was cognisable by the tribunal of the head chief or Fiaga, either on appeal from lower tribunals or as a tribunal of first instance. The tribunals under the traditional state system having been superseded by the statutory courts, one would have expected that the latter would generally perform the

former's function in this respect. Thus one would expect as a logical development that, in appropriate cases, the present courts would compel the head of family to render such accounts as are reasonable in the particular circumstances of each case.

The principle applied by the Courts of Ghana, however, is that the head of a family, while such a head, is not accountable for family property in his hands. Ollennu says that, because of the customary law principle that only the head of family can sue and be sued in respect of family property, "neither the occupant of the stool nor head of the family can be sued for account either of stool or family funds";[1] for such an action will be "an action by the stool against the stool, or by the family against the family, which is absurd".[2] This, it is submitted, is a statement of the judicial customary law which does not represent Ewe law.

The courts of Ghana had adopted the principle of non-accountability of the head of family from Sarbah who was writing on the Fanti and the Akan of Ghana. As is the tendency in Ghana, this proposition on the Akan has been extended almost as a matter of course to all other tribes of the country. In stating that among the Fanti the head of family is not accountable, Sarbah wrote:

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.137.

2. Ibid., p.138.

> If the family, therefore, find the head of the family misappropriating the family possessions and squandering them the only remedy is to remove him and appoint another instead. 1

This statement by Sarbah was adopted almost without question by the Full Court in Pappoe v. Kweku[2] and that court held that the sole surviving brother of an intestate could not, therefore, enquire into accounts with the head of the family in respect of his deceased brother's estate. Since then it has been applied in other cases and, when "the head of a branch family" sought accounts from the head of the family in Fynn v. Gardiner,[3] the West African Court of Appeal said:

> It is a well settled principle of native law and custom that junior members of a family cannot call upon a head of family for an account. Their remedy is to depose him and appoint another in his stead. 4

In Fynn v. Koom[5], Adumua-Bossman, J., considered the principle so well established that he said it was "common learning". This is, therefore, the principle which the Ghana courts have generally applied.

However, realising the danger in granting absolute immunity to the head of family from accounting, Ollennu says that (apparently apart from Sarbah's "only remedy" of deposition) there is nevertheless some other remedy in the case of mismanagement. Thus he says:

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1. J.M. Sarbah, op.cit., p.90. Emphasis supplied.
2. Pappoe v. Kweku, (1924) F.C. 1923-25, p.158.
3. (1953) 14 W.A.C.A. 260.
4. Fynn v. Gardiner, (1953) 14 W.A.C.A. 260, 261.
5. Fynn v. Koom, Unreported, Land Suit No. 4/1959, Land Court, Cape Coast, 20th February, 1960.

> The remedy of the stool or the family is firstly to remove the said occupant of the stool or the said head of the family from office. The moment he is deposed, he is no longer the lawful representative of the stool or the family and he becomes liable to hand over and account to his successor or the person or persons entitled by customary law to have custody and control of the stool property. The new occupant or the new head of the family or any individual or group of individuals authorised in that behalf by customary law, can then call upon him to hand over and to make full and proper account of all stool or family funds and other property which came into his possession during his term of office. In short, therefore, while the occupant of the stool or head of family cannot be sued for accounts, because that is tantamount to a claim by the stool against itself or by the family against itself, the ex-occupant of the stool or an ex-head of the family may be sued for accounts. 1

The learned author evidently was adopting the proposition by Yates, Ag.C.J., in the unreported case of Botchway v. Solomon[2] referred to by Adumua-Bossman, J., in Fynn v. Koom,[3] also unreported, that it is only after his removal that an action can be maintained against the former head of a family for an account. The implication, then, is that, after his deposition, the said head of family becomes fully accountable in respect of the whole period of his tenure of office.

Taking first the rider that the former head of family, once deposed, becomes fully accountable for the whole of his stewardship, it is difficult to understand the rationale of the rule of unaccountability while in office. It would certainly be better

1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.139.
2. Botchway v. Solomon, Unreported, Divisional Court, Accra, Suit No. 64/1935, 7th December, 1935; referred to in Vanderpuye v. Botchway, (1951) 13 W.A.C.A. 164.
3. Fynn v. Koom, supra.

to make the head of family accountable even while in office, since this would be a more practical and more effective corrective measure short of removal from office. The present rule confers only an illusory immunity from accounting, there being full accountability when deposed.

The basic question, however, is the implication of Sarbah's statement and the manner in which it has been applied by the courts. Sarbah says that, if the family "find" that there is a misappropriation, the only remedy lies in the removal of the head of family. It is respectfully submitted that Sarbah's own statement implies that the head of family is accountable; for the family cannot "find" that there has been a misappropriation except after an accounting. Accounting is thus implicit in the exercise to "find" whether there has been a misappropriation of the family property. That is why Sarbah did not say that the head is deposed merely when the family suspect that there has been a misappropriation, but only when they "find" that there has been one, Accordingly, it is submitted that, even if we rely on Sarbah as correctly stating the law, his statement is an implicit acceptance of the principle of accountability of the head of family. In that case there has been a misinterpretation of Sarbah's statement.

If we so interpret Sarbah's statement, then we can say that, in spite of what Sarbah says, the head of family is accountable. That the head of family cannot be sued in the courts, therefore, amounts

to no more than a doctrine of procedural immunity evolved by the statutory courts, which does not affect his substantive liability to render accounts. Such cases of procedural immunity are, of course, not unknown to the law. Thus a diplomat accredited to a foreign country is not amenable to the jurisdiction of the process of the courts of the receiving country even in respect of torts committed by him in his personal capacity; but such immunity does not affect the substantive liability of the tort-feasor and an action may be successfully maintained against him if he is subsequently found within the jurisdiction after he has been divested of his diplomatic status.[1]

The case of Abude v. Onano[2] is often cited in support of non-accountability of the head of family, because of the dictum of Korsah, J., as he then was, that

> It is an accepted principle of native customary law that neither a chief nor the head of family can be sued for account either of state or family funds. 3

This dictum, however, must be read in conjunction with another statement of the learned Judge later in the course of the same judgment. For he said:

> There is evidence on record which proves that whenever a member of the Council is of the opinion that either the chief and/or some of his elders have misappropriated State funds, the proper course is to bring the matter before the local Council or the Ga State Council which alone has jurisdiction to enquire into such matters. 4

1. Dickinson v. Del Solar, (1930) 1 K.B. 376, 380; Zoernsch v. Waldock, (1964) 2 All E.R. 256, 265, 266.
2. Abude v. Onano, (1946) 12 W.A.C.A. 102.
3. Abude v. Onano, (1946) 12 W.A.C.A. 102, 104.
4. Abude v. Onano, (1946) 12 W.A.C.A. 102, 104. Emphasis supplied.

The Court thus declined to entertain the suit for lack of jurisdiction because the remedy lay in obtaining relief through the customary arbitral process. The case of Abude v. Onano was one in which some elders of the stool sued the chief for an account. If we extend the implication of this case to family property, as the Courts are wont to do, it is obvious that members of the family may have recourse to the customary judicial process (now known as customary arbitral proceedings) to compel the head of family to render accounts. Indeed this is what happens. Instead of deposing him, the head of family is always liable to be summoned to an "arbitration" to enquire into accounts when there is a suspicion of improper handling of family property. Translated into its proper legal term, before the advent of European rule and the constitution of the statutory courts for the land, what is now "arbitration" was the only recognised form of legal proceeding known to the customary law. Therefore, in the eyes of the customary law, a head of family is accountable. It is only the statutory courts which have declined to extend their jurisdiction to cases of this nature. In the view of Ewe law the head of family is accountable and the chief's tribunal will enforce such an obligation even today.

In any case, reading the quotation in its proper context, it seems that Sarbah was only emphasising the extent to which the head of family can bind his family, thus precluding the right of the family to re-call any family property alienated by

the head. Sarbah seems to be here concerned primarily with the question of alienation rather than the question of removability of the head of family from office. It is, therefore, a misplacement of emphasis on the part of the courts which have regarded as categorical the incidental reference by Sarbah to the question of removability of the head of family. When Sarbah made his statement he had been discussing the capacity to alienate title to family property. His argument, then, seems to be that once the formal alienation has been effected by the head of family, the transaction cannot be impugned even if effected irresponsibly and if the general membership of the family is in disagreement. Certainly such irresponsible dissipation of family property could be motivated by the desire of the head and some of the principal elders of the family to benefit themselves. This is where Sarbah's concern for the misappropriation of family property arises. Ultimately, however, it is a question of the extent to which the family can be bound by its head and Sarbah's submission is that this is absolute. Hence he suggests that the only remedy open to the family whose headacts in such irresponsible manner is to replace him; for his alienation of family property cannot be impugned. Sarbah himself, however, is to blame for the brevity with which he disposed of this important issue.

The above analysis may be attacked on the ground that Sarbah has also stated that junior members of the family cannot go into accounts with the head of the family.[1] This, however, is

1. J.M. Sarbah, op.cit., p.90.

not inconsistent with the principle of accountability. For, to say that a head of family is accountable is not to concede that even the smallest child can at any time sue in court for accounts, thus allowing for a multiplicity of suits which may paralyse or disrupt the normal functioning of the family as a unit. If so understood, Sarbah's statement would imply that, while the head of family is accountable, an action for accounts may only be maintained by those who, because of their position within the family, are entitled to demand such accounts. This is in accordance with Ewe law which, like any other system of law, has its own procedure for regulating such matters. Among the Ewe a relatively junior person in the family cannot by himself alone demand accounts of family property generally. He can only do so through one of the elders, unless there is such a strong body of opinion among a large section of the junior members that they cannot be ignored by the principal elders. This, however, is not the sense in which the courts have understood Sarbah. The courts have acted on the general supposition that all other members of the family, including the principal elders, are "junior members" in relation to the head of the family and, therefore, cannot enquire into accounts with the head. That explains why, as we have seen in Pappoe v. Kweku,[1] the full Court held that a sole surviving brother of an intestate could

1. (1923-25) F.Ct. 158.

not enquire into accounts with the head of the family even as regards the estate of his deceased brother. If the result in Pappoe v. Kweku was intended by Sarbah, then we must dissent from his opinion because it does not conform to Ewe law. In that case Sarbah's opinion must be confined to the Fanti and Akan, of whom he was writing; for it is submitted that, if Pappoe v. Kweku were an Ewe case, the right of the sole surviving brother, as heir to the deceased, to enquire into accounts relating to his late brother's estate could not have been denied. Not only is this submission supported by information from field research, but it is also the basis of the decision of the West African Court of Appeal in the unreported Ewe case of Tamakloe v. Attipoe.[1] In that case the children of the deceased, as heirs in Ewe law, sought accounts from the head of family when their father's estate was eventually handed over to them by the head of the family. The West African Court of Appeal, per Coussey, J., said:

> I can see no difference in principle in their liability to account both in English law and by the customary law, once it is appreciated that the 1st and 2nd Defendants have no beneficial interest in the estate of the deceased, and that their function, as Heads of the larger family is advisory and protective. 2

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1. Tamakloe v. Attipoe, Unreported, Civil Appeal No. 38/1952, West African Court of Appeal, 22nd June, 1953.

2. Ibid. Quoted in Ennin v. Prah, (1959) G.L.R. 44, 48.

In this instance the head of family's liability to account is thus recognised in a manner contrary to the decision in Pappoe v. Kweku. It is submitted that, as far as Ewe law is concerned, Tamakloe v. Attipoe was correctly decided. It is further submitted that, on the same principle, the head of family being only the administrator of family property without any personal beneficial interest beyond that conferred on him by membership of the family, is in Ewe law accountable for family property under his control and management.

The law of non-accountability of the head of family, which we have been discussing, was formulated on the strength of cases from the Akan and Ga areas of Ghana where there are usually substantial properties in the hands of the head of family. Among the Northern Ewe-speaking people of Ghana, however, the question of accountability does not seem to be of the same degree of importance. Apart from the ancestral land under his administration, the head of family in Northern Eweland has hardly any other family property in his hands. His only beneficial enjoyment of such property is that it is only the head of family who may sell timber (like odum trees) and palm trees naturally growing on the ancestral land. Moneys realised from such occasional sales of timber and palm trees are so insignificant that they cannot justify a demand for the removal of the head of family just in order to be able to go into accounts with him.

The only substantial sums of money which may come into the hands of the head of the family today in Northern Eweland are moneys realised from the sale or lease of the family lands. Such transactions, however, take place validly only with the authorisation of the family, as expressed by the consent and concurrence of the principal members of the family, and the figures are openly known. Furthermore, the regrettable practice in this area is to share the proceeds among the principal members of the family as each transaction is concluded. The result is that, as a rule, there are no family funds in the hands of the head of the family for which he may be subsequently requested to account. His accountability ends with the supervision of the distribution of the moneys among the principal members, in the proportions decided by the family. Until then, however, he is fully accountable for the moneys received by him on behalf of the family.

Family money may also come into the hands of the Ewe head of family when there are contributions by members of the family to meet the cost of litigation in defence of family property, the expenses in connection with the funerals of the deceased members and relations of the family, or any other purpose agreed by the family. In all these cases there is a strict accountability though the sums involved may not be enough to justify the deposition of a head of family who is guilty of mismanagement. He may only be rebuked and the moneys lost refunded, if possible, or written off.

Within the context of the explanation given above, it is agreed in all areas that among the Northern Ewe-speaking people of Ghana the head of family is accountable for family property coming under his administration. It was only in the Aveme area that it was suggested by some informants that the head of family was not accountable. Upon further enquiry, however, it appeared that the only reason for this view was that he scarcely controlled sufficient property (apart from land), so that his accountability was not a serious issue. In any case, in an interview with Togbe Gazari IV, Fiaga of Aveme, the Fiaga and his elders corrected the view and stated that the head of family was accountable in Aveme.

It is submitted, therefore, that among the Northern Ewe-speaking people of Ghana, the head of family is accountable for his administration of any family property that is entrusted to him.[1] There is, of course, a natural reluctance to sue the head of a family because his disgrace is as much that of the family and his liability is a liability of the family, and because such litigation within the family destroys the solidarity of the unit. It is, however, only a case of self-restraint and not immunity of the head of the family from accounting.

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1. This is known among other African societies as well. For instance, in the Nigerian case of Kosoko v. Kosoko, (1937) 13 N.L.R. 131, it was held that the head of family is liable to account to other members of the family.

As the law now stands, however, even an action from the Northern Ewe area to compel the head of a family to render accounts may not be entertained by the Ghana courts. This cannot be explained on the basis that there is no liability to account, but because of the procedural immunity granted to the head of family by the courts. It leads to an absurdity among the Northern Ewe because, while members of the family may often seek accounts, they are rarely prepared to apply the extreme sanction of deposing even a guilty head of family; for, granting that there is a misappropriation or mismanagement, the sum of money or value of property involved in this area is hardly large enough to call for the dismissal of the head of family. Furthermore, the application of the judicial customary law principle of non-accountability may lead to serious difficulties because in most Ewe chiefdoms it is not accepted that a head of family can be removed from office. It means that in most Ewe chiefdoms no accounts can be required of the head because he cannot be deposed in order to divest him of his judicial immunity.

The rule that in Ghana the head of family cannot be held accountable until he has been deposed is in any case, an absurd one which needs to be changed. It denies members of the family the right to go into accounts with their head and yet retain him in his office notwithstanding any irregularities. It engenders instability in the family since any suspicion of mismanagement can only be investigated after first deposing the suspected head

of family. Furthermore, it is a strange rule that requires a suspected or accused head to be first removed from office before he can be compelled to account; for removal from office can only be a sanction for mismanagement or misconduct. What, then, is the position when a head of family, after having been deposed, is eventually exonerated when he comes to render accounts? Perhaps the answer is that he will be re-instated. Such a situation can hardly be in the interest of the family.

It seems that the rule of non-accountability of the head of family was based on the other rule that only the head of family may sue or be sued in respect of family property.[1] That is why Ollennu argues that an action by members of the family against the head of family is tantamount to the absurdity of an action by the family against itself. Such an ingenious argument is, however, only a legal nicety which has been allowed to stand in the way of the solution of a practical problem. It is not a contrivance of native jurisprudence but an imposition from the statutory courts. The argument is sound only if we concede that any person taking an action in respect of any item of family property must necessarily sue as representing the family. In that case there would indeed be the technical absurdity of an action by the family against itself, since the head of the family, as such head, also represents the family. This, however,

1. See, e.g. Mahmudu v. Zenuah, (1934) 2 W.A.C.A. 172, 175; and Koran v. Dokyi, (1941) 7 W.A.C.A. 78, 80.

is only a procedural problem which does not affect the substantive question of liability to account. In any case it is suggested that a possible solution is to permit any responsible member of the family to sue in his own name, though as such member, for accounts. In that case it would not be an action by the family but by a member of the family, so that the individual should be personally liable for any costs occasioned by the action. An analogy may be found in members of a club or society suing in their own names to obtain a relief against the officers of their club or society. Such an individual suing in his own name should be granted a locus standi inherent in his membership of the family. This indeed is the basis on which the tribunals of the indigenous law grant a hearing to a member of the family who seeks to enquire into accounts with the head of the family. As regards the head of family who is sued for accounts, the courts could get round the difficulty created by his position as the legal representative of the family by, as it were, "piercing the veil of incorporation", thus treating him for the purpose of that action alone as a private individual whose acts are being called in question. This does not seem to be unreasonable because, if indeed he is eventually found to have defaulted in his duties, it means that the family has a remedy against him. In that case he is not entitled to hide behind the family to defraud the family, or to prevent the family from obtaining its relief against him. If, on the other

hand, the head of family is exonerated, he should be entitled to recover his full costs personally against the person who instituted the action. In either event, therefore, the head of family is not at a disadvantage, except that his misconduct may be exposed and such exposure is to the benefit of the family.

In any case, there has been a definite derogation from the rigidity of the rule that only the head of family can sue in respect of family property. For, as stated in Kwan v. Nyieni,[1] in exceptional cases when family property is in danger but the head and the principal members of the family are likely to compromise the interests of the family, the courts will entertain an action by any member of the family properly authorised in that behalf or "upon proof of necessity". It is suggested that by extending the basis of the proposition in Kwan v. Nyieni, it should be possible for genuinely interested members of the family (such as the sole surviving brother of the intestate in Pappoe v. Kweku[2]) to compel accounts from the head of the family if, as the proviso in Kwan v. Nyieni states, "the Court is satisfied that the action is instituted in order to preserve the family character of the property". This is not to release the flood gates for a spate of frivolous or vexatious actions by discontented individuals calculated to paralyse the adminis-

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1. (1959) G.L.R. 67.

2. Pappoe v. Kweku, (1923-25) F.C.158.

tration of affairs by the head of the family. This danger can in part be avoided by setting conditions on the institution and prosecution of such actions, such as that a prima facie case of mismanagement or irregularity must be disclosed in lemine, that a relatively substantial portion of the family property must be in danger, and that the interests of the family must be demonstrably at stake. Furthermore, "accounting" in this context must be given a meaning limited by the peculiar circumstances of each family without necessarily importing the meticulous fervor of a professional accountant. In most families no books are kept relating to the administration of family property in the sense in which it is understood in a business or commercial enterprise. In most cases, therefore, the liability of the head of family to account may amount to no more than a general statement of incomes, expenditure and other disbursements of the family, sufficient to show whether there has been a misappropriation.

Removability of the Head of Family

The Ewe law in the majority of the chiefdoms is that a head of family is irremovable. He holds his office for life, and, though he may probably resign, he cannot be deposed for any cause whatever. In some chiefdoms, however, the law is that a head of family may be removed from office in cases of very grave misconduct.

The judicial customary law in Ghana is that a head of family is removable from office by the family.

The late Sarbah wrote thus:

> Where the /head of family/ suffers from mental incapacity, or enters upon a course of conduct which unchecked may end in the ruin of the family, or persistently disregards the interests of the family, he can be removed by a majority of the other members of the family, and a new person substituted for him. 1

This statement concerning the Fanti head of family has been generally treated as a rule applicable to all the people of Ghana. Hence, Ollennu was able to state the general proposition that:

> The head of family holds his office subject to good behaviour; he continues in office so long as he enjoys the confidence of the majority of the principal elders of the family, or so long as he does not suffer any disabilities. 2

He gives several reasons for which a head of family may be removed from office, such as failure to perform his duties properly, mismanagement of family property, selfish practices, disrespect for the family, failing to account to the family for funds of the family, conduct likely to disgrace the family and physical or mental incapacity. Significantly, Ollennu does not say that a head of family may be removed only to be able to go into accounts with him. He says that the head of family is removable through the same procedure that he was appointed,

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1. J.M. Sarbah, op.cit., p.35.

2. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.162-3.

that is, by a formal meeting of the family. Bentsi-Enchill also says of the head of family that:

> He is elected to his office, holds it during good behaviour, and is removable for misconduct. 1

Apart from these opinions, there is not much authority for the proposition that a head of family is removable from office. Although in the Ga case of Welbeck v. Captan[2] it was mentioned that a co-defendant had been removed from office as head of family "for reasons involving finance and alleged squandering of moneys", the question of removability was not the point in issue in that case. The real issue was the question of the validity of the appointment of a head of family at a meeting from which some principal elders had absented themselves. That case is, therefore, no authority for the proposition that the head of family is removable from office.

In any case, if, as has been contended for the other tribes of Ghana, the office of head of family is elective, then it is only logical that he should be removable at the instance of the body that elected him. For, to that extent, the position of head of family is hardly distinguishable from any other political office, such as that of a chief who can be removed for various reasons.

Among the Northern Ewe-speaking people of Ghana, as we have pointed out, the office of head of family is not elective,

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1. K. Bentsi-Enchill, op.cit., p.187.
2. Welbeck v. Captan, (1957) 2 W.A.L.R. 47, 48.

there being the right of automatic succession. There is, however, no uniform Ewe rule on the issue of the removability of the head of family from office.

The rule stated in the majority of the Ewe areas is that the head of family is not removable from office, though he may be rebuked in cases of misconduct.[1] This is also the rule stated by Westermann[2] and Ward.[3] The areas where the principle of the irremovability of the head of family applies include Gbi, Aveme, Kpando, Abutia, Akome, Matse and Ho. If, in these areas, a head of family persists in wilful misconduct, the sanction applied to him is that of non-cooperation. He quickly ceases to command the respect and obedience due to his office and person and, if the misconduct involves an element of mismanagement, family property is no longer entrusted to his care. He no longer enjoys the support of the family and the members turn more and more to the natural deputy who is the next senior elder of the family. It should be noted, however, that the head of family in this part of the country has little scope for serious misconduct in office because, apart from land, he does not control much that is in the nature of family property. Where a head of family is not very reliable in financial dealings with little sums that pass through his hands, the expedient is that responsibility for such matters is transferred to other elders without deposing the head

1. Among the Yoruba, where also succession to the office is automatic on the principle of seniority, the head of family is not removable. See P.C. Lloyd, Yoruba Land Law, O.U.P., London, 1962, p.83.
2. D. Westermann, Die Glidyi-Ewe in Togo, 1935, p.135.
3. B.E. Ward, op.cit., p.82.

from his office. Deposition of a head of family is considered in this area as a calamitous event or busu nya. The procedure, therefore, is to settle matters at family meetings without deposing the head of the family, lest the wrath of the ancestors is incurred.

In Taviefe it is stated that theoretically the head of family is removable from office; but the circumstances must be patently very grave and such drastic action irresistible. It is stated by the Head Chief and his elders, however, that there is no case in living memory in the Taviefe area when the head of a family had been deposed.

In Anfoega, where it is contended that the head of family is elected, it is stated as a logical corollary that he is removable for serious misconduct. But no example of such a removal can be referred to even in this area.

In Peki and Kpedze, where the rule of automatic succession is held to apply, it is nevertheless stated that the head of family may be removed from office if he is guilty of a serious misconduct. Here again, an example is wanting of a recourse to such a drastic action.

The only place where the principle of the removability of the head of family is supported with an example is Awudome. The Fiaga of Awudome, Togbe Addai Kwasi X and his elders stated in an interview that in the Awudome area a head of family who was found guilty of a serious misconduct or mismanagement could be

removed from office by his family. They supported their proposition of the law with reference to an example of a "recent" removal from office of a head of family in the Anyirawase division of Awudome. Unfortunately, however, they declined to supply the name of the deposed head of family, and neither would they name the family concerned.

In the Northern Ewe areas where the principle of removability is accepted, it is not inconsistent with the principle of the right of automatic succession. For, on the deposition of a head of family, the next in seniority by generation and age succeeds automatically.

Although it is only in a minority of the areas that it has been stated that a head of family is removable from office, the principle of removability is a sound one. The head of family, whether elected or succeeding automatically, is answerable to the family. That being so, there is no reason why he should not be removable by the family for gross misconduct, dishonesty or misappropriation of family property, mismanagement and even incompetence. It is to be hoped that in course of time the principle of removability will be accepted in all areas.

Even in the Northern Ewe areas where it is the rule that a head of family is removable from office, it is not the principle, as suggested by Ollennu, that he holds his office "subject to good behaviour" or "so long as he does not suffer any

disabilities". Nor is Bentsi-Enchill wholly correct when he states briefly and simply that a head of family holds office "during good behaviour and is removable for misconduct". The principle among the Northern Ewe-speaking people of Ghana is that the head of family holds his office for life, with only the proviso that in a few areas he may be removed in special cases of very grave misconduct. It means that, even in areas where a head of family may be removed from office, he cannot be removed for mere absence of "good behaviour" or merely for the reason that he no longer "enjoys the confidence of the majority of the principal elders of the family". It must be clearly more than that. The conduct complained of must manifest a systematic and persistent but highly reprehensible course of conduct referable to his office as head of family. Accordingly, an occasional failure to perform his duties properly, a simple mismanagement or even misappropriation of family funds, cannot be a sufficient ground for his removal from office, unless it is in the serious circumstances of a deliberate and systematic dissipation of family property or the compromising of the interests of the family in a manner clearly inconsistent with the position of a head of family. To justify the removal of a head from office, the gravity of the dereliction of duty or mismanagement of family property must be beyond doubt. An example may be when a head of family supports an adverse title against his own family with

respect to a substantial portion of the family property, either out of selfishness or other relationship with the adverse claimant. If he merely refuses to litigate the family's title to property, another elder may be authorised to do so without removing the head, unless more can be read into the refusal. Failure to repair a family house is too trivial, and so is the mere refusal or inability to summon a family meeting when requested by some members of the family. Conviction of criminal offence is no ground for deposing a head of family. Because of the gravity and consequential rarity of the circumstances which can justify the removal of a head of family from office, it is difficult to find examples of such removal among the Northern Ewe. It may well be that, because of the rarity of the exercise of that power, in most of the Ewe areas the family's power to remove its head had fallen into desuetitude, and this may explain why it is assumed in those areas that the head of family cannot be removed from office.

In all areas of Northern Eweland, it is stated that a head of family cannot be removed from office on the simple ground that he no longer "enjoys the confidence of the majority of the principal elders of the family". Where he is removable, it must be on the ground of a stated misconduct of sufficient seriousness, and not mere lack of confidence in him. Furthermore, it is not Ewe law that a "majority of the principal elders of the family" can remove a head of family from office. Where he is

removable, it must be with an almost unanimous consent of the principal members of the family because it is a most drastic step. Unless this near-unanimity can be obtained the attempt to remove a head of family from office fails.

In no part of the Northern Ewe-speaking area of Ghana is mental or physical incapacity a ground for removing a head of family from office. If the head of family becomes insane, there is still no formal act of removal, but the next in seniority automatically assumes the position of head of family. If the insane head of family subsequently regains sanity, he automatically resumes his office without formality, just as if he had been absent from the locality.

As regards physical infirmity, it is never a ground for removing a head of family from office. Even though he may be blind, deaf or bed-ridden, he remains head of the family. Accordingly, although another elder, usually the next in seniority, deputises for him, all formal acts are still done in the name of the infirm head of the family and, unless it is inconvenient to do so, all family meetings are still held in his house. The Ewe attitude to illness is dictated by sympathy and understanding, and it would be deemed both cruel and inconsiderate on the part of any member of the family to suggest the removal of a head of family from office on the ground of illness.

CHAPTER V

THE NATURE OF LAND TITLES

The Ewe Conception of Land

In Ewe law, land or anyigba means the soil itself, as well as the sub-soil and anything under the soil, such as minerals. It does not include things on or attached to the soil, such as trees, houses or other permanent fixtures. There is thus a distinction between interests in the land itself or anyigba and interests in things on or attached to the land.

Writing on the customary land law of Ghana in general, Ollennu says:

> The term land as understood in customary law has a wide application. It includes the land itself, i.e. the surface soil; it includes things on the soil which are enjoyed with it as being part of the land by nature, e.g. rivers, streams, lakes, lagoons, creeks, growing trees like palm trees and dawadawa trees, or as being artificially fixed to it like houses, buildings and structures whatsoever; it also includes any estate, interest or right in, to or over the land or over any of the other things which land denotes, e.g. the right to collect snails, herbs or to hunt on land. 1

With respect, this sounds rather like a definition of "land" in English law. Furthermore, it would appear from the subsequent

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.1.

passages in that work that the learned Judge was not primarily concerned with the customary law conception of land as such.[1] His primary purpose seemed to be to spell out the guidelines for determining whether a suit was a "land suit" rather than a personal suit or a succession suit. This distinction was at one time vital to the jurisdiction of the courts, especially between April, 1945 and July, 1960. For, under the Courts (Amendment) Ordinance, 1944,[2] there was created a Land Court which had exclusive jurisdiction in land suits. Since 1960, however, this distinction for the purposes of jurisdiction has been swept away because under the Courts Act, 1960,[3] and later the Courts Decree, 1966,[4] there is now only one High Court vested with jurisdiction in all matters, the former Land Court having been abolished. Not unlikely, the old legal distinction was still present to the mind of Ollennu. In any case, his definition cannot be regarded as an exposition of either the indigenous law or even the present substantive law of the land.

In what he called a retrospective view of the Ashanti law of land tenure and alienation, Rattray wrote thus:

> The words 'land', 'earth', 'soil' could hardly in themselves conjure up anything else but something which was personified in the Earth goddess whom all men worshipped. ... Land was seldom or never visualised as the soil of which it was composed; it was regarded as an area of the world's surface, over which mankind might roam for food ...

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1. Ibid., pp. 1-3.
2. No. 23 of 1944.
3. C.A.9.
4. N.L.C. Decree No. 84 of 1966.

> and if the actual soil or earth were thought of at all, it was in association with a deity with whom it was personified or to whom it belonged. 1

In Rattray's view, it was from this stage that there later developed a transition into the possession of tribal, then family and individual, "usufruct" of land. Whatever may be the comment on this historical conspectus of Ashanti land law, Rattray stated thereafter the significant proposition that crops, trees and even houses were not, in Ashanti law, regarded as inseparable from the soil.[2] This has now been stated by Allott in clearer terms thus:

> The Ashanti conception of land extends only to the soil itself, and things in land (e.g. minerals) or on the land (planted trees, houses) would not fall within the definition of land (asase) and might be separately dealt with in law. 3

Subject to some qualification, this is also the Ewe law.

In Ewe law, land or anyigba consists of the soil itself as well as the sub-soil and anything thereunder. Since the Ewe have no means of analysing the contents of the bowels of the earth, they regard land as including minerals and other things embedded in the soil. The absolute or paramount interest in land, therefore, extends not only to the sub-soil but also ad inferos. The holder of the paramount interest in the land is thus also entitled to any minerals or objects discovered under the soil. The Ewe

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1. R.S. Rattray, Ashanti Law and Constitution, Clarendon Press, Oxford, 1929, pp.345-346.
2. Ibid., p.340.
3. A.N. Allott, The Ashanti Law of Property, Stuttgart, 1966, p.143.

conception of land is consequently more extensive than that of the Ashanti as stated by both Allott and Rattray, inasmuch as "land" among the Ewe includes minerals and other things in the soil.

Like the Ashanti law, trees growing naturally on the land and even those planted by the industry of man are not regarded as part of the land in Ewe law, though title to them vests in the holder of the paramount title to the land on which they grow. Hence timber like odum and mahogany, as well as palm trees, belong to the family holding the absolute or paramount interest in the land on which they grow and can only be validly sold by the head of that family. Things artificially fixed to the soil, even if of the nature of a permanent fixture, are not regarded as land. Accordingly, houses, buildings and other structures on the soil are not regarded as part of the land. Conceptually, such fixtures and structures are regarded as different from land in Ewe law. As Pogucki puts it,

> Rights in buildings (houses, compounds) are of a special nature, as are rights in trees of economic value. They may be, and normally are, separated from the right to the land on which the buildings or trees stand or grow. 1

The Religious Significance of Land

Generally the earth, the soil or land is not regarded as a fetish or a "god" among the Ewe. Though it is conceived of

1. R.J.H. Pogucki, Land Tenure in Ghana, Lands Department, Accra, 1957, Vol. 6, p.8.

as a principle, it is not a fetish or tro and has no worshippers. It, however, has certain observances which must be obeyed in order to ensure fertility and progress and to avoid personal illness.

On the religious importance of land, Rattray says that in Ashanti the earth is regarded as a goddess and is known as Asase Yaa, whose rest day is Thursday.[1] Commenting on this, Busia says:

> The Ashanti believed that the Earth had a power or spirit of its own which could be helpful if propitiated or harmful if neglected. The power in the Earth was conceived as a female principle, Asase Yaa (Earth) whose natal day is Thursday. 2

He continues to explain that the earth is, however, not a goddess. Says Busia:

> Rattray, translated Asase Yaa as 'Thursday, Earth Goddess', and spoke of the 'Cult of the Earth Deity'. This was not a very accurate rendering of the Ashanti conception. The Earth has no priests or priestesses, nor do the Ashanti consult her for divination in case of illness or need as they do other gods (abosom) ... The Ashanti say ... the Earth is not a goddess, she does not divine. The conception is rather that of a power or principle possessed by the Earth. 3

The view of Busia is not far from the religious significance of land among the Northern Ewe generally. The only area in Northern Eweland where an Earth fetish or tro is known to exist is Awudome. This tro is known as Zodzi, meaning "that on which

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1. R.S. Rattray, Ashanti, Clarendon Press, Oxford, 1923, p.215; and Ashanti Law and Constitution, Clarendon Press, Oxford, 1929, pp.342-343.
2. K.A. Busia, The Position of the Chief in the Modern Political System of Ashanti, O,U.P., London, 1951, p.40.
3. K.A. Busia, Ibid.

we walk". Its shrine and priest are at Awudome-Avenui, but it is a tro or fetish for the whole of the chiefdom of Awudome.

The Earth fetish, zodzi, of Awudome, however, is an exceptional case. The Northern Ewe of Ghana generally have no Earth God or Earth Goddess. Neither is the earth or the land regarded as a fetish or tro. Therefore, with the sole exception of the Awudome case, there are no priests or priestesses ministering unto the earth or the land anywhere. Nevertheless, land in the abstract is conceived of as a potent principle of some spiritual force. It has decreed certain taboos and avoidances, failure to observe which is visited with a sanction in the form of an incurable disease leading to inevitable death. To swear, for instance, by the earth or to strike or even touch the soil with the palm or a finger or swallow a bit of the soil, is a mode of proof of one's truthfulness; for to foreswear in this manner is believed to mean a certain death to him who utters the falsehood. In case of such false swearing or violation of the earth's taboo, the offence may be purged by propitiating the earth with appropriate sacrifices involving a sheep, a goat or a fowl with drinks. This, however, is done not by a priest but by the linguist or tsiami of the local divisional chief or fia, together with the elders. Such spiritual transgressions are also legal offences because it is believed that such misconduct angers the earth so that rain does not fall and crops do not prosper.

The earth, as a principle, is considered as capable of being disposed through offerings and sacrifices to bestow its blessings in the form of increased fertility. Hence in the case of prolonged drought or bad harvests, sacrifices are made to the earth, the rain-makers being usually called in aid, to ensure a good harvest. For this reason also, at the annual harvest of the first crops, special rituals and celebrations are held to thank the earth, the deities and the ancestral spirits for their bounty and to pray for future prosperity. This is the origin of the annual yam festivals or te dudu and other such celebrations in many parts of the Ewe area.

In Eweland each area of the earth's surface is parcelled out in identifiable lands with separate and distinct names. Thus in Alavanyo, for example, a part of the land is called Abriwanko; in Wli we have Haveme; in Have we have Hefu; in Ho we have Ahorlor; and in Gbi we hear of names like Tonglo, Klokpo, Abudome, Deblanyi and Desiamadove. Primarily, these are names for purposes of geographical identification; but they have also been clothed with the personality of spiritual entities. In other words, each of these areas is a local manifestation of the power or spirit of the earth and is, in its own right, entitled to certain avoidances and sacrifices. None of them, however, has a priest or priestess of its own.

If there is a defilement of the land, it is the particular area involved that is purified to propitiate the spirits. Such

a defilement may result from a human being dying in the area (for a person must die in the habitable town or village and not in the bush), a woman visiting the area while "unclean" because she is in her menstrual period, or in having sexual intercourse on the bare ground in the farm or bush. Such acts are sins and the iniquity must be washed away with the sacrifice of a goat, a sheep or a fowl, otherwise, not only will the guilty be punished with illness and ultimate death, but the area will withhold its rainfall and crops will not flourish. Thus if in Gbi the area of Tonglo is defiled it is believed that rain may not fall in that area and crops will wither or be destroyed there, while rainfall and fertility in another area like Klokpo may be unaffected. Therefore, when there is a scarcity of rainfall in a particular area, that area is supposed to be visiting its wrath on the farmers because of undetected transgressions. Fertility rites are, therefore, performed in such an area, usually with the sacrifice of a goat (not a sheep) to appease the anger of the land. This is known as ave dada. Because of the effect on all the inhabitants, such defilements are not regarded merely as belonging to the realm of spiritualism but are treated as public wrongs which are punishable by exacting the penalty consisting of the articles necessary for the appeasement of the spirits.

Throughout the Northern Ewe area, each chiefdom has a day set aside when no work may be done on the soil. That is the day of rest for the earth, when it must not be disturbed. It is not

regarded as a natal day, but a day which the ancestors and the spirits have signified as a sacred day when all must abstain from manual work. Perhaps on analysis today we may say that the ancestors decreed such abstention from work to ensure that, in a farming community, everybody had a mandatory rest day each week. However, like many others, its observance is ensured by the imposition of a spiritual sanction. Violation of the rule of abstention from work on the rest day was also a public wrong because it was regarded as an act which displeased the spirits. Today, however, observance of the day of rest is not enforced with the same rigidity.

The days set aside for general rest vary from one chiefdom to another. In Gbi and Peki, with the traditional seven-day week, the sacred day of rest is Thursday or Afenoegbe,[1] the same as for the Ashanti; but in Abutia and Awudome, where also the seven-day week is observed, the day of rest is every Wednesday. In places where the week has a four or five day cycle constructed around the traditional market day, the day after the market day or Asiamigbe is usually the day of rest.

Apart from the general day of rest in the chiefdom, there is also a special day of rest for each farming area, when no manual work may be undertaken in that area only. In Gbi, for instance, the special day of rest for the area known as Danyimegbe is Friday and that for Manamegbe is Wednesday. To

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1. Also known as Yawodagbe.

violate this is a spiritual as well as a public offence for which there must be an atonement by the sacrifice of a goat, lest the fertility of the land be impaired. In effect, therefore, there are two days of rest each week, one general and the other for the particular area. The general one is obligatory throughout the chiefdom; but that of the specific farming area does not mean a mandatory rest because the farmer may go to another farm in a different farming area.

Modes of Acquisition of Land

The methods by which lands were acquired may afford an explanation for the interests which stools and families have in land among the Northern Ewe of Ghana. In particular they explain why, as we shall submit later, the paramount interest in practically all lands is held by the respective families in this part of the country.

Those who have dealt with the subject of acquisition of land in Ghana have discussed the issue on the basis that the interests in lands are held by the families from one stool or another. The view of Sarbah is that land could become a property of the stool or the community by the appropriation of an owner-less or vacant land, through conquest followed by settlement on the lands of the vanquished, or through alienation such as a sale or a gift.[1] He also suggests that the paramount title to

1. J.M. Sarbah, Fanti Customary Laws, Clowes, London, 1904, pp.47-48.

some lands could be acquired through the natural process of accession, such as lands reclaimed from the sea or a river by the recession or drying up of the waters. This last process must be of a comparatively rare and insignificant occurrence even among the coastal tribes and is hardly relevant to the modes of land acquisition of a non-coastal community like the Northern Ewe of Ghana. Acquisition through accretion or accession will, therefore, not be discussed further.

The picture given by Casely Hayford is that

> In the early stages of the Native State System, upon the acquisition of lands by conquest or settlement by members of a given community, the lands so acquired or settled upon would be apportioned among those worthy of them in the order of merit. 1

This apportionment of land, according to Casely Hayford, was done by the supreme ruler, the head chief.

Danquah gives a more vivid picture of the traditional process of land acquisition among the Akan of Ghana. He writes:

> Stool property, with particular reference to land, is acquired in one of many ways. A warlike tribe invades a country under a supreme commander, or war lord with commanders and captains and their respective people and retainers. The country is over-run; the invaded tribes are enslaved, massacred or driven away from their own country by force of arms. The invaders occupy the devastated and evacuated towns, and after setting up defences against attacks by the conquered tribes or any others, they portion out the conquered territories among themselves and destroy the institutions which they find in the country and substitute their own. The supreme commander, almost always the prince of the tribe, becomes ex-officio supreme lord of the whole land. Every

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1. Casely Hayford, Gold Coast Native Institutions, Sweet & Maxwell, London, 1903, p.45.

> commander, captain or head of tribe retains such land as falls to his lot in the general apportionment, and the land thus retained is held by him in virtue of his allegiance to the supreme lord of the tribe and of his headship of his own tribe or family section. This was one way of acquiring stool land in historic times. 1

Other modes of acquisition described by Danquah include the confiscation of land to the stool, a long and uninterrupted occupation by or on behalf of the stool and an acknowledgment of a superior stool's paramount title. He also states that stool land may be acquired by gift or purchase, the latter being described by him as a comparatively modern form of acquisition.

In Ohimen v. Adjei, Ollennu, J., as he then was, stated the modes of acquisition of lands by stools thus:

> There are four principal methods by which a stool acquires land. They are: conquest and settlement thereon and cultivation by subjects of the stool; discovery, by hunters or pioneers of the stool, of unoccupied land and subsequent settlement thereon and use thereof by the stool and its subjects; gift to the stool; purchase by the stool. 2

In addition to gift and purchase, the two principal methods of acquisition outlined by the learned Judge in essence consist in settlement on the land by the subjects of the stool.

The picturesque account given by Danquah cannot be regarded as descriptive of the Ewe process of land acquisition. In particular the idea of original land apportionment, which comes from both Casely Hayford and Danquah, was not a feature of land

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1. J.B. Danquah, Akan Laws and Customs, Routledge, London, 1928, p.199.
2. Ohimen v. Adjei, (1957) 2 W.A.L.R. 275, 279.

acquisition among the Northern Ewe-speaking people of Ghana. The Akan account, which comes from these learned authors, is based on the fundamental notion that the chief, as supreme ruler, apportioned lands to his subjects of various degrees of importance and status, who thereupon settled on them. The lands are thus held of the stool even today. The Northern Ewe chiefs, however, have never assumed such a role in land administration, with the result that the paramount interest in practically all lands in Northern Eweland is held by the families in their own right and not as grants from stools.

In Eweland, as among the Akan, the basis of land acquisition in the ancient times was settlement; the difference is that the Ewe settlement was not by virtue of apportionment by the political authority. Land became available for settlement either because of war, because of the discovery of unoccupied land or because of cession of territory by way of a gift. Once the lands became available, acquisition on behalf of the family was simply through occupation and use by the individual members of the families.

In some cases a more powerful community defeated another in war and settled on its lands. The area thus abandoned by the defeated people became available for settlement by the victors. The people of Awudome, for instance, claim that they obtained their present lands by defeating and driving away the people of Akpafu and Lolobi who were formerly in occupation. This is an instance of open warfare resulting in the overrunning of enemy territory.

Even without open warfare, sometimes a community was driven away by a hostile but more powerful neighbour. An example is that of the people of Gbi who have settled on certain portions of lands formerly occupied by the people of Likpe. There is no tradition of any open war between Gbi and Likpe. The tradition, however, is that the Likpe people were driven away to their present places by the people of Gbi through pressure in the form of persistent raids on them. There were intermittent but effective attacks by the people of Gbi on the Likpe people. Rather than risk an open war against a superior force, the Likpe people decided to migrate further east to avoid hostilities. Thus it has been suggested that an area in Gbi now normally known as "Bla-to" was originally "Bala-to" which means the "Bala mountain", Bala being one of the divisions of Likpe. Cooking utensils and other relics evidencing a previous human occupation, all attributable to the people of Likpe, were also shown to me in the Todzi farming area of Gbi-Kpeme in Gbi near the present boundary with Likpe.

The more peaceful instance was when a community came upon occupied tracts of land. Such a pacific mode of acquisition was no more than the appropriation of a <u>res nullius</u>. The tradition is that most of the Ewe communities settled in their present abodes in this way. Even though the Gbi people, for instance, had to drive away the Likpe, yet Gbi had found the bulk of the lands, including the vital river Dayi, unoccupied. It was,

therefore, out of expansionist ambitions that surrounding communities with potentially competing claims were driven off in hostile operations.

Communities sometimes settled on land ceded to them by way of express grant, or tacit consent, of other friendly communities in prior occupation. This was normally the case where a community already settled in the locality considered that it could not occupy and did not need all the contiguous lands. A community still in transit was thus allowed to settle in such lands as friendly neighbours. A case in point is the Peki-Awudome-Abutia area lands, particularly interesting because of the conflicting claims of prior settlement. The people of Awudome claim that they had arrived there first and had driven away the Akpafu and Lolobi communities after defeating them in a war, but later allowed the Peki people to settle on parts of the lands as a manifestation of a friendly disposition. The contrary contention of Peki is that the people of Peki and Abutia had settled in the area long before the arrival of the Awudome people whom they permitted to settle "between them", for which reason the Awudome people got their present name which is a corruption of Wodome or "between them". This is one of the arguments of Peki in claiming suzerainty over Awudome, which Awudome vehemently rejects. As to which of these conflicting stories should be believed, we must await a fuller historical research. The making of these claims and counterclaims in this and other areas is mentioned only as

evidence to show that such permissive occupation, maturing into an absolute and indefeasible title, was an accepted feature of land acquisition in the early times among the Ewe.

If settlement was by conquest with a resulting confiscation of the lands of the vanquished, the territorial limits of the lands were those of the former occupants. That area then became the expanse of land that came under the territorial jurisdiction of the head chief or Fiaga of the victorious invading community. If it was a permissive occupation, that is, settlement on land ceded or granted by another friendly community, the boundaries would be generally known and the area so delimited was the area of authority of the new chiefdom. The position, however, was different where the community settled on an unoccupied land or a res nullius. In that case the land area immediately in the effective occupation of the settling community formed the nucleus of the territory under the authority of the head chief or Fiaga. In the course of time, however, the subjects extended their areas of occupation by farming and hunting. As the subjects so extended the area, the territorial jurisdiction of the head chief was also extended pro tanto. Such extension became an interminable process in all directions until other communities were encountered, whereupon the respective boundaries were settled by mutual agreement or tacit understanding.

The position of the Fiaga or head chief has been mentioned, as regards the acquisition of land, with respect to only his

jurisdictional authority. This is deliberate because it is fundamental to the understanding of the land law among the Northern Ewe-speaking people of Ghana. The stool as such, represented by the chief, has only jurisdictional authority over the land. The jurisdiction is both political, legislative and judicial. It means in the political sense that the territory over which he has jurisdiction is the area that may be designated as a chiefdom. In that sense also it means that all inhabitants, including subordinate chiefs, on those lands owe him political allegiance and are entitled to his protection. In the legal and judicial sense it means that it is the land area over which the laws and orders promulgated by the chief have effect and validity. If any transgressions are committed on any part of these lands, they are punishable only by or under the authority of the head chief exercising jurisdiction over the area. The authority of the Fiaga, however, is exercised in each of the divisions of the chiefdom by the respective divisional chiefs or fiawo.

The jurisdictional authority of the stool entails no element of a proprietary interest in the lands under its authority. The paramount interest in the lands is held by the families in occupation. Whether the lands were acquired through conquest or by settlement on unoccupied lands, or even through gift, the stool did not acquire any proprietary rights or interests in them. Therefore, it was not the pattern among the Northern Ewe

of Ghana that the head chief or the head stool held the paramount interest in all the lands; nor was it the case that "the lands so acquired or settled upon would be apportioned among those worthy of them in order of merit",[1] by the chief. The families did not hold the interests in their lands of the stool as the English lords did of William the Conqueror after the Norman Conquest of 1066. Nor did they hold their lands "in virtue of /their/ allegiance to the supreme lord of the tribe" as Danquah tells us of the Akan.[2]

Once the land became available for settlement the Ewe families went into direct occupation. Each family automatically acquired the absolute or paramount interest in such portions of the land as it could reduce into its effective occupation. Such family title was absolute and paramount in itself, it was not derivative from the stool and was a proprietary title of the family in its own right. The areas of land farmed by the members of a family became family lands; similarly, the areas exclusively retained by the members of a family for hunting animals became family lands. The most usual methods of acquiring family interest in unappropriated lands, therefore, were through farming and hunting. It should be explained, however, that the origin of the Ewe family lands was not by a right of succession in the family.

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1. Cf. Casely Hayford, op.cit., p. 45.
2. Cf. J.B. Danquah, op.cit., p.199.

It was the accepted rule that individuals could not hold the paramount or absolute interest in land. Only the family as such had the capacity to hold such an interest. Therefore, any land acquired by a member of the family was acquired for the whole family and the family only. For this reason no boundary marks or trees were set or planted as between the holdings of two members of the same family, for the totality of their joint acquisitions belonged not to themselves alone but to their family. The phenomenon of only the family holding the absolute interest in land may also be understood against the background of the fact that in many cases the joint endeavours of several or many members of the family were necessary for clearing and penetrating into the thick tropical forests.

Within the territorial limits of the chiefdom a family could continue extending its lands until it met another family. This became the boundary between different families within the same chiefdom and was identified with suitable boundary marks. It is said that hunters were very good at grabbing lands by identifying the areas roamed by them with stones, trees, mounds with grass planted on them, and natural physical features. Families with enterprising hunters, therefore, had more lands and consequently hunters were highly esteemed. That is why Westermann records the following information on the Gbi (Hohoe) dynasty:

> As in those days a hunter was more highly esteemed than a chief, Kadrake was given the cognomen 'Big Hunter' and was left in possession of the hunting drum. The chief's stool he left to his younger brother, Adom. The office of a chief was little respected in those days, and the chiefs kept their stools somewhere in or behind the house. 1

For this reason, today in Northern Eweland, many of the stool families have less lands than the other families whose ancestors were hunters.

If the extension of family lands continued until it touched on a boundary with a family belonging to another chiefdom, the boundary so formed became the inter-state boundary between the respective chiefdoms. The maintenance of that boundary, therefore, became also a matter of interest to the head chiefs concerned because it automatically defined the territorial limits of their respective jurisdictions.

The acquisition of land through purchase by the whole community has been suggested as a mode of land acquisition in the early times. There is, however, no evidence of such acquisition of land by an Ewe chiefdom through purchase from another chiefdom. No instance of this could be found anywhere in Northern Eweland, though it is known that individual families did purchase lands. It is suggested, therefore, that this method of land acquisition was not employed by the Ewe, although there later developed in many areas the notion of alienation of land by families.

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1. D. Westermann, Afrikaner Erzahlen Ihr Leben, Essen, 1942, pp.259-260. Freely translated from the German.

The same may be said of gifts of lands to communities. There is not enough evidence of any Ewe chiefdom having made a gift of its lands to another chiefdom, if we understand a gift in the sense of transferring the rights and title previously held in property. As the stool as such did not have any proprietary interest in the lands, it could not make a gift of any portion of them to another stool; for the lands were family lands, though subject to the jurisdiction of the stool. The common law principle of nemo dat quod non habet was also a principle of Ewe law. The apparent instances of gifts were no more than permitting a new chiefdom to settle on unappropriated contiguous lands which would otherwise be appropriated in the course of time by the families in the community granting such a permission. This was not strictly a gift. But even such permissive occupation, though now ripened into absolute title, is strenuously denied by every community, sometimes only out of national pride. We have, for instance, the conflicting claims of Peki and Awudome as to which community permitted the other to settle on their present lands. The only admitted cases of such gifts are the alleged gifts of the Afram plains lands to communities like Aveme and Wusuta by the Kumawu of Ashanti. These lands, therefore, stand in a different category, even as regards the rest of the Aveme and Wusuta lands. In any case the alleged gifts are challenged by the Kwahu of the Eastern Region of Ghana who deny that they were ever made.

Today the normal way of establishing inter-chiefdom boundaries is by proof that the paramount title to the disputed portion of land is held by a family belonging to the particular chiefdom. Once it is proved that title to the disputed portion of land is held by a family of the chiefdom, not as an isolated parcel of land but as part of the general holdings of the families of the chiefdom, that constitutes a strong prima facie evidence of the physical extent of the territorial area of the chiefdom. It is thus the extent of the territorial jurisdiction of the head chief or Fiaga.

This, however, was not always the case in ancient times. In the early times the inter-chiefdom boundaries were sometimes demarcated, as marking the points beyond which families could not extend their lands. At that stage of the demarcation, all the lands contained within the physical boundaries of the chiefdom need not have been occupied or appropriated by families. It was only a political boundary and citizens might not have appropriated lands up to the inter-chiefdom boundary; but after settling the boundary the families farmed and acquired lands up to that point. Until appropriated, the land within the boundary was said to "belong" to the chief or enye fia to. The meaning of enye fia to in Ewe, however, was not that it was stool land; for the stool did not have any proprietary interest in such lands. Its true import was that it was unappropriated land within the territorial boundary of the stool and could thus be appropriated by families

owing allegiance to the stool. In some areas it was suggested that the boundary was settled on an arbitrary principle, the more powerful chiefdom pushing its boundary as far as it could conscionably do. Others suggested that the boundary was settled only after a period of settlement in the locality, so that the boundary was fixed at the spot up to which, by mutual tacit agreement, each community stopped when clearing the public footpath or road connecting the two chiefdoms. This point was known as motasefe, that is, "where the clearing of the footpath stops". The boundary itself was known as kpefe or "where we meet". In Peki, however, it was stated that the motasefe was not necessarily the kpefe or inter-chiefdom boundary; for any suitable spot could be agreed as the boundary or kpefe. The proof of inter-chiefdom boundaries, therefore, is today a matter of evidence, of which the fact of long possession by subjects is almost conclusive.

The nature of land acquisition among the Ewe makes possible the existence of vacant lands to which the paramount title does not vest in any individual or family. There are, however, no lands over which one chief or another does not exercise jurisdictional authority. Thus, in Eweland, the dictum that there is no land without an "owner" is inapplicable unless by that we mean that there is no land which is not under the jurisdiction of a chief. As the determination of the territorial boundaries of the chiefdoms did not imply any proprietary interest of the stools in the lands, there are at times pockets of lands which

are not beneficially "owned" by any family or stool. Informants were reluctant to specify such lands because of possible litigation. Such "ownerless" parcels of land as were mentioned have, therefore, either been flooded or have been declared "forest reserves" by the central government. One example is the 'Kodzofe lands" of Gbi-Kpeme in Gbi, on the boundary between Gbi and Likpe. These lands were known as Gbi lands, inasmuch as they were within the boundaries of Gbi, but title to them was vested in nobody until 1925 when Togbe Adzima, then chief of Gbi-Kpeme, urged the subjects of Gbi-Kpeme to go into occupation. Every subject acquired the absolute title to as much land as he could clear, because by that time there had occurred a change in the law which permitted the individual to personally hold and acquire the absolute interest in land. These lands now consist mainly of individual cocoa farms and neither the Gbi-Kpeme stool nor the head stool has any proprietary interest in them. Thus the distinguishing feature of these lands and the evidence of their recent occupation is that they are not ancestral family lands. Another example from Gbi is the "Abudome lands", near the boundary between Gbi and Alavanyo. Although the Abudome lands were admittedly Gbi lands, no family, individual person or stool held the absolute interest in them in Gbi. It was only fairly recently that the lands were divided among the then seven divisions of Gbi, each division thereafter sharing it among its

component sub-divisions. Those individuals who so desired made farms there, on the portions of land allotted to their divisions and sub-divisions; but the Abudome lands have now been declared a "forest reserve" in which farming activity has been prohibited by statute. In Aveme-Dra in Aveme, the land known as "Dra-to" is part of the division of Aveme-Dra; but the absolute title to it is not vested in any family, nor is it vested in the chief or stool as stool land. This "owner-less" land, however, has also now been declared a "forest reserve" in which farming is no longer permitted. In Kpando, the lands lying between Kpando and the Kwahu of the Eastern Region of Ghana and known as "Kpatoe lands" belong to no family and are not stool property. These lands which lie beyond the Volta River are nevertheless under the jurisdic-tion of the Fiaga of Kpando, albeit "ownerless" in the proprietary sense. The Kpatoe lands have now been flooded by the rising waters of the Volta Dam as a result of the Volta River Project. From these examples we may suggest that unowned lands exist, though such lands are under the jurisdictional authority of the chiefs within whose territ-orial boundaries they lie.

The Paramount Interest in Land

We may preface this discussion with the oft-quoted words of Rayner, C.J., 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. 1

In general this also expresses the traditional view of Ewe land law. 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. The holder of the paramount title in land is known as anyigbato or "land owner". Although the Ewe stools have always enjoyed jurisdictional authority, apart from the specific cases of small stool lands, the paramount or absolute title to lands has been vested in the several families and not in the stools. Hence the stool or the chief is not necessarily the anyigbato.

The idea has not been generally accepted that in some parts of Ghana, in any case among the Northern Ewe of Ghana, absolute or paramount title to lands is vested in the families. Perhaps because the dictum of Rayner, C.J., first received application in the Ghana courts in cases involving the Akan and

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1. Rayner, C.J., in a Report on West African Land Tenure. Quoted with approval by Lord Haldane in Amodu Tijani v. Secretary to the Government Southern Nigeria (1921) 2 A.C.399, 404.

Ga, it has been assumed that the absolute title to land can only be vested in the stool which symbolises the sovereignty of the entire political community. It seems to have been forgotten that Rayner did not say that land belonged only to the community but that it could also belong to the family. Thus Ollennu, in what he describes as the basic principles of Ghana land law, apart from tenancies, licences and pledges which are essentially forms of alienation, states three types of title to land.[1] They are the paramount or absolute title, the sub-paramount title, and the determinable or usufructuary title, all of which are constructed around the hierarchy of political authority in the traditional state.

The nature of titles to land, as given by Ollennu, though purporting to be a generalisation for all Ghana, is a typical Akan pattern. In Ollennu's classification the paramount title, also known as the absolute title or the allodial title, is vested in the head stool. He explains that, as the stool is the embodiment of the collective authority of all the members of the community, the stool holds the paramount or absolute title to all the lands of the village, town or tribe. He thus equates political authority with proprietary interest in land. In conformity with this scheme of land titles, Ollennu also

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.4.

identifies a lesser title which he describes as the sub-paramount title. The sub-paramount title, according to him, resides in the stool immediately subordinate to the head stool in political importance. The quantum of interest in land is thus commensurate with political authority. No doubt it is such identification of land titles in terms of political authority that misled writers like Rattray to describe the Ashanti land tenure in terms of feudalism, a view which has now been rejected by anthropologists and lawyers alike. Nevertheless it seems to be a generally accepted view that among the Akan, notably the Ashanti, paramount title to all the lands is vested in the head chief,[1] of whom the lesser chiefs in turn hold lesser titles in a manner corresponding to their positions in the hierarchy of political authority. If we are to press the scheme to its logical interpretation, it means that these must be still lesser titles than even the sub-paramount title before we come to the family and the individual. If we take a normal Ewe chiefdom, the acceptance of such a scheme of land titles would mean that the absolute or paramount title would be vested in the Fiaga or head chief, while the divisional chief or fia logically would have the sub-paramount title. The sub-divisional chief or saamefia, then, must have something like a "sub-sub-paramount"

1. Though this is not true of all Akan. This contention was, for instance, rejected in the case of Akim Abuakwa: Asamankese Arbitration Award, (1926-29) D.Ct. 220.

title, with a further reduplication of the prefix "sub" for as far as there are still lesser chiefs before we come to the families.

In Ollennu's classification, it is only after the titles of the stools that we may come to the "determinable estate" or the "possessory" or "usufructuary" titles of the family.[1] There seems to be some confusion in the learned Judge's description of this type of "ownership". He says that "the determinable or usufructuary title is the right of the individual subject of the stool or member of the family to the enjoyment" of the land, the paramount title to which is held by the head stool. Before that he had also said of the "determinable" or "usufructuary" title that "it is also one which a family usually holds in general stool, skin or communal land". While trying to distinguish them the learned Judge nevertheless seems to treat the individual's interest and that of the family as the same thing. Conceptually, however, one must be higher than the other.

There is, however, ample support for Ollennu's view when we consider land holding among such communities as the Ashanti, some areas of Akim Abuakwa and the Ga. Rattray had recorded a similar view of Ashanti lands. And of the Akan generally Danquah has said:

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.4-11.

> The stool occupier is in common parlance, or by courtesy, referred to as the owner of the land; but he is so only in so far as he occupies the Stool and represents the sovereignty of the people, giving due respect to the sacredness of the Stool. If we were pressed for an answer to the fundamental question as to ultimate ownership of stool property, we should readily say the thing called 'Stool', whose supremacy is acknowledged by members of the family, section of the tribe or subjects of the State, and to which they are bound by their own traditions and laws to serve and respect, is the ultimate and absolute owner. 1

The view of Danquah is based on the necessary assumption that the particular lands are stool property. This is understandable because Danquah was writing on the Akan, particularly the Akim Abuakwa, whose lands are mainly stool lands. This view, however, was rejected as regards the Asamenkese lands in Akim Abuakwa.[2]

Even as regards the Akan communities, there is no unanimity that all land is stool land. That is why at the beginning of the century Deane, C.J., was able to say that "The presumption with regard to land in this country is that it is family land".[3] More significant is what Casely Hayford has said about title to land among the Fanti, an Akan community. Said Casely Hayford:

> The King, qua King, does not own all the lands of the state. The limits of his proprietary rights are strictly defined.
>
> There are first of all lands which are the ancestral property of the King. These he can deal with as he pleases, but with the sanction of the members of his family.
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> Secondly, there are lands attached to the stool which the King can deal with only with the consent of the councillors.

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1. J.B. Danquah, op.cit., p.200.
2. Asamankese Arbitration Award, (1926-29) D.Ct. 220.
3. United Products v. Afari, (1929-1931) D.Ct. 12.

> Thirdly, 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. It is not even ownership in a general way in respect of which, per se, the King can have a locus standi in a court of law. 1

The Paramount Chief or Omanhene was known in Casely Hayford's days as "King".

Casely Hayford's account is meant to indicate that at least among the Fanti it is not the law that all lands belong to the Stool, of whom the families hold their allocations. Casely Hayford, however, seems to have been ignored completely in favour of Sarbah and authorities like Ollennu have assumed that all lands in Ghana are stool lands.

Apart from Ollennu, the other writer on this point is Bentsi-Enchill; for others have dealt with only specified communities. There is little doubt that Bentsi-Enchill conducted a more serious study than Ollennu into the question of paramount titles to lands in Ghana. He, like Ollennu, recognises that among many communities, notably among the Akan and the Ga, the paramount title to land is vested in the stools. However, while Ollennu treats the Akan and Ga experience as applicable to all Ghana, Bentsi-Enchill rightly points out that differences exist in other parts of the country. After considering the stool interest in land among the Akim Abuakwa

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1. Casely Hayford, op.cit., pp.44-45.

and the Ashanti, Bentsi-Enchill states that:

> In most other states of Ghana, there is no basic notion of what has been called 'state ownership' above: the principal owners of land - absolute or allodial owners thereof - are clans or extended families, or village communities ... To be sure, these clans, or extended families, or village communities, are members of a particular state, owe allegiance to its governing authority of the state and are subject to the jurisdiction. And jurisdiction is exercised in ways which have profound effects on title ... As a result, the distinction between the obligations of allegiance and proprietary rights can become blurred. Nevertheless the titles of such families to their land are regarded as independent and allodial. 1

The same view has also been expressed by Pogucki, formerly of the Lands Department of Ghana, who after examining stool interests in land in other parts of Ghana, said:

> The fact that certain principles or notions are known need not necessarily mean that they must be applicable in the whole of the country. For instance the notion of stool lands appears to be confined mainly to areas inhabited by peoples belonging to the Akan group; there is no stool-land in the Northern Region nor e.g., among the Ewe and Adangbe ... 2

It is respectfully submitted that both Bentsi-Enchill and Pogucki are right. Among the Northern Ewe-speaking people of Ghana the rule is that the paramount or absolute title to land is vested in the families. The Ewe family does not hold its interest in land from any stool. The family's original title to its lands is paramount or absolute in its own right, which

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1. K. Bentsi-Enchill, Ghana Land Law, Sweet & Maxwell, London, 1964, p.16.
2. R.J.H. Pogucki, Land Tenure in Ghana, Lands Department, Accra, 1957, Vol. 6, Preface, p.iii.

is unaffected by the political sovereignty of the stool. The Ewe stool, while clothed with jurisdictional authority over the whole territory, has no proprietary rights or interests in the lands generally. As far as can be ascertained, this rule admits of no exception among the Northern Ewe.

This scheme of land titles among the Ewe has its own implications. It means first and foremost that in this part of Eweland, the concept of land holding is divorced from the notion of political allegiance to the stool. The authority of the chief is not all pervasive as among other communities. In England, after the Norman Conquest, William the Conqueror declared all the lands of the realm to be vested in the Crown, so that all lands were thereafter held either mediately or immediately of the Crown. For that reason the theory of English land law is that the highest interest which an individual or body of persons can have in land is the fee simple absolute. Only the English Crown possesses the allodial title. This indeed is the basis of the English law doctrines of tenures and estates, the tenure indicating the quantum of interest held in the land while the estate explains the duration of the interest so granted. Strictly, therefore, it is somewhat misleading to speak of "land tenure" among the Northern Ewe-speaking people of Ghana. There is no question of a "tenure" because the family does not hold its land in tenure from the holder of any superior title. The family's title to its lands is absolute in its own right, not by virtue of but in spite of the political allegiance to the stool. The

title of the family is in perpetuity as an invariable incident of Ewe law of land acquisition and, therefore, the concept of a tenure is strictly inapplicable. Similarly, the quantum of interest vested in the family in Eweland is the highest known to the law, the paramount title. It is the highest interest and not a lesser carved out of any higher one. While in legal theory it is similar to the theoretical allodial title of the English Crown in the lands of England, the paramount title of the Ewe family is a real one expressed in the power of proprietary control and the right of physical occupation or user by members of the family or persons claiming through the family. Therefore, in the same sense that we cannot speak of the Crown's tenure of English lands because its interest is unlimited in both duration and quantum, we cannot correctly speak of land tenure as regards the paramount titles of families to their lands among the Northern Ewe, because the interest of each family is unlimited in point of time and is without limit in its quantum. Hence, as regards family titles to land, we would prefer expressions like "land titles" and "land holding" rather than "land tenure". Land tenure can perhaps only properly refer to titles created in individual strangers who have taken lands from families in a transaction not transferring the paramount title, such as a lease of different kinds. However, it is also true that even in England the expression "land tenure" has undergone a change from its original meaning and today it more properly refers to the

nature of interests in land. With this meaning it can equally be applied to interests in land under Ewe law. This analysis of the original meaning of the expression has, therefore, been attempted primarily in order to emphasise the paramount nature of family titles to Ewe family lands.

The Ewe scheme of land titles defies being contained within the classification of the types of interests in land that Ollennu has suggested. The classification suggested by Ollennu places the paramount titles to the lands in the head stool, with the lesser stools possessing the sub-paramount title. The family's title, he, therefore, describes as the "determinable estate" or "possessory" or "usufructuary" title. The learned Judge, with the greatest respect, cannot be right if his classification is to be applied throughout the country, because political authority in the traditional Ewe society has no corresponding quantum of proprietary interests in the lands under the jurisdiction of the stool. Accordingly the head stool in Eweland has no derivative paramount title, and a fortiori the sub-stools have no sub-paramount title, in the lands. As for Ollennu's description of the family's title to its lands as a "determinable estate", nothing could be further from the truth when it is applied to the Northern Ewe. As already explained, we cannot strictly describe the title to lands held by the Ewe family in terms of the English law doctrine of estates because the Ewe

family's interest in land is of unlimited quantum. More important, the interest of the Ewe family in its lands is anything but "determinable". It is not "determinable" because the title is absolute and paramount and exists in perpetuity unless alienated; for it is not an interest which is subject to termination by the holder of any superior title. Although the Ewe family is normally in possession of its lands through the members of the family, the interest of the family is not merely a "possessory title" because its possession is only an incident of the paramount title. To describe it as a "usufructuary title" is equally wrong. The "usufruct", even in Roman law from which the concept is borrowed, only implies a right of user and enjoyment of the fruits of the property belonging to another person without thereby causing a destruction of that property or substantially altering its nature. Since, as we suggest, the Ewe family has a paramount title in its own right, its title cannot be described as usufructuary. And, because of the absolute nature of the family title, it is not a basis of any derivative title in the stool.

Once it is appreciated that, unlike the Ashanti and other Akan communities, government in the traditional Ewe society is not linked with interests in land, the position of the stools as regards lands will become clearer. The jurisdiction of the Ewe head chief as paramount ruler is acknowledged. This authority he normally exercises through lesser chiefs. However, neither the

head chief nor any sub-chief under him has any proprietary interest in the lands. Where a stool, whether a head stool or a sub-stool, has title to any lands it holds it directly and its title is not derivative from a higher or a lower stool or from any family. In such cases of a stool holding an interest in land, which are indeed rare and hardly significant, the title of the Ewe stool is as paramount or absolute as that vested in each family in its own lands and no more. No stool has any proprietary interest in any of the lands, title to which is vested in families which serve it, for the family titles are paramount in themselves. The chiefs accept this as the correct legal and practical position and, in the interviews with them, no Fiaga or head chief, indeed no chief, in the Northern Ewe area pretended to lay claim in the proprietary sense to title to the family lands under his jurisdiction. Similarly all the heads of families were unanimous in emphasising that absolute title to their lands was vested in their families in their own right without any stool interest therein. This, it is respectfully submitted, is the law of the Northern Ewe-speaking people of Ghana.

What, then, is the nature of the paramount title to land in Ewe law? The answer partly depends on whether the paramount title is vested in a family, a stool or an individual person; but in all cases the issues raised are those of benefit and

control. As the normal case is that the paramount title to land is held by a family, we may first consider the nature of the paramount title held by a family. The nature of the beneficial interest of the family is limited because the family is but an artificial person and also because the notion of family property other than land is little developed among the Ewe. Thus the family, as the holder of the paramount title, has the right to occupy any part of its own lands, such as for the cultivation of a family farm or the building of a family house; but this type of beneficial user is rare among the Northern Ewe because the creation of family property as such is hardly ever undertaken. Furthermore, the right of the family to appropriate or develop part of its lands can only be exercised over such part of its lands as are unoccupied by members of the family. For the interest of the individual members of the family is a qualification on the paramount title of the family, such that a member of the family occupying family land by an inherent right of occupation cannot be dispossessed by the family. The benefit to the family (because it is responsible for the welfare of its members), is, therefore, that only members of the family have an inherent right of occupation and use of family land. Occupation of the family land by the members of the family is consequently regarded as occupation by the family. As there are today scarcely any family lands unoccupied by members of the family, we may say that the benefit to the family, derived from its paramount title to land, is that it provides for members

of the family the lands which they may occupy and use as individuals. Apart from these the other beneficial interest of the family is that any naturally growing trees, like odum and mahogany, and naturally growing palm trees belong to the family. Thus only the family, through the head of family, may sell such timber. Similarly only the head of family may on behalf of the family fell or sell palm trees growing naturally on the family land or permit such felling or selling. Minerals and treasure trove discovered in or on the family land, as well as the soil and sub-soil and any stones, pebbles or objects in or on the soil belong beneficially to the family, and only the family may sell or otherwise dispose of any interest in them or consent to their exploitation.

The paramount title of the family in its land also implies the power of control. Control here is of two types: one over members of the family and the other over non-members. As regards non-members of the family the power of control means that the family can exclude from the land all those who are not its members, while also reserving the right to permit any such strangers the use of its lands on such terms as it may determine. The power of control over members of the family in the use of family land is very general and supervisory. The family cannot deny a member the general right to use family land, nor can it terminate the occupation of a member already in occupation of a portion of the family land. The right and function of the family

by way of control, therefore, is to determine the competing claims of its individual members to the use of available portions of family land. This is one of the reasons why the permission of the head of the family must be obtained before going into occupation of an unoccupied family land. For, although the general right to occupy land cannot be denied and although individuals are not rationed in their use of family land, the permission to occupy a specific portion may be withheld if the family wishes to utilise the site for some purpose or if another person has already been permitted to go into occupation, and a limit may be imposed on the size of individual occupation or cultivation if the needs of other members of the family so require. Finally, the power of control means that only the family can alienate title to the land. This is important because in Ewe law the sale or outright gift of land has the effect of conveying only the paramount title and an individual in occupation of family land cannot alienate his own inherent interest to a stranger nor alienate his family's paramount title.

The paramount title of the stool in stool lands is similar to that of the family in family lands, both the stool and the family being corporate personalities of the indigenous law. Like the family the stool is entitled to any trees, including palm trees, growing naturally on the land and also to any minerals or treasure trove found in or on the stool land. Similarly the stool has the absolute interest in the soil and sub-soil and in

the stones, pebbles and other objects in it. The contrast with the family land, however, is that in actual use and control all the subjects of the stool as well as strangers are excluded from the stool land, unless expressly permitted by the stool to occupy or use it for a definite time. It is the exclusive reservation to the stool that marks out the Ewe-type stool land from the general lands. Hence stool land can be used only for the purposes of the stool or for the benefit of the stool. Once title thereto is transferred to an individual or a family, it ceases to be stool land. It follows that only the stool can alienate the paramount title to the stool land or grant any lesser interests therein.

The individual could not in the past acquire the paramount title to land; but this is possible today. An individual who acquires the paramount title to land from a stool or a family acquires all the concomitant rights of benefit and control. He may exclude everybody else from the land. Unlike an artificial person such as the stool and the family, an individual person holding the paramount title to land may go into personal occupation and use the property for any purpose permitted by law. The individual title holder is entitled to all the trees, minerals, stones, pebbles and any other objects in or under the soil, as well as the soil and sub-soil. He also has the right and power of alienation.

Land Boundaries

Boundaries are an absolute necessity in defining interests in land; for without boundaries it is idle to speak of title to land. Boundaries are perhaps an even more crucial issue when, as in the case of the Northern Ewe of Ghana, we are dealing with thick tropical forests which are hardly penetrable until considerable time and effort have been expended in cutting paths through. Added to this are the facts that one has to deal with an illiterate population among whom geometrical surveying was unknown, cadastral plans had never been heard of and any talk of the registration of land titles was meaningless. In spite of these handicaps, the ingenuity of the forefathers had devised various means for the identification of boundaries marking out the portions of land held by the families.

It seems that in the very early times all kinds of natural physical features served as identification marks for land boundaries. In the event of inability to find a suitable land mark, concessions were made so that, even with the loss of some land on one side, the boundary might coincide with some unchangeable natural features such as a river-bed or a hill. Gradually people began to resort to the intentional planting of trees as boundary marks, when it was discovered that certain trees were very difficult to destroy. Today a combination of all these is used in the identification of boundaries to family lands.

Natural physical features are still very important boundary marks today. The reason is that they are by nature very difficult, if not impossible, to falsify. Such physical features include hills and other conspicuous elevations of the ground, because it is impossible to obliterate the boundary by levelling a hill with the ground. Large ant-hills and mounds are, therefore, also often accepted as boundary marks. In the same way large rocks forming distinct marks on the land are constituted into boundary marks which cannot be changed. Similarly, any large depression in the earth may serve as a boundary because it forms a permanent mark on the land. A river-bed, though sometimes dry, is also a very usual form of boundary mark. Large rivers, streams and rivulets and ponds are always convenient boundary marks because of man's inability to alter their course without detection. Presumably, if the river alters its course imperceptibly over the years, it may result in an unnoticed change in the boundary in favour of one party; but, if it is a sudden change, the former bed of the river, though now dry, will continue to be accepted as the land boundary. It does not appear that the Ewe law confers any special property in a boundary river on any of the riparian land holders; such a river seems to be regarded as a "no man's land" separating the two properties.

Sometimes, and indeed quite as often as convenient, large trees naturally growing on the soil are regarded as boundary marks. The two types of trees usually serving this purpose are

the vuti and the lokoti. In the first place they are not very common trees and few of them are likely to be found close together. Secondly, they are large trees towering over other trees in both height and size. Furthermore, they are known to enjoy long life, being able to stand drought, strong winds and the elements. Neither of these trees can be uprooted without leaving permanent evidence of a large hole in the earth and the bulk of its trunk sprawling on the ground and destroying other trees and undergrowth with it. Thus by sheer size the vuti and lokoti are convenient boundary marks. When a large tree is accepted as a boundary, it is usually disfigured in one form or another, either by removing some of its bark or making some deep cuts into the tree trunk, to identify it as representing a boundary mark. Occasionally trees like odum and mahogany are also used as boundary marks; but, because of their commercial value, other substitutes are preferred.

Since land boundaries cannot always be made to coincide with natural physical features or fall in line with wild growing trees, special trees are planted as boundary marks whenever necessary. Such trees may be planted to supplement the natural features or wild trees, in order to cover all corners of the land. Often they are planted as the only boundary markers. The tree specially accepted throughout all Northern Eweland as

boundary markers is known as kpoti.[1] In some areas the same tree is known as anya or anyra. The name kpoti in the Ewe in fact means "boundary tree". The only other tree which may serve the same purpose is womia, also known as dameti or damti. The ancestral Ewe botanists had discovered that these two trees hardly ever die out and are exceptionally difficult to destroy. The kpoti and womia have the unusual property of germinating and growing almost wherever planted, even on very infertile soil and in the severest drought. They cannot be successfully destroyed either by cutting them off or burning them with fire; for the roots will germinate again. The only way to completely exterminate them is to dig deep into the earth to remove even the smallest pieces of roots; but this exercise would leave a huge hole in the soil and a mess around the spot even if carried out successfully and clandestinely. The kpoti and womia take over 15 years to grow into sizeable trees. It is, therefore, impracticable to falsify the boundary by planting new ones merely in contemplation of a dispute. These are some of the reasons why these two trees are accepted throughout the Northern Ewe-speaking area as special trees to serve as boundary markers. Because of the convenience and usefulness of these trees, land boundaries are not marked by fences or paths among the Northern Ewe.

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1. Dracaena arborea. The kpoti in Anlo dialect, however, is jatropha curcas.

Boundary marks are not, and must not, be fixed in secret or merely by agreement between the parties. The planting of boundary trees or kpoti dodo is always a public ceremony and the attendant publicity is an additional guarantee against future denial or repudiation of the boundary so fixed. In the first place, apart from the parties themselves, other families holding title to lands in the vicinity or near the intended boundary must be notified to attend. Such third parties must be present to protest if the projected boundary would compromise their own interests; and they are vital independent witnesses in any future dispute. Where it is a boundary between families in the same sub-division, the sub-divisional elder, assisted by all heads of families and the principal elders in the sub-division, must preside over the ceremony. If the families are from different sub-divisions of the same division, a neutral sub-divisional elder is invited to preside. If different divisions are involved in the same chiefdom the divisional chiefs or their representatives jointly preside. If the opposing families are from different chiefdoms, in which case the boundary would be the inter-chiefdom boundary, the divisional chiefs concerned in each of the chiefdoms may preside; but, if they are unable to settle the boundary, the head chiefs would directly meet over it, they in turn inviting another head chief as an arbiter if they disagree. Relatives, including maternal relations, may be invited from anywhere as

independent witnesses. In addition any citizen who chooses may be present at the site. The boundaries must be agreed and marked in the presence of all these witnesses.

The actual ceremony of planting the boundary tree requires that representatives from each side must jointly physically place the boundary tree in its hole, thus dramatising the agreement of both sides that the spot is the boundary between them. In Gbi the account of the ceremony is that the holes for the planting of the boundary trees may be dug by any person from among those present. Then a representative from each side should jointly hold the plant at the same time and together place it in its hole. Both representatives should then add soil to the stem of the new tree at the same time to fix it firmly in the soil, each party adding and pressing the soil from the opposite side of his boundary. In Gbi every one of the boundary trees should be jointly planted in this way. In Matse it is stated that the digging of the first hole should be a joint endeavour of the representatives of both sides taking their turn, and both representatives should jointly place the first tree in the soil and add the soil together at the same time as in Gbi. In Matse, however, once the first of the boundary trees is planted with such formality, the remaining trees may be planted by other people attending the ceremony. In all places, before the commencement of planting the boundary trees, libation is poured and prayers are offered to the

ancestral spirits invoking their intervention to visit death upon any person who would falsify or deny the boundary as determined. For many people, therefore, maintenance of the true boundaries is enjoined by the fear of a supernatural sanction rather than the necessity to obey the laws of this world.

Parties to the determination of boundaries, that is members of the families concerned, are not allowed at the site with cutlasses, guns or other lethal weapons, lest they be tempted to settle any disagreement by recourse to physical violence. Cutlasses and guns are removed from all parties before going to the actual site and deposited elsewhere in the bush till after the inspection of the land. Only independent persons selected by the chief or the arbitrators hold cutlasses for cutting the paths as boundary lines through the bush. That is why the holes for planting the boundary trees in Gbi and other places are dug by non-members of the families concerned. In Matse it means that, agreement having been secured on the boundaries and peace ensured, implements may be borrowed from others present there for digging the first hole.

The procedure outlined above is the same whether it is a boundary dispute which is being settled or whether it is a sale of land. A boundary dispute requires somebody to preside and an award is made after inspecting the disputed land. In the case of the sale of land, however, no presiding official

is needed; but the fixing of the boundaries is done in exactly the same way if it is a forest land in the bush. In the case of town lands the modern expedient of concrete pillars buried in the soil is the normal method today.

Even today the existence of boundary marks is very vital to disputes as to title to land. One even gets the impression that the former Native Courts had been placing too much importance on the existence of boundary marks. Almost all land cases that have been before the Native Courts in this area were decided simply as questions of fact because one party was able to adduce more convincing evidence of his boundary marks. Most of the judgments, even where questions of law such as proof of title had been raised, are framed along the following lines:

> The statement as given by both Plaintiff and Defendant, although traditional they are, evidences of more witnesses on either side should have been heard in confirmation [sic]. However, this Tribunal is convinced to have the belief that the land in dispute is owned by the Plaintiff who during the inspection of the portion in dispute did satisfactorily show the boundaries at the four corners, i.e. north, south, east and west, together with the boundary definitions or marks, namely womia trees, whereas on the contrary Defendant could not do so than pointing out a set of womia trees only on the west despite his statement on record showing the various boundaries and their marks ... Judgment is therefore entered in favour of Plaintiff and against Defendant with costs ... 1

The insistence on boundary marks, however, is not unreasonable, especially as it is difficult to think of an alternative method of proving title. Boundary marks, as we have explained, are

1. Tendeh v. Degbadjor. Unreported, Native Tribunal of Kpando, January 1944, pp.321-322 of Civil Record Book.

difficult to falsify. It is difficult to destroy the planted trees and plant new ones in their stead, and physical features are equally difficult to obliterate. Furthermore, falsification is difficult because all the marks taken together must form a coherent pattern.

At times litigants, like drowning men clutching at any straw, try to rely on other trees as boundary markers. Because of the facility with which such allegations can be made in an area with a thick tropical vegetation containing many large trees, tribunals are usually insistent on the specially accepted kinds of trees as boundary markers. In the case of X v. L.K. Agbesi,[1] a case from Gbi-Kledzo in Gbi, the defendant based his claim of title to land on a boundary marked by a kind of tree known as the anyi tree. From the spelling the name anyi may phonetically be confused with the acceptable anya tree, but the two kinds of trees are very unlike each other. The anya or kpoti is one of the recognised boundary trees. Although the anyi is bigger, it does not serve as a boundary tree. The Atando Native Court, sitting at Hohoe, therefore, rejected the defendant's contention and stated thus:

> According to our Gbi native customs, 'anya' trees are always planted as boundary marks between lands. Defendant's witness by name Togbe Deh, Kledzo Chief, in answer to Plaintiff's third question stated that it was said in that arbitration that this 'anyi' tree was planted in place of a certain ant-hill that was the boundary mark between the

1. X v. L.K. Agbesi, Unreported, Suit No. 35/49, Atando Native Court, Hohoe, 20th December, 1951, at p.400 of Civil Record Book. Name of Plaintiff illegible.

> three people. 'Anyi' trees are not planted in Gbi as boundary marks but 'anya' trees, hence Defendant and Paul Yawo went and planted 'anya' tree in place of this 'anyi' tree. Why should 'anya' tree not be planted in place of this ant-hill but rather 'anyi' tree? We don't believe that this 'anyi' tree is really a boundary mark ...1

The insistence on special trees as boundary markers is justifiable, otherwise boundaries would be unidentifiable in a land with many large trees.

One other rule which is vital to the determination of inter-family boundaries is that the kpoti, otherwise known as anya, and the womia are exclusively reserved for marking inter-family boundaries only. The anya or womia may not be used to demarcate boundaries between members of the same family. Internal boundaries between members of the same family are usually not marked. If they should for any reason be marked, such internal boundaries are indicated with a row of pineapple plants. In this connection it may be explained that there were indigenous pineapples before the introduction of the imported species which are now more in common use. Either species of pineapple plants is acceptable. For internal boundaries also another tree known as trekpo may be used. This leaves kpoti or anya and womia or dameti for inter-family boundaries. Accordingly, in case of doubt, the anya or kpoti and womia or dameti will be accepted as marking an inter-family rather than an internal boundary. Similarly pineapple plants and trekpo trees indicate only internal boundaries between members of the same family and cannot be held out as inter-family boundary marks.

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1. X v. L.K. Agbesi, supra.

The Individual's Interest in Family Land

An important issue which has engaged the attention of Ghanaian lawyers is the nature of the interest of an individual in family land. Among the Northern Ewe of Ghana we may describe the individual's interest in family land as a dependent interest inherent in membership of the family which holds the paramount title to the land. It is a dependent interest because it is incapable of separate existence by itself, except as a burden on the family's paramount title. In the view of the old and orthodox Ewe law this was the highest interest which an individual person could hold in land; for only a family or a stool could hold the paramount title to land. Hence, although he has been criticised by several authorities and although he was not speaking of the Ewe specifically, we would agree with Rayner, C.J., in his statement to the committee on West African Land Tenure that in the old Ewe law "the notion of individual ownership /of land/ is quite foreign to native ideas".[1] We would also adopt the words of Deane, C.J., that even today, among the Northern Ewe, "the presumption with regard to land ... is that it is family land",[2] though this presumption is now rebuttable. The position has now changed and today the individual person has the legal capacity to acquire the paramount title to land

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1. Quoted by Lord Haldane in Amodu Tijani v. Secretary to Government of Southern Nigeria, (1921) A.C. 399, 404.
2. United Products v. Afari, (1919-1931) D.Ct. 12.

in his own right. However, insofar as family lands are concerned, the individual's interest is still a dependent interest which is subordinate to the paramount title of his family.

The primary interest which an individual has in the land of his family is that he has an inherent right to occupy and use such land, provided that it is not already occupied. Once in occupation of a particular portion of the family land, he can remain in such occupation for life because the interest is indeterminable and cannot be determined even by the family. On the other hand the individual cannot in Ewe law alienate his interest in family land to a person who is not a member of the family, whether inter vivos or by testamentary disposition. He may transfer his interest inter vivos to any other member of the family, and it is transmissible to his heirs upon his death; but he cannot transfer it by testamentary disposition to even members of the family.

Ollennu has criticised the statement by Rayner, C.J., that individual "ownership" of land is a notion which is foreign to native ideas. Ollennu's main ground for rejecting the statement as incorrect is apparently the modern practice of alienation of land by sale to individual purchasers. Apparently Ollennu was also thinking of only stool lands of the communities which have stool lands. In the Ewe context, the statements of Rayner and Deane, C. J.J., must both be understood to mean that the paramount title to land by virtue of original acquisition of land

was always vested in the family. Among the Ewe, this is not because the individual, as Ollennu suggests, "is himself a property of the family" or because on his death intestate the land becomes family property. The traditional Ewe notion from the earliest times was that because land was a special type of property, the individual was incapable of holding the paramount title to it. Therefore, any person who acquired unoccupied land in the olden days did so on the understanding that it was acquired for his family as a whole. This is the basis of the origin of family titles to lands, since it precluded individuals from laying personal claims to the paramount title to lands acquired by them. Changes have taken place and today the paramount interest in land can be purchased as individual private property like any other commodity; but it is still true that the roots of title to each of these lands must be traced to a family or a stool. In that sense, therefore, it is still the presumption, though rebuttable, that land among the Northern Ewe is family land.

In any case, considering family land even today, what is the interest of the individual in the land of his family? Ollennu's answer is that the highest estate or title which a subject or individual person can hold in stool land or family land is the "determinable" or "usufructuary" estate.[1] He,

1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.9-11, 54-60.

however, somewhat confuses the discussion here by his choice of terminology because he also describes the title of the family as a determinable estate and says that both are qualifications on the "allodial" title. The explanation seems to be that, in Ollennu's view, the family acquires no interest in land except by intestate succession to the interest of one or other of its deceased members. And since the member, on a grant from the stool, had only a determinable estate, that interest is the highest estate to which the family itself can succeed.[1] Hence, both the individual's interest and that of the family are described by Ollennu as determinable estates. The basis of Ollennu's analysis is that the land held by the family and the individual must be stool land. An individual's interest in Ollennu's scheme is, however, of two kinds. In one case it is a right of occupation of unoccupied stool land by either express or implicit grant. He says of this type that it is both inheritable and alienable inter vivos or by testamentary disposition;[2] and it is to this that the family automatically succeeds on the intestacy of the grantee member. The other type of individual interest is that of a member of family in occupation of land already belonging to his family but also held of the stool as a determinable estate. Although either of these interests is an inherent one resulting automatically

1. See, e.g. N.A. Ollennu, Ibid., pp.29, 33; and K. Bentsi-Enchill, op.cit., p.81.
2. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.57.

from the fact of birth and not by contract, Ollennu points out that its continued enjoyment subsists only so long as the subject acknowledges his loyalty to the stool or tribe.[1] Hence the interest is described by him as "determinable", inasmuch as the stool can terminate it in the event of disloyalty by the individual and for other reasons. The definition of the individual's interest within the framework of stool lands, however, is inapplicable to a community like the Northern Ewe where Akan-type stool lands are non-existent.

Bentsi-Enchill, although drawing the distinction between families which hold the paramount title to their lands and those which hold "determinable estates" from their stools, nevertheless falls into practically the same error of suggesting that the individual may do as he pleases with the land occupied by him, including the right to alienate his interest in it. This, like Ollennu's view, is not correct because it does not take account of a study of the Northern Ewe. For among the Northern Ewe the individual in occupation cannot alienate his interest in family land to a stranger, though he may transfer it gratis to another member of the family.

The individual in Northern Eweland has an inherent right of occupation and user in respect of his family's lands. This is an incident flowing automatically as a matter of law from birth into his family. Thus far the position is the same among both the Akan

1. N.A. Ollennu, Ibid., p.55.

and the Ewe. The difference, however, is that, unlike the Akan, the right of occupation and user among the Ewe is an indefeasible one which not even the stool or head of family can deny or terminate. For the right is not one of permissive occupation but an inherent one created by law and subsisting for the individual's membership of the family. Since the Ewe have no means of terminating the membership of a family by an individual, it means that the right, which is an inseparable incident of membership of the family, is itself incapable of being ended or denied. The individual's right over his family land cannot, therefore, be described as a determinable estate because it cannot be terminated under any circumstances. The explanation by Ollennu that the individual's determinable estate can be terminated for disloyalty to the stool may be applicable to only stool lands occupied in areas where they exist. As stool lands in this sense do not exist among the Northern Ewe, the individual's interest in this part of the country cannot be determined for disloyalty to the stool because the stool has no proprietary interest in family lands. The penalty for disloyalty to one's stool is differently exacted without affecting land titles among the Ewe. It is, therefore, difficult to visualise a situation in which an individual's interest in occupation of his family land can, short of death, be terminated.

Technically the individual needs the permission of the head of the family in order to go into occupation of a vacant

virgin land belonging to the family. Such permission is granted as a matter of course, unless there are compelling reasons for refusal, such as that permission had already been granted to another member in respect of the same spot, or that the family has some other plans for utilising the vacant land. Another reason why the permission of the head of the family must be sought is that the approval is a fairly reliable indication that the available spot falls within the boundaries of the family lands. The individual member of the family, like the subject of a stool on stool lands, as stated by Ollennu, J., as he then was, in Oblee v. Armah,[1] is not rationed in his use of family land. The head of the family, however, has the supervisory power, though rarely applied in practice, to ensure that even the most avaricious has due regard for the needs of other members of the family.

The general principle of Ewe law is that an individual in occupation of family land cannot alienate his interest in that land, as distinguished from the fruits of his own labour, without the authorisation of the family. This, however, is not the generally accepted view of the law in Ghana. Ollennu, for instance, enunciates the contrary proposition when, writing of the individual's interest in land, he states that "an outstanding incident of the determinable estate is that it is inheritable and alienable, either by transfer inter vivos or by testamentary

1. Oblee v. Armah, (1958) 3 W.A.L.R. 484.

disposition".[1] This had always been Ollennu's view of the law and, with his appointment to the Bench, it is being entrenched and clothed with judicial authority. While still practising at the Bar, Ollennu forcefully but unsuccessfully urged this view on the Court in Golightly v. Ashrifi,[2] popularly known as the Kokomlemle Consolidated Cases. Ollennu's view was rejected by Jackson, J., who stated that "by Native custom the owner of the usufructuary title cannot transfer that title without the previous consent and concurrence of the absolute owner". An appeal argued by Ollennu on behalf of the Atukpai family was dismissed by the West African Court of Appeal and the judgment of Jackson, J., was affirmed. Barely two years later, in 1957, Mr. Justice Ollennu, now elevated to the High Court Bench, was invited to the Court of Appeal in Thompson v. Mensah[3] and he did not let slip the opportunity to re-state the law. Delivering the opinion of the Court of Appeal in Thompson v. Mensah, in which the right of alienation of the individual's interest in family land was in issue, Ollennu, J., stated that:

> The submission of learned Counsel based upon the passage quoted from the judgment of Jackson, J., approved of by the West African Court of Appeal in the Kokomlemle Consolidated Cases 'that by native custom the owner of the usufructuary title cannot transfer that title without

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.57.
2. Golightly v. Ashrifi, (1955) 14 W.A.C.A. 676.
3. Thompson v. Mensah, (1957) 3 W.A.L.R. 240.

> the previous consent and concurrence of the absolute owner' requires qualification. What the native custom guards against is alienation to the prejudice of the absolute owner, that is to say, alienation which determines the recognition of the title of the absolute owner and of the customary services due to him ... 1
>
> In my opinion the correct statement of the native custom is that a usufructuary title can be transferred without the consent of the real owner provided the transfer carries with it an obligation upon the transferee to recognise the title of the real owner and all the incidents of the subject's right of occupation, including performance of customary services to the real owner. 2

With the greatest respect, Mr. Justice Ollennu was not merely adding a "qualification" to the dictum of Jackson, J. It was a complete rejection of the proposition in Golightly v. Ashrifi.[3] In Golightly v. Ashrifi, the learned trial Judge had stated that

> the owner of the usufructuary title cannot transfer that title without the previous consent and concurrence of the absolute owner.

The word "that" refers to "the usufructuary title" and nothing more; and the alienation of the usufructuary title cannot be "alienation which determines the recognition of the title of the absolute owner". It should be understood, therefore, that in Thompson v. Mensah the Court of Appeal dissented from the dictum of Jackson, J., in Golightly v. Ashrifi, which had been approved by the then West African Court of Appeal. We are thus presented with two conflicting dicta of two different courts,

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1. Thompson v. Mensah, (1957) 3 W.A.L.R. 240, 248.
2. Ibid., at pp.249-250.
3. (1955) 14 W.A.C.A. 676.

none of which we can regard as superior to the other. It seems, however, that should the same issue arise again today, the view of Ollennu will prevail that the individual's dependent interest in family land is alienable without reference to the family which holds the paramount title to the land. Since Thompson v. Mensah,[1] Ollennu, J., has also applied the principle of alienability of the dependent title in Total Oil Products Ltd., v. Obeng[2] by holding that the sale to a stranger of stool land by a subject in occupation was valid insofar as the paramount title of the head stool of Akim Abuakwa (through the Tafo stool) was not denied.

Whether we agree with him or not, Ollennu is consistent in his view of the law. In his opinion, stool land was first allocated to an individual by the stool, so that the family obtained title to it only through the individual and not vice versa. The individual's title, therefore, is fully alienable and the family has only a contingent interest which becomes vested on intestacy. As Ollennu was apparently concerned only with stool lands, his scheme of interests in land may fit in with the pattern of land holding among those communities, notably the Akan and Ga, who have stool lands. His proposition must, however, be confined to those communities which have stool lands.

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1. Supra.
2. Total Oil Products v. Obeng, (1962) 1 G.L.R. 228.

The Ewe family lands not being stool lands, the Ewe law on succession to and alienation of the individual's interest in land under his occupation is different.

Among the Northern Ewe-speaking people of Ghana where there are no Akan-type stool lands, the individual cannot be said to be in occupation of stool lands. All the lands are family lands except the small portions to which a stool has the paramount title, which portions are then not in occupation of individuals as holders of the dependent interest. An individual's dependent interest in family land is neither inheritable by nor alienable to a non-member of the family. The land cannot be said to be inherited by the family because it is already family property, which is the only reason why the individual has the dependent interest in it at all. The individual's dependent interest cannot be inherited by any person of his choice because, as a matter of law, the interest automatically passes on to his heirs on his death. The deceased's children, who are the proper persons to succeed him, succeed to his interest in the land; but, the Ewe community being patrilineal, the children also have an inherent right of their own, of the same nature and extent, to use the family land. That a deceased's children farm or use the portion previously farmed by their father, therefore, is not only by a right of succession but also by virtue of an inherent right flowing from their own membership of the family which has the paramount interest in

the land. Succession to the dependent interest of the deceased farmer, therefore, is only an additional right which determines the order of priorities as between members of the family. Hence the right to succeed to the dependent interest in family lands is not enjoyable by a non-member of the family.

Just as an individual's dependent interest in family land is not inheritable outside the family, so also is it not alienable by him to any person who is not a member of the family. No individual member of the family may alienate his interest in any parcel of family land that he occupies. Not only does the individual lack testamentary capacity with respect thereto, but he also cannot transfer his interest inter vivos either by way of sale or gift or otherwise. For the same reason, the individual in occupation of family land has no interest in the land, as distinguished from the crops or other development thereon, which can be attached in satisfaction of the individual's debt: Lokko v. Konklofi.[1] Any person purchasing such property on the levying of execution, such as by way of fi.fa., purchases nothing more than the crops or building only, because the paramount title to the land itself remains vested in the family. The only valid way of alienating title to family land is through the head of the family on the authority of the family. The Ewe customary law on this point is founded on the common law principle of nemo dat

1. Lokko v. Konklofi (1907) Ren. 451, 452.

quod non habet. In Lokko v. Konklofi, Brandford Griffith, C.J., recognised the difference between family property and stool property and said that stool property in the individual's occupation may be attached in execution, but not so with family property.

Although an individual cannot devise or make an alienation inter vivos of his dependent interest in the family land, he can make a testamentary disposition, or a transfer inter vivos, of the produce of that land. Similarly, the crops or the house, but not the land itself, may be attached in execution for his personal liabilities. In the olden days this meant merely that he could sell the farm, that is, the crops on the land, or the building, to any purchaser or make a gift thereof and he could will all or part of it to any beneficiary of his choice. No difficulties arose with respect to farm land because the produce in those days normally consisted of foodstuffs, which were mainly annual crops, and the land reverted to the family unencumbered when the crops were harvested. In such circumstances the legal transaction of merely selling the farm, that is, its produce, without affecting title to the land itself, was easily distinguishable both as a matter of law and of practice.

The law in this respect has now been thrown into some confusion by the introduction of permanent cash crops like cocoa and coffee. If the individual can alienate his interest

in the cassava farm cultivated by him, there is no theoretical legal basis on which he can be denied the right to alienate his interest in a farm planted by him with cocoa or coffee. However, the nature of cocoa, coffee and other permanent cash crops is such that, because they are permanently growing in the soil for many years, the sale of such a farm implies, at least in fact if not in law, a transfer to the purchaser of the right to the exclusive use of the land for an indefinite period. Its effect is practically the same as that of the sale of the land because the reversion in the family is only consequent upon the very unlikely contingency of the total destruction of the crops; but it is not a sale of the paramount title or the dependent interest in the land. Probably the indigenous law did not contemplate this sort of situation, so that no express rule had been formulated to cover it. The first effort of the family today is to prevail upon the member not to alienate his farm. If he persists and goes ahead with the sale or gift, the legal theory is that the purchaser buys and the donee takes only the interest in the crops standing on the soil. It means that, when the farm no longer exists, the family automatically resumes possession of the land. It also means that only the family, and not the purchaser or donee, is entitled to the timber and palm trees naturally growing on the land, and any minerals in the land. Only the family is entitled to exploit or permit the exploitation of the soil and sub-soil and stones thereon. It

also means that, while the purchaser or donee may by normal husbandry maintain and improve his farm, he cannot change the character of the farm by planting different crops, such as cocoa in place of coffee. Unfortunately, it seems that families do not insist on these residuary and reversionary rights when permanent cash crop farms are sold by individuals without the concurrence of the family. They regard the possibility of regaining possession of the land as so remote that in practice they do not take the trouble to assert their rights. If this attitude continues, the situation may well become accepted whereby individuals can affect family titles to lands by simply selling their farms on family lands after growing permanent crops on them.

The next question is the individual's right to occupy family lands. Obviously there must be some rules governing the priority of claims to family land; otherwise, in a large family of the Ewe type, only chaos will result. Hence, although the rule is that any member of the family is entitled as of right to the occupation and use of family land, this refers only to unoccupied or virgin family land. For a member of the family in occupation of family land cannot be displaced by another member. Furthermore, the family cannot dispossess a member of the family in occupation of family land, however long that occupation may be. Thus the family cannot sell or otherwise alienate title to that portion of the family land which is in the

occupation of a member. So long as the individual is deemed to be in occupation, he may remain in such occupation for life, unless he abandons the portion. Thus the cultivation of permanent cash crops like cocoa has the effect of excluding other members of the family as well as the family itself for as long as the crops remain on the soil. The same exclusion applies when a house or other permanent structure is erected on the land.

The other rule governing the occupation of family land is that no person may farm on a portion of land left fallow by another member of the family, unless that portion has been allowed to revert to virgin bush again. Most African communities, the Ewe not excepted, practise shifting cultivation as a traditional method of farming so as to enable the land to regain its fertility. When a farmer leaves his land fallow, he nevertheless retains his right to it, which will prevail against any other member of the family. This type of fallow land is known as afuu or afluu in the different Northern Ewe dialects. It is land regarded as being in the continued occupation of the previous farmer but not under active cultivation. Since a farm must have been made on it just recently, such fallow land usually has some crops scattered about, such as an odd cassava, cocoyam or plantain, which may be occasionally harvested by the previous farmer. Therefore, no other member of the family may go into occupation of that portion of land, unless the previous farmer consents to his doing so.

The previous farmer's right, as we have stated, lapses when the fallow land or afuu has so overgrown that it becomes virgin bush once more. For in that event it is regarded as unoccupied virgin land which any member of the family is entitled to use. This rule presented no particular problems in the days when the population was small and land was easily available. Now, however, land has become increasingly scarce because of the expanding population and farmers cannot afford to leave the fallow lands long enough before returning to them. The result is that, by exercising the right to one's fallow land, portions of family lands have become virtually tied to individual farmers as though they were self-acquired properties. Land, although family land, is, therefore, highly individualised in many areas today, although the paramount title remains in the family.

The individualisation of land has been further accentuated by the rule that, on his death, a previous farmer's children have a right of first refusal to the portion farmed by him. Therefore, when a farmer dies, his children have the prior right of occupation of his fallow land, the right being of the same nature and extent as the deceased farmer would have had if he had not died. If there are several children, the family determines their individual entitlements, daughters being usually postponed to sons. Failing children, this right devolves on other close relatives in an expanding circle, as in the case of succession to interests in self-acquired property.

In practice, therefore, specific portions of the family land are tied to persons within certain lines of descent within the family, to the exclusion of other members.

The enjoyment of the right to use fallow land or afuu is limited to only members of the family which has the paramount title to the land. Although it is usually acquired by succession to the previous holder of the dependent interest, the successor, as a member of the family, already has an inherent potential right of occupation and user, which becomes vested on such succession. Upon succession, therefore, the successor acquires a vested interest which is in the nature of a prior right of occupation and user as against other members of the family who have a potential right to the occupation and use of the lands. The table of precedence in the matter of such succession is a rigid one fixed by law strictly according to proximity in consanguinity to the deceased farmer. Therefore, even the deceased farmer, while in his own life-time he may transfer his interest to another member of the family, cannot will it to any member of the family to take effect after his death. Non-members of the family cannot benefit by acquiring the interest either inter vivos or post mortem by testamentary disposition. Therefore, as regards women, the interest cannot devolve on their children who are born into different families. In most cases today the woman would have been farming fallow land left by her father, so on her death her brothers or her brother's children would resume occupation.

The farmer, in his own lifetime, may consent to another member of his family, but only another member, taking over the land. Such consent, however, if given, must be given gratis, as the new occupier must also be a member of the family with an inherent and potential right of user. It is not strictly an alienation of the interest but only a waiver of the prior right of occupation to another member of the same family who also has the inherent right of occupation and user.

The subjection of portions of the family land to individual interests in the farms or houses of several members of the family does not affect the paramount title of the family. The paramount title to the land remains vested in the family which is the only legal entity that can validly alienate it. However, individualisation of family land is a drastic limitation on the general rights of the members of the family. Individualisation is an obstacle to large-scale agriculture because it reduces the lands to small and individually controlled strips. At the same time it is to its credit that, because of the system, every person has at least some small portion of land to farm, which would not be the case if there were unrestricted exploitation of family lands by its wealthy members. Perhaps the only way by which large-scale farming could be encouraged within the system would be for members of the same family to pool their resources to cultivate larger farms over contiguous areas of the family lands separately held by them.

Having thus discussed the interest of the individual in family land among the Northern Ewe, we may attempt to fix that interest within a conceptual framework. We have already argued that the interest is not a determinable estate because it is a right of user which is legally incapable of being determined by either the stool or even the family itself which has the paramount title. Neither can we call it a usufructuary estate since the individual is part of the family which holds the paramount interest in the property. Nevertheless the individual's interest is an interest which cannot be alienated inter vivos to non-members of the family and is not devisable to even members of the family. However, the interest, which persists for the lifetime of the individual, may in his lifetime be transferred within the family. Furthermore, the individual's interest devolves on his death on his heirs, who are mainly his children or certain close relations within the family. We may, therefore, describe the individual's interest in the family land among the Northern Ewe as an inherent right of occupation and user for life which, however, transmits certain preferential rights to the deceased's children and other relations within the family as against other members of that family. The individual's interest is thus a conjunction of two legal factors. Firstly, the individual must have an inherent right of occupation and user, derived from membership of the family. Then the right to the occupation of the specific portion in question must have been acquired by the

individual going into occupation of virgin land belonging to the family, or else the right must have been transferred to him inter vivos or post mortem from a previous occupier. It is thus a dependent interest because it exists only as a qualification on the paramount interest of the family and not independently of it.

Community Rights Over Land

As already explained, the paramount title to practically all lands among the Northern Ewe of Ghana is vested in the families of the respective chiefdoms. Such family lands are not communal lands in the sense of belonging to the whole chiefdom, the whole village or the whole tribe. The entire community as such has no proprietary interest of any kind in the family lands.

However, members of the community constituting the chiefdom or the division have certain rights which they may exercise over all the lands within the territorial boundaries of the chiefdom. The explanation for the existence of the common public rights is that the families are protected in their title and the enjoyment of their lands by the collective power of the entire community. In the past, all the citizens of the chiefdom were under an equal obligation to fight to preserve the lands. Similarly, there was an obligation of common defence and protection for every citizen while on his lands, extending to cases like

attacks by assailants, bandits or wild animals and calamities like being trapped by falling trees or raging bush fire. In return for the different forms of protection and the guarantee of person safety and security, the holders of titles to lands have accepted certain common rights which the community may exercise over them. There is nothing really onerous about these common rights, because every family has lands and the common rights are exercisable by every member of the community over all the lands.

A form of direct obligation which the community exacts from the farmer is the requirement that the entire community of the division of the chiefdom must be given a free drink from palm wine tapped by a citizen on his family land. Whenever a citizen fells palm trees and taps palm wine, he must provide a large potful or a whole day's collection of palm wine (whichever is less) for the free enjoyment of all the adult male members of his division. This is known as duha or "the drink of the townspeople". It is not a tribute paid on the land and it is not given to the chief. The duha is a direct right claimed by the entire community over the produce of the land. It is for the entire male population as an expression of gratitude and a reminder of their collective obligation to protect and defend the citizen. If a citizen sells the palm trees to a stranger for tapping palm wine instead of tapping it himself, he is nevertheless not relieved of the obligation to provide the duha; for he is then expected to ensure that a whole day's collection or a large potful is supplied to the people at his expense.

Other rights of the community, though not less effective, are not exercised by the community en masse over the land. One such manifestation of common rights over land is the virtual non-existence of trespass laws. The law with respect to trespass as an actionable wrong per se is unknown to the indigenous Ewe law. A family land or even an individual holding is not regarded as a "close" from which other citizens are in law presumed to be excluded. In the indigenous law, therefore, it is permissible to enter or pass through the land of another or walk over his farm without permission or invitation. Where necessary one may even cut a bush path through another's lands without notice or permission. Neither of these acts is an actionable wrong per se in Ewe law. At the same time, they are not rights in the nature of an easement because they are not created in consequence of the express consent or even passive acquiescence of the landlord or the farmer or his predecessor. They are public rights affecting all lands and may be described as a public common right of passage.

The absence of trespass laws in the English common law sense does not, however, mean that one can cause damage to the property of another with impunity. If, in the exercise of the common right of free passage, the citizen deliberately causes any damage to the crops or other property on the land, he is fully liable for such damage. An action in that event will be founded on the specific injury suffered and limited to that only. The basis of such an action cannot be trespass as such,

but the loss occasioned by the deliberate act of the tortfeasor.

The law, however, is not without those who dislike it. In the first place, even from time immemorial, farmers have often sought to exclude intruders if by their passage they cause unspecifiable damage to property on the land. This is done by a public announcement, usually through the gong-gong beater. As the intention to exclude others is, however, not strictly enforceable at Ewe law without proof of damage, such an announcement of exclusion is coupled with threats that it is intended to make the area dangerous by planting thorns concealed in the soil or setting subterranean traps in the locality. Such threats do scare people because they are sometimes carried out; for they are not customary law offences. As regards homesteads, the only effective way to prevent people from walking across the house is to erect a fence enclosing the compound.

Today, as a result of the infiltration of English common law ideas, people often try to have recourse to the common law remedy in trespass to enforce their claims of title to land. Where there is a genuine dispute as to the title to a piece of land cleared by an adverse claimant, the practice, especially in the lower courts, is to found the action in trespass. At times, because of an old vendetta, a plaintiff may sue for trespass, even without damage, because the defendant had merely entered upon his land. These, however, are not cases of the application of Ewe customary law.

The right to hunt is one generally enjoyed by all citizens of a chiefdom over the territorial area of the chiefdom. Individuals are not restricted to hunting animals on only their own family lands. They may hunt at any place that there is game. Citizens could formerly also set traps for animals anywhere, though even then in practice this was better done near one's own farm or family land. The holders of paramount interests in land and farmers are, however, objecting to such traps now. Where traps are buried under the soil, the person setting them must in any case inform the farmer, or the head of the family in whom the paramount title is vested, of their existence and location, otherwise he is liable for any injury resulting to the users of the land who fall into the traps.

Neither the chief nor the family or individual holding the paramount or dependent interest in the land is generally entitled to any portion of game killed on the land. However, as a matter of courtesy and to promote good relations, the farmer or head of the family on whose land a big game has been killed is sometimes given a leg of the animal. If the farmer is on his farm when a big game is killed on his land, he is entitled to the right forelimb of the animal. If there was nobody on the land when the animal was killed, the first person met by the hunter on his way home gets the forelimb. The reason for this rule is that, if the hunter had met with any misfortune in attempting to shoot the animal, it would be either the farmer on his farm or the passer-by who would come to his rescue.

The general rule is that no chief is entitled to any portion of game by virtue of his official position. In Matse and Kpando, however, it is stated that the head chief is entitled to a leg of any big game killed on his territory because he is the protector of everybody on the land. Even in these places nothing goes to the holder of the paramount title or the dependent interest in the land on which the game is killed. The portion of the head chief is sent through the divisional chief who is given a part by his superior. It is not clear whether the rule has been in existence in Matse and Kpando from time immemorial or is an innovation due to Akan influences.

Cattle grazing is not common in the Northern Ewe area and there does not seem to be any customary law rule on the point. It seems, however, that cattle grazing on uncultivated land is free because this usually takes place on grasslands or dzogbe which were originally communal lands;[1] but informants disagree on this point.

Citizens of the chiefdom have a common right to collect uncultivated mushrooms growing anywhere within the realm. This does not cover mushrooms growing on dumping spots in the farm or on felled palm trees or other specified places. Snails are not as popular among the Ewe as among the Akan; but wherever they are found they may be collected without permission. Crabs, tortoise and other such animals may be caught or collected

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1. See pp.384 -401 infra for a discussion of communal lands.

anywhere that they are found.

Wild fruits may be plucked for personal consumption from another person's lands, with or without information to the farmer or landlord. This freedom is even extended to cultivated fruits such as pawpaws, bananas, oranges, mangoes and pears, so long as they are not collected in large quantities for sale. In the same way, without a need for permission, one may take out cassava or cocoyam for personal consumption on the spot when in the bush.

Malleable clay or tsu may be dug occasionally from another's land for pottery works. Pottery is a very advanced industry among the Ewe who make all kinds of earthenware pots, dishes and water holders. The Kpando, Sovie and Gbi areas are particularly noted for this, but it is a special preserve of the female sex. So long as the digging is not for commercial purposes, the individual is permitted to dig the clay for his own use. If, as is now often the case, it is for pottery works on a commercial scale, then permission must first be obtained from the family or individual who holds the paramount interest in the land. In the past such a permission was granted gratis, the potter occasionally showing her gratitude by making a token gift of her wares to the head of the family concerned. Today, however, monetary payment is usually demanded as consideration for the commercial exploitation of malleable clay or tsu.

Firewood is still generally used in cooking among the Northern Ewe of Ghana. Every citizen, therefore, is at liberty to collect firewood anywhere for domestic use. It is not, however, permitted to collect firewood from another person's farm or even from an old farm lying fallow, unless the farmer's consent has been obtained. Collection of firewood from unoccupied land (i.e. not a farm), though from land belonging to another family, requires no permission; but if, as is sometimes the case today, the collection is a systematic series for the purposes of sale for profit, then permission is necessary and such permission will usually not be forthcoming except for a good consideration. Permission may be obtained from the head of the family or stool having the paramount interest in the land, if it is an uncultivated land. If, however, it is a farm or a fallow land, the permission is obtainable from the farmer.

In places where thatch is still used for roofing houses, the grass may be cut without permission. If, however, these are required in commercial quantities for sale to others, then the holder of the paramount title to the land must first give permission, usually for a quid pro quo.

Rivers and streams, though flowing over lands belonging to specific families, are subject to the common rights of the whole community. Any person may draw water from the river or stream without permission. Fishing in the waters of a river or a stream is absolutely free and open to every citizen.

Originally sand could be dug free from the bed of a river or a stream for any purpose. However, since sand is now sold to builders in large quantities, holders of the paramount title to riparian land are insisting on valuable quid pro quo before consenting to such exploitation of sand and gravels from rivers. In opposition to this, some divisional chiefs are also claiming that dues be paid to them for the collection of such sand, pebbles or gravels. It seems that the holders of land titles have a better claim, because traditionally the Ewe stools have had no proprietary interest in property belonging to families over which they exercise political authority.

Lakes, creeks and lagoons are in a special category. There are very few of these in Northern Eweland. Where they exist, title to them is exclusively vested in the families on whose lands they lie. Accordingly they are not open to fishing or collection of sand by non-members of the family. There is no prohibition against taking out water therefrom for personal use by non-members of the family; but tsikuklu, which is a way of drawing out all the water in a pool or pond in order to isolate fish for catching, is prohibited in another family's land.

The Individual's Paramount Title to Land

The classic observation of Rayner, C.J., to which we have already referred, 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. 1

This has been criticised in its application to other communities. It should be pointed out, however, that it expresses a fundamental view of land law among the Northern Ewe-speaking people of Ghana. Among the Northern Ewe, the traditional view was that the paramount title to land could only be vested in the stool or the family and never in an individual person.[2] Therefore, even those who in the ancient times went into original occupation of vacant lands which have now become ancestral family lands, did so on the basis that whatever area they occupied became the acquisition of the family. Family lands, therefore, did not become family lands merely because the original occupiers died intestate. They assumed their family character by the very act of acquisition because, apart from the stool, the family was the only unit capable of holding the paramount interest in land in the view of the indigenous law. For land was regarded as different from other kinds of property, with man's very existence rooted in it. It was, therefore, governed by a different regime of property rights which excluded individuals from holding the paramount title to it.

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1. Rayner, C.J., in a Report on West African Land Tenure. Quoted by Lord Haldane in Amodu Tijani v. Sec. to the Government of Southern Nigeria, (1921) 2 A.C. 399, 404.

2. Rattray similarly observes that in ancient Ashanti "individual ownership in land did not exist". See R.S. Rattray, Ashanti, 1923, p.226.

Rayner, however, has not been without his critics. Ollennu, for instance, says that Rayner's statement is good law only as regards the paramount title which, in Ollennu's view, vests only in the community or the stool and not even in the families.[1] Since, as Ollennu sees it, the stool even today can make a grant of a "determinable estate" to an individual, the individual is capable of holding that interest in land so that he holds it alone as an individual until his death intestate, when it assumes the nature of family property by reason of the family's right of succession. In such a scheme of things, land can and does belong to individuals if we speak of the so-called determinable estate. Ollennu's criticism may be well founded when we consider the Akan and Ga communities in which paramount titles to lands are vested in the stools, so that family lands are created through specific grants to individuals who are subsequently succeeded on intestacy by their families. This, however, is not the process among the Ewe where, as we have submitted, Akan-type stool lands do not exist and the paramount title to land is held by the families.

Bentsi-Enchill has also criticised Rayner's statement because of the emphatic tone of the proposition that land "never" belongs to an individual. Bentsi-Enchill's argument is that the very notion of family land imports "an original individual acquisition by the founder of the family".[2] This,

1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp. 5, 29.
2. K. Bentsi-Enchill, op.cit., pp. 80-81.

with respect, is a non sequitur because it is not necessary for the constitution of every family property that there should have been an individual owner. Bentsi-Enchill agrees with Ollennu here in thinking that in all cases the family property of today became family property as a result of intestate succession by the family to what was formerly individual or self-acquired property of some of its deceased members. That is not the correct explanation for the origin of family lands among the Ewe. Among the Ewe, original land acquisition was a special type of acquisition for and on behalf of the family, so that the lands became family property at the very time of their acquisition. The "mine" attitude to land was unknown in the old Ewe community. It was always "our" rather than "my" land. The progressive emphasis on individual interest in any property is a product of modern times, a product of urbanisation and the introduction of cash economy and partly a result of western capitalist influence. It is very recent in the field of Ewe land law.

However much we may defend the statement by Rayner, C.J., we must limit its effect as a proposition to the traditional view of Ewe law. The paramount title to land in Ewe law was traditionally vested in families and sometimes in stools, and an individual member of a family could enjoy no more than a limited interest, dependent on the absolute title of his family. This rule applied equally to land which had been originally brought into occupation by the present holder (which is original

acquisition) and that which the holder had received by way of transmission from a previous occupant who was a member of the same family (derivative acquisition). That Rayner, C.J., was concerned with the traditionalist view may be read into his choice of words that "the notion of individual ownership is quite foreign to native ideas". Although he later says that land "never" belongs to an individual, that statement must be related to the earlier stage of society. For, at the time the learned Chief Justice uttered those words in 1896, he must have been aware that land was being purchased freely by individuals out of their own resources as private property in the then Gold Coast. His statement that the notion of "individual ownership" was "foreign to native ideas" must, therefore, be understood to mean that the notion was unknown until comparatively recently. To say that an idea is foreign is not necessarily to say that it has never been received at all.

If, however, by being "foreign to native ideas", Rayner, C.J., meant that even at the time he used those words the notion of individual persons holding the paramount title to land was unknown to the native law, then we must also respectfully dissent. For land, a commodity which because of its special nature was once not saleable, is now capable of being sold in most areas of Northern Eweland and has been so for some time. Private purchase of land for valuable consideration has been introduced and accepted even in many of those Ewe communities where the sale of land was formerly unknown and was prohibited. Therefore,

any individual can today purchase land with his own resources. Any such piece of land purchased by an individual today becomes his own self-acquired property, like any chattel. Consequently, there are today lands to which individuals hold the paramount title and which are not family lands or stool lands. Today, therefore, there are individuals who hold the paramount title to land. Such lands are not family or stool properties but the self-acquired properties of those individuals in whom the paramount title is vested.

CHAPTER VI

STOOL INTERESTS IN LAND

The Concept of Stool Land in Ghana Generally

The "stool" is the wooden seat which symbolises the political authority of a chief. As an inanimate object it is incapable of holding an interest in property. The stool, however, is regarded as a corporate personality in the customary law and as such may hold an interest in property. "Stool land", therefore, may be understood as land to which the paramount title is vested in the stool, which land is therefore under the administration of a chief and his councillors. The authorities, however, do not make this clear.

The statutory definition of "stool land" is not very helpful. Sweeping away previous legislation on stool lands, the Administration of Lands Act, 1962, defines "stool land" by saying that it

> includes land controlled by any person for the benefit of the subjects or members of a stool, clan, company or community, as the case may be, and all land in the Upper and Northern Regions other than land vested in the President. 1

1. Section 31 of the Administration of Lands Act, 1962 (Act 123).

The "company" is presumably the "asafu company" as known among the Fanti, a traditional youth organisation rather than a company under the Companies Code. It is not clear what is meant by "community" in the Act. If by that is meant any group of people, then it also comprehends the Ewe-type family, inasmuch as it is a large group of persons. In that case stool land also includes land to which the paramount interest is vested in a family among the Ewe, that is land which we have identified as "family land". More probably, however, "community" here refers to a political or territorial community, a unit certainly larger than the family, in which case it would include units of varying sizes and degrees of political organisation. The word "clan" in the Act is ambiguous and of imprecise meaning. Sometimes the word is used in Ewe to refer to a large unit like the sub-division or saa which comprises several families. On the other hand it is understood in Ghana, especially among the Akan, to mean a totemistic and dispersed group of persons claiming descent from a common mystical ancestress, such as the "Asona clan" or "Bretuo clan". The genealogical tree in the latter case cannot usually be traced. In both cases it is hardly possible that it is the type of unit contemplated in the definition of stool land, because such a unit does not normally hold interests in property. Moreover, we can only guess what "control" means. For there are several types of control over land. The holder of the paramount title to land always has the power of control inherent in that title, manifested in the

right to exclude others from the land, and the power to regulate the exercise of the right of user by those entitled to use the land. Political control over the use of land generally has always been a function of all stools, such as the power to decree days of mandatory rest when no work may be done on the land. Such control by the stool is no more than a political function and cannot be the basis of any stool interest in the land in a proprietary sense. Another type of control is the general power of superintendence exercised by the local chief over communal lands, but this is distinguishable from a proprietary interest in the stool; for, as will be explained later, communal lands are not stool lands among the Ewe. Mere "control", therefore, cannot, as the Act seems to suggest, constitute the controlled land into a stool land. For control is exercised today by both the central government and local authorities over land, through town and country planning legislation and building byelaws. Such control, however, has no necessary implication of a proprietary interest in the central government or the local authority. This is an unsatisfactory piece of legislative draftmanship which makes the meaning of "stool land" anything but clear. In particular it does not afford any guidance in determining what unit of society is a "community" within the meaning of the Act. It confuses the issue by placing in a group, <u>eiusdem generis</u> with the stool, such organisations as the <u>asafu</u> company and other corporate bodies of the indigenous

law. Nor can we say what measure of control by a stool will stamp the land with the character of stool land.

Neither does the case law offer a satisfactory definition. An example is the case of Ameoda v. Pordier,[1] in which Ollennu, J., stated a definition of "stool land". In that case the plaintiff, as head of family, claimed that certain lands in Ningo (not an Ewe area) were family properties of his family, the Osabunya Family of Ningo. In order to sustain his claim, it was urged on behalf of the plaintiff as a general proposition that there were no stool lands in Ningo and the Adangbe area. The learned Judge rejected the proposition that there were no stool lands in Ningo and the Adangbe area because of the view that he took of the concept of stool land. He said:

> Now what in customary law is meant by 'stool land'? By stool land we mean, land owned by a community, the head of which occupies a stool, such that in the olden days of tribal wars the said head of the community carried the ultimate responsibility of mobilising the community to fight to save it, and in modern days to raise money from the subjects to litigate the community's title to the land. We may put it in another form, any land in respect of which an occupant of a stool is the proper person to conduct its extra-territorial affairs is a stool land. 2

With respect, not only is this definition not meaningful, but it also shows some confusion of thought. First of all it leaves unexplained the meaning of "ownership" of land by a community. If by "ownership" by the community it means unappropriated land which lies within the frontiers of a chiefdom

1. (1962) 1 G.L.R. 200.
2. Amõgda v. Pordier, (1962) 1 G.L.R. 203.

or a traditional state, as we find among the Northern Ewe-speaking people of Ghana, then, as we shall explain later, this is certainly not stool land but communal land. If, on the other hand, "ownership" here means that the paramount title vests in the whole community, then it is probably the same thing as land belonging to the community as represented by the stool, such that it is under the administration of a chief for the benefit of his subjects within the meaning of Section 31 of the Administration of Lands Act, 1962 (Act 123). This type of land does not exist among the Northern Ewe. As to the learned Judge's reference to the obligation of the head of the community to mobilise forces for the defence of the lands, it is respectfully submitted that the obligation bears no necessary relationship to the concept of proprietary interests in land. Among the Northern Ewe and most other tribes, it was a political obligation on the chief as head of the community to mobilise his forces to defend even the private property of individuals or families against external aggression. It was part of the obligation of the political state, even in traditional political thought, to protect the individual, not only in his life and limb but also in respect of his property, whether movable or immovable. When the burden of the defence of property is today translated into terms of litigation of title at law, the obligation is indeed merely to contribute money towards the cost of litigation. But it is not all who in the past would have

taken up arms in defence of the property that would today be under an obligation to contribute such money in Eweland. Today the obligation to contribute money for litigating land titles falls only on members of the family. In modern times, whenever there is a land dispute between two families from two different chiefdoms at a point which forms an inter-territorial boundary in Eweland, the head chiefs are interested because the territorial extent of their respective jurisdictions would be determined by the result. The cost of such litigation, however, is borne by the families which claim the paramount title to the land and not by the chief or the entire community. The obligation of the entire community in the past to defend such property with arms did not, therefore, arise out of any proprietary interest in the stool or the entire community, but out of the exigencies of the defence mechanism of those days.

The characterisation of land as stool land merely because the stool occupant is the proper person to conduct its extra-territorial affairs is equally fallacious. In Togbe Gbogbolulu v. Togbe Hodo,[1] for instance, the two head chiefs litigated over the lands which formed the boundary between Vakpo and Anfoega in the Northern Ewe area. However, the lands over which they fought were not necessarily stool lands. In fact in the present instance they were communal lands in which the stools had no proprietary interests. Such communal lands are not stool lands

1. (1941) 7 W.A.C.A. 164.

in Ewe law and they do not become stool lands merely because the head chief is responsible in his political office for the conduct of extra-territorial affairs connected with them.

It may be that the definition in Ameoda v. Pordier was formulated to cover the Ningo case only, though the learned Judge did not put it in this form. For the definition breaks down when, for instance, it is applied to the Ewe.

The proper approach, it is submitted, is to examine the real nature of stool land in the customary law untrammelled by definitions. As the concept of stool land is perhaps most developed in the Akan communities in Ghana, we may refer to the Ashanti example.

The basic assumption of Ashanti land law, for example, is that the paramount title to all the lands of the realm is vested in the head stool.[1] As the occupant of the head stool or omanhene cannot personally be in effective control and administration of all the lands, he delegates part of his functions to subordinate chiefs under him. The principle of delegatus non potest delegare being not applicable here, the subordinate chiefs may also sub-delegate their functions to still lesser chiefs under them, until we come to the families and individuals in actual occupation of the lands. We see in this arrangement that political paramountcy is also the basis of proprietary

1. Though there are exceptions, e.g. Adansi, where some subordinate stools hold the Paramount title to their own lands without holding them from the Paramount Stool. See A.N. Allott, The Akan Law of Property, Unpublished Ph.D. thesis, University of London, 1954, pp.91-92.

interest in land in Ashanti, except that the Asantehene, the supreme lord of all Ashanti, does not hold the paramount title to all the lands. The paramount or absolute title being in the head stool, the politically subordinate stool has a sub-paramount title, and so on until we come to the family and individual interests which are usually described as the determinable estate. Whether they differ in the verbal identification of these interests or not, this scheme of land titles is accepted by many writers on Akan land law.[1] In the case of Ashanti lands, therefore, there can be no valid alienation of the paramount title except by the head stool, which here means the head chief or omanhene acting with the consent of his principal councillors. Neither the family to whom the stool has allocated the land nor the individual in occupation can transfer the paramount title because nemo dat quod non habet.

The individual's interest in occupation of stool land among the Ashanti and Akim Abuakwa has been described as a determinable estate because, it is suggested, the interest can be determined for good reason by the grantor stool. Among

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1. See, e.g. A.N. Allott, The Akan Law of Property, Unpublished Ph.D. thesis, University of London, 1954, esp. pp.23-70 and his The Ashanti Law of Property, 1966, pp. 134, 140-142 and 144-145; K. Bentsi-Enchill, op.cit., pp. 29, 42-45, 224; K.A. Busia, op.cit., pp. 42-60; J.B. Danquah, op.cit., esp. pp.199-200; N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.4-28, 46-54; J.M. Sarbah, op.cit., pp.47-48; R.S. Rattray, Ashanti, 1923, pp.220-227 and his Ashanti Law and Constitution, 1929, pp.340-366.

the reasons which, it is alleged, may justify such determination of the individual's occupation and user is disloyalty to the stool.[1] This proposition, to say the least, is suspect and is certainly inapplicable to the Ewe. If loyalty is a basis for the continued occupation of land among the Akan, then their land tenure is inextricably related to political allegiance, a feature often associated with feudalism. Is it really much wonder, then, that Rattray described the Ashanti land tenure as feudalistic? For drawing this analogy Rattray has been criticised by almost every modern scholar, including Allott,[2] Busia,[3] and Ollennu.[4] It is indeed a valid objection to the analogy to point out that "feudalism" is so vague a term that it is not meaningful. Moreover, whatever may be the points of similarity between Ashanti land tenure and land tenure in feudal England, Rattray seems to have ignored the serious differences in the two systems. Consequently, the application of the term "feudalism" to Ashanti land tenure may obscure rather than illuminate the Ashanti system. It should be pointed

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.55.
2. A.N. Allott, The Akan Law of Property, Unpublished Ph.D. thesis, University of London, 1954, pp.27-28 and his The Ashanti Law of Property, Stuttgart, 1966, pp.140-142.
3. K.A. Busia, op.cit., pp.57-60.
4. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.8.

out, however, that feudalism was both a political and an economic system, and one of its essential features was the making of land holding conditional upon the political nexus of allegiance and loyalty to the political superior. The land was forfeit if the obligation of political allegiance and loyalty failed. In this connection, it may be pointed out that Ollennu, one of Rattray's critics, has himself stated that:

> So long as the subject acknowledges his loyalty to the Stool or tribe, his determinable title to the portion of stool land he occupies prevails against the whole world. 1

In the opinion of that critic and others, therefore, the tenure of the individual on Ashanti land is dependent on continued political loyalty and allegiance. This produces the point of similarity which, together with the hierarchy of land titles reflecting the hierarchy of political authority, provides some justification for the parallel drawn by Rattray, though it should be conceded that he pressed the analogy somewhat too far and at the expense of the differences. It is true that English feudalism also made land tenure dependent on the performance of services, ranging from one like the provision of horsemen for the King's army, to such ridiculous ones as carrying the Lord's pillow or praying for the eventual repose of his soul. Parallels

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.55.

to these are not wanting in the various services and tributes exacted by the Ashanti and Akan chiefs; but these alone do not sufficiently justify the suggestion of an exact parallel between the Ashanti (or Akan) and feudal systems of land tenure.

The striking feature of the concept of stool lands among the Akan is that it is interwoven into the fabric of government and political authority. Allott tells us that the Ashanti express the concept in the maxim that "the farmer owns his farm, but the stool owns the land".[1] The same authority also says:

> 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. 2

Explaining the nature of the paramount title of the Akan stool in all the lands of the realm, Danquah says:

> The stool occupier is in common parlance, or by courtesy, referred to as the owner of land; but he is so only in so far as he occupies the Stool and represents the sovereignty of the people, giving due respect to the sacredness of the Stool. If we were pressed for an answer to the fundamental question as to ultimate ownership of stool property, we should readily say the thing called 'Stool', whose supremacy is acknowledged by members of the family, section of the tribe, or subjects of the State, and to which they are bound by their own traditions and laws to serve and respect, is the ultimate and absolute owner.
>
> No one can deny the reality of stool ownership, for to deny that is to deny the stool. 3

1. A.N. Allott, The Akan Law of Property, Unpublished Ph.D. thesis, University of London, 1954, p.142.
2. A.N. Allott, The Ashanti Law of Property, 1966, pp.140-141.
3. J.B. Danquah, op.cit., p.200.

The exact nature and extent of the stool's interest in land, however, has not been easy to express. Some writers have tried to express it in terms of English law by drawing an incongruous analogy with a trust, describing the stool occupant as a trustee. It was thus expressed by Sarbah:

> At most the King or 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. 1

Then, after saying that nobody can deny the reality of the stool's interest in land, Danquah nevertheless explains that:

> In short Akan chiefs hold the lands and other stool property in trust for the Asamanfo and to the benefit of the subjects of the stools. 2

The language of English trust law does not adequately describe the nature of the stool's interest in Akan lands. The trust analogy has now been discarded by most Ghananian lawyers, primarily because the customary law scheme does not find an exact parallel in the English law of trusts. Firstly, unlike the case of a trust, the legal title to the property is not vested in the chief alone, so that he is incapable of alienating the title except with the authorisation of his councillors. Secondly, the chief does not incur the strict liabilities and obligations of a trustee, such as that of a strict accountability. Even with these distinctions Asante thinks that the fiduciary principle nevertheless exists in the customary land law.[3]

1. J.M. Sarbah, op.cit., p.66.
2. J.B. Danquah, op.cit., p.200.
3. S.K.B. Asante, "Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana", (1965) 14 I.C.L.Q., 1144-1188.

He argues that although incidents such as strict liability and accountability are not found in the customary land law with respect to the position of either the chief or head of family, the customary law concept is not very different from a trust in Anglo-American jurisprudence if the head of family is described as a trustee because he "holds an office of trust in the general sense".[1]

Avoiding the language of the trust institution, we may say that while the paramount interest of the stool in the lands is real among the Akan communities, the occupant of the stool is regarded as holder of the interest but only in his capacity as such occupant. The reality of the stool's paramount interest is to be seen in the fact that no alienation of the absolute or paramount title is valid unless effected by the chief and his elders together. It is also seen in the fact that it is in the exercise of the rights flowing from its paramount title that the stool can and does allocate land to its subjects for their occupation and use.

It is, however, our submission that stool lands of the Akan type, as described above, do not, as a rule, exist among the Northern Ewe of Ghana. The Ewe chiefs exercise political jurisdiction over all the lands; but the paramount title of the families in their lands is not affected by this exercise of political authority. We may, therefore, consider the distinction between jurisdictional authority and proprietary interests.

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1. S.K.B. Asante, ibid., pp. 1181-1182.

Proprietary Interests and Jurisdictional Authority

Before we attempt to examine the question of the existence of stool interests in land among the Northern Ewe-speaking people of Ghana, we may briefly draw the distinction between proprietary interests and jurisdictional authority of Ewe chiefs over land. Quite often this distinction, even if not blurred, is not sufficiently appreciated in this part of the country.

As regards proprietary interests, we need not go further than identify them as the bundle of rights which constitute the beneficial enjoyment of land. In the case of a stool holding the paramount title to land as well as a family holding such title, these rights, among others, include the rights of appropriation, occupation and use, and, in the particular context of the Ghananian land law, the ultimate right of alienation of the paramount title. The person, whether a single individual or a legal entity, in whom the paramount interest is vested, does not hold his title at the mercy of any superior title holder.

Accordingly, the holder of the absolute or paramount title must hold it in his own right, his title being in no way subordinate to any other superior title. His right of appropriation of land in which he has the paramount interest, barring any encumbrances or qualifications on that title, must not be subject to the control of a holder of a superior title. Similarly no other person may alienate the absolute title to the land except the holder of the said title. Hence, when we identify a

stool, a family or an individual as anyigbato or the holder of the paramount title to a parcel of land, the implication is that such stool, family or individual has the highest interest known to the law in that land. Among the Akan, to say that a stool has a proprietary interest in some land may mean that, in the final analysis, only the head stool may alienate the paramount title to that land. This is deductively so because, once we establish the sub-paramount title in a lesser stool, the general rule urged by the authorities is that the paramount title must vest in its head stool.

Jurisdictional authority over land is an entirely different concept. The basis of jurisdictional authority is essentially political rather than proprietary. From its base of political authority, the traditional concept of jurisdiction is manifested by political overlordship, legislative power, judicial authority and executive as well as administrative responsibility. The territorial extent of the head chief's jurisdiction is the land area over which his authority runs as paramount ruler. All persons living within the boundaries enjoy the head chief's protection, both as regards life and property; and they are also subject to his legislative, judicial and administrative authority. Transgressions within the boundaries are punishable by or with the authority of the head chief. For these reasons we may point at a defineable land area under the jurisdiction of a head chief, the totality of the area being, however, in

many cases administered by lesser chiefs owing allegiance to that head chief. Yet the chief or the stool has no proprietary or beneficial interest in the lands under his jurisdiction. It is pure land control without any implication of proprietary interests even if the chief regulates the use of land generally, whether as regards days of rest or prohibition of certain crops. Although Allott has stated that in Ashanti "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",[1] the same is not true of all indigenous African political systems. It is a peculiarity of the Ashanti and some Akan and Ga political systems which are constructed around land titles. For there is no inherent reason why the exercise of political authority, with its concomitant functions, cannot be divorced from proprietary interests in land.

Casely Hayford draws attention to the distinction between jurisdictional authority and proprietary interests in land. After describing two types of land to which the paramount title is held by the "King" or head chief among the Fanti, an Akan people, he says:

> Thirdly, 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. It is not even ownership in a general way 2

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1. A.N. Allott, The Ashanti Law of Property, 1966, p.141.
2. Casely Hayford, op.cit., pp.44-45.

In the Fanti example we see proprietary interests separated from the jurisdictional authority or "paramountcy" of the head chief. Even among the Ashanti, a classic example of a society in which interests in land are held by the stools, the construction of land titles around the hierarchy of political power is not carried to the apex of the pyramid of political authority. The Asantehene is the paramount ruler of all Ashanti; but the Asantehene is not the holder of the paramount title to all the lands in Ashanti.[1] Each omanhene or head chief under the Asantehene holds the paramount interest in his lands. The constitution of the Ashanti Union (later the Ashanti Confederacy), therefore, did not involve the cession of all lands to the Asantehene as political head of the Union. It is submitted, therefore, that even among the Ashanti the concept of jurisdictional authority does not at all stages of the ladder necessarily involve the proprietary interest in land; otherwise the Asantehene would be the holder of the paramount title to all lands in Ashanti. The distinction between political paramountcy and title to land exists also in several other Akan communities and is not illustrated by only the position of the Asantehene. Of Adansi in the same Ashanti, Allott says

> In Adansi, there are stools owning their own lands, with the Adansi Paramount Stool as paramount in authority rather than in title. 2

1. See, e.g. K.A. Busia, op.cit., pp. 52-53. Also A.N. Allott, The Akan Law of Property, Unpublished Ph.D. thesis, University of London, 1954, pp.89-91.
2. A.N. Allott, The Akan Law of Property, Unpublished Ph.D. thesis, University of London, 1954, p.91.

The same authority also says that in some Fanti areas, notably Mankessim and Ajumako, there are no stool lands but title to the lands are held by the families and clans which are subject to the jurisdiction of and owe allegiance to the head stool.[1] This supports Danquah's statement on Fanti land tenure that

> In Fanti proper (Borebori Fanti) there are but very few Paramount stools which can claim absolute right of ultimate ownership in all the lands in their state divisions. 2

In Akim Abuakwa also the finding in the Asamankese Arbitration Award was that the paramount title to all the lands of Akim Abuakwa was not vested in the Paramount Stool.[3] Hence, although the subordinate chiefs served the head chief "with their lands", and although the Paramount Stool was entitled to one-third of whatever was realised from the land, the consent of the Paramount Stool was not necessary for the alienation of title to the land. These examples, it is submitted, illustrate the distinction between political authority over land and proprietary interests in land, a distinction which exists throughout Northern Eweland.

Indeed the two concepts of proprietary interest and jurisdictional authority are different, notwithstanding that they may

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1. Ibid., pp. 105-106.
2. J.B. Danquah, op.cit., p.215.
3. Asamankese Arbitration Award, (1926-29) D.Ct., 220, 297, 301-302.

be blended together in some communities. The political supremacy of the sovereign need not depend on any proprietary interests in property, whether movable or immovable. It is not a necessary incident of political sovereignty that the sovereign should hold the paramount interest in property within the realm, whether it be clothes, items of furniture, or the land itself. It should be borne in mind, therefore, that, regardless of what may be the experience elsewhere, proprietary interest in land is not always indivisible from the exercise of political sovereignty or jurisdictional authority in every traditional African political system.

Ewe-type Stool Lands

Stool lands, as the expression is generally understood in Ghanaian law, which in fact is the Akan sense of the term, do not exist among the Northern Ewe-speaking people of Ghana. Among the Northern Ewe-speaking people of Ghana, the political sovereignty of the stool is not reflected in or even related to the system of land titles. Hence, although the stool has jurisdiction over the territorial area of the chiefdom, that jurisdiction does not lend itself to proprietary interests in the lands. The Ewe head stool, therefore, does not have any interest, not even a subordinate or dependent interest, in all the lands of the realm. As a corollary, the divisional and other subordinate chiefs do not have any proprietary interest

in the lands over which they exercise political authority. For, in this part of the country, the basic principle of land holding is that the paramount title to the lands is vested in the respective families. The families hold the paramount title to the lands in their own right and their title is not determinable even by the stool.

The non-existence of Akan-type stool lands among the Northern-Ewe has not always been appreciated. On occasions when the subject has been discussed, the discussion has proceeded on the wrong assumption that all lands in Ghana, including the Northern Ewe area, are stool lands.[1] However, at least some writers have recognised that the concept of stool lands does not exist everywhere in Ghana. As Pogucki, formerly Assistant Commissioner of Lands in Ghana, has put it,

> The fact that certain principles or notions are known need not necessarily mean that they must be applicable in the whole country. For instance the notion of stool lands appears to be confined mainly to areas inhabited by people belonging to the Akan group; there is no stool-land in the Northern Region nor e.g. among the Ewe and Adangbe ... 2

Bentsi-Enchill, after discussing the concept of stool lands among some of the Akan communities, makes the significant statement that:

> In most other states of Ghana, there is no such basic notion of what has been called 'state ownership' above. The principal owners of land - absolute or allodial owners thereof - are clans or extended families, or village communities ... 3

1. See e.g. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp. 5-7, 20-21, et passim.
2. R.J.H. Pogucki, Land Tenure in Ghana, Accra, 1957, Vol. 6, p.8
3. K. Bentsi-Enchill, op.cit., p.16.

He goes on to explain that although the political authority of the head chief is acknowledged by families which hold title to the lands under his jurisdiction, "Nevertheless the titles of such families to their land are regarded as independent and allodial."[1] It is respectfully submitted that both Pogucki and Bentsi-Enchill are right.

It seems that the non-existence among the Northern Ewe-speaking people of stool lands properly so called has also been tacitly recognised by some of the administrative agencies of the state, notably the Lands Department. We have already referred to the definition of stool land which says that it is land controlled by any person for the benefit of the subjects of a stool, clan or community. It means that, in the case of any land which falls within this definition, the "stool" concerned must be a party to any conveyance of the paramount title thereto. Now, in the Land Registry Act, 1962, for instance, it is provided that an instrument, including a deed of conveyance, shall be of no effect until it is registered in the Land Registry.[2] Before it can be registered, every conveyance relating to a stool land must first receive the approval of the conveying stool and the Administrator of Stool Lands. This is because Section 20(b) of the said Land Registry Act, 1962, (Act 122), says that registration may be refused if on the face of

1. Ibid.
2. Land Registry Act, 1962 (Act 122), esp. Section 24.

the records the grantor does not appear to be entitled to deal with the land as the instrument purports to do. Although this procedure has been adhered to in other parts of the country as an application of Section 20(b) of the Act, the information from the Lands Department is that the approval of the Administrator of Stool Lands is not required for conveyances of land in the Northern Ewe area. Neither is the approval of the local chief necessary, though some purchasers would obtain his signature, not as a party, but as an additional witness. The reason for this exception by the Lands Department is that stool lands as generally understood in Ghana, that is in the Akan sense, do not exist in that part of the country.

Although there are no stool lands property so called among the Ewe-speaking people of Ghana, there are certain lands which, either for lack of a better term or by the force of habit, are usually designated as "stool lands". One type of these lands can properly only be described as communal lands. These we shall discuss in the next sub-section. The other two types are lands in which a stool has a special controlling interest, which justifies their description as stool lands. These are (a) land which has traditionally belonged to a stool, and (b) land recently earmarked for a stool.

We may first consider lands recently earmarked for a stool. These are not strictly speaking stool lands. The origin of such lands is that they have comparatively recently been set aside for exclusive use in affairs connected with the stool.

In all cases such lands are in fact part of the ancestral family lands of the stool family. Such portions are carved out of the stool family's lands and are reserved for use only in connection with the purposes of the stool. Members of the stool family are thus precluded from the occupation and use of such lands that are specially set aside for the stool. They are, therefore, known as kpukpo nyigba or zikpui nyigba, which precisely means "stool land". The reason for the institution of such lands is that the Ewe stools have no independent economic resources with which to meet the ever increasing financial needs of the stool. Against this background must be considered the heavy expenses of the chief who must in these modern days maintain a certain minimum of dignity, decorum and grandeur both of his own person and of the stool. There are the now expensive customary rites and sacrifices, such as the purification of the stool and the yam festivals. The installation ceremonies as well as funeral rites of chiefs involve considerable expenditure of money today; and from time to time the stool paraphernalia must be maintained, repaired and augmented at great cost. Rather than rely on ad hoc contributions from members of the stool family or taxing the chief's own pocket, the stool family may decide to earmark some pieces of land, the proceeds from which are devoted exclusively to the purposes of the stool. This is why the kpukpo nyigba or "stool land" of recent days came to be created.

The second type, which are lands which have traditionally belonged to stools, are also known as "stool lands". The actual origin of such lands is not very clear and probably they are not all of the same origin. Some of them must probably have been attached to the stools in much the same way that recent attachments have been made and which we have just discussed. It has been suggested, however, that most of these traditional stool lands became part of the stool property at the time the stools were created. If so, then the ancestral stool lands of this type are not really parts of the lands of the stool family, nor are they communal lands. They belong to the stool in the sense that the paramount title to them is vested in the stool as a corporate personality.

Such stool lands of ancestral origin are not common in Eweland because it seems that at the time of the creation of the stools the ancestors did not foresee the burden of the expenses of maintaining the status and prestige of the stools. It is also for this reason that, even where they exist, they are only small strips of land, forming only a small and insignificant portion of the lands of the division or chiefdom and hardly of any substantial economic value in modern terms. Nevertheless there are examples of them in places like Anfoega, Woadje, Have, Aveme, Peki, Akome, Matse, Awudome and Ho. Thus in Fia Dzomeku of Woadje v. Kwasi Afutu of Have Etoe,[1] both

1. Fia Dzomeku per Theophilus Dzimega of Woadje v. Kwasi Afutu of Have Etoe, Unreported, Native Tribunal of Akpini State, Kpando, 12th September, 1944.

parties based their claims to the "Hefu land" on stool ownership. The plaintiff Chief, Fia Dzomeku of Woadje, contended that "The land in dispute is property attached to the sub-divisional stool of Woadje-Tsamla."[1] To this the defendant countered by saying: "The land in dispute was originated from my great grandfather called Mude. It is stool property. It was founded by Mude."[2] Unfortunately, the trial Native Tribunal did not enquire in sufficient detail into the question of stool interests in land but decided the issue as a question of fact, depending more on evidence of specific boundaries as established by boundary marks and physical features. Nevertheless, it is one of those few cases which establish the notion of stool interests in land among the Northern Ewe-speaking people of Ghana, albeit with different incidents from the Akan-type stool lands. For the capacity or possibility of the stool as such holding an interest in land was not challenged by either the parties or the Native Tribunal itself, which may be interpreted as a tacit acceptance of the existence of stool lands.

Another method by which the ancestral stool lands were created was through the confiscation of lands in satisfaction of the penalty for the swearing of oaths. In Aveme and a few other places it was explained that such confiscation was the origin of some of their stool lands. Traditional penalties are exacted whenever the oath of a chief is sworn in a dispute,

1. Ibid., p.478.
2. Ibid., p.498.

the guilty party being particularly liable. Again the oath may be sworn by the chief himself or any other person by way of an injunction restraining a specified type of conduct (such as a continuing public nuisance or private misconduct) or to enforce a public duty or obligation (such as to render military service or quench a raging fire). Disobedience to such an oath also renders one liable to the oath penalty. In the olden days, if an individual could not pay the penalty, the obligation fell on his family. Hence, if the penalty could not be paid, part of the family lands could be offered or seized in satisfaction of the liabilities under the oath because the family was equally involved.[1] This was not a loss of title as a direct result of the infringement but in lieu of the penalty due. Thus the land could not be forfeited if the guilty person or his family could pay the penalty. The land so forfeited to the chief in default of payment became stool property and retained such character. Recent examples of such seizure or confiscation of land under the oath procedure do not seem to exist.

It has been suggested that some lands which are now stool lands were acquired by direct grants to the stools. Such lands are very rare among the Northern Ewe because generally stools did not have the paramount title to lands of which they could make gifts to other stools. Accordingly no such stool lands

1. Cf. Ashanti where it is stated that "communal and family interest in land protected it from forfeiture, even when a clansman had committed some capital offence, and ... the king ... did not dare to seize the offender's land ..." R.S. Rattray, Ashanti, 1923, p.231.

exist in the Northern Ewe area proper. The only lands alleged to be in this category are the lands in the Afram plains across the Volta River. The Ewe communities on the east bank of the Volta River claim that these lands were given to them by the Head Chief or Omanhene of Kumawu in Ashanti who had overrun them during the unsuccessful Ashanti invasion of Eweland in about 1868-69. It seems that, after the Ashanti forces had been beaten back, they abandoned these lands to the Kwahu and some of those Ewe communities which had assisted them in crossing the large and unfamiliar Volta River. It is, therefore, only among the Ewe communities along the Volta River, such as Aveme and Wusuta, that we are told of the existence of stool lands originating from outright grants to stools. These types of lands, so far as the Ewe are concerned, are sui generis. In their nature, enjoyment and control, they resemble the Akan-type stool lands. They are administered by the stools in much the same way that the Akan-type stool lands in other parts of Ghana are administered. This is not very surprising because, assuming that the historical origins of these lands are correct as related, these lands have their origins in grants from a foreign stool accustomed to dealings in Ashanti-type stool lands. However, to leave no doubt about these lands, it is necessary to state that title to these lands on the west bank of the Volta River is being constantly contested even today in a series of court actions by the chiefs of Kwahu on behalf of the Paramount Stool of Kwahu in the Eastern Region of Ghana.

In these contests the Ewe communities are having considerable difficulty in explaining the anomaly of Akan-type stool lands held, controlled and administered by Ewe-type chiefs whose system of government is not structured around land titles.

As regards the use of Ewe-type stool lands, the usual way which still preserves the property is the tapping of palm wine. The palm trees may be felled and the palm wine which is tapped is used directly on the occasion of important celebrations. At other times the mature palm trees are felled and the palm wine tapped is sold to bring money into the coffers of the stool. Timber and palm trees are also sometimes sold on the land and the amounts realised go into the stool funds. Sometimes portions of the lands are leased to farmers for cultivation, of which a third, two-thirds or one half of the proceeds are paid to the stool as may be agreed. In Matse and Aveme it is stated that such leases are permissible; but in other places, such as Anfoega, the information is that stool land may not be leased in this way. In most areas it is agreed that, in cases of absolute necessity, portions of the stool lands may be sold to bring in stool revenue.

As may be seen from the above analysis, the Ewe-type stool land is very different from the Akan-type stool land. While the Akan-type stool land covers the whole of the territorial area under the political authority of the stool, the Ewe-type does not. Indeed what distinguishes the Ewe-type stool land

from the rest of the lands of the chiefdom is that it is a very small portion of the whole which has been carved out and reserved for the exclusive purposes of the stool. By definition the Ewe-type stool land, therefore, is only a very small part of the lands under the jurisdiction of the stool and which has been set aside exclusively for the purposes of the stool. Following from this it is also empirically the fact that stool lands of the Ewe-type are usually very small pieces of land, hardly of any substantial economic value today.

As the Ewe-type stool lands are only portions of the general lands of the chiefdom, these lands are never allotted to families and can never become family lands. They would cease to be stool lands once they were allocated to families. In any event, the Ewe-type stool lands are usually too small to admit of such sub-division or allocation to families. In contrast, in the Akan system, as a rule, all the lands are stool lands out of which allocations are made to the individual families, such families then acquiring the so-called "determinable" or "usufructuary" titles over their allocations as qualifications on the head stool's paramount title. The Ewe-type stool lands, on the other hand, are by definition never encumbered by any lesser title or interest of any individual or family.

There is also a difference in the administration of Ewe-type stool lands. Among the Akan, the occupant of the stool is

personally in charge of the administration of stool lands. It is, therefore, only the chief who, acting with the consent and concurrence of his principal councillors, can alienate title to the stool lands or enter into any legal transactions affecting them. In the Ewe community, however, another limitation on the power of the chief is the distinction between the chief and his stool as separate legal entities. Hence, as the land belongs to the stool, the person for the time being on the stool does not have any direct legal control over the stool land. It is the zikpuito, which means "owner of the stool", who legally has control over the ancestral stool lands. The zikpuito or kpukpoto, as we have already explained, has come to be known as "stool-father".[1] To use the more popular Ghanaian language, therefore, the stool-father is the person in charge of the administration and control of Ewe-type stool lands of ancestral origin. It is, therefore, only the stool-father, acting with the authority of the stool, expressed in the consent and concurrence of the chief and the principal members of the stool family, who can alienate title to such lands. Only the stool-father can sell palm trees on the land or fell them to tap palm wine. Only he can sell timber on the land and, where permissible, lease part of the land for farming or any other purpose.

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1. The position and function of the "stool-father" are briefly explained at pp. 74-75 supra.

In all cases, however, the proceeds must be applied only to the purposes connected directly with the stool. There are only rare occasions when stool lands are ever sold and examples are, therefore, hard to find. The information was given as an example, however, that when part of the stool lands of Togbe Dzeke of Kpando-Dzigbe was recently sold, it was the zikpuito or stool-father who conveyed title to the property. The chief, strictly speaking, is, in this connection, in a somewhat anomalous position of being regarded as only a principal councillor of the stool, though obviously a very important one. In practice, however, the chief and his stool-father do not insist on such fine legal distinctions, especially as they would in any event not act on their own but with the authority of the principal councillors of the stool. Moreover, as a result of the extension of Akan notions of stool land to the Ewe area by both administrators and lawyers, it has become a usual practice that the chief himself should personally join the stool-father in alienating or otherwise dealing with title to stool lands. This is not strictly Ewe law. The trend, however, suggests that in time the stool-father will even be supplanted completely by the chief in the control and administration of stool lands.

The position of the Ewe chief is even less effective as regards the administration of stool lands which are lands only comparatively recently earmarked for the stool. Strictly speaking such lands are not stool lands in the sense that title

to them can be said to be vested in the stool or its occupant. They are in reality family lands belonging to the stool family. The attachment of such lands to the stool as "stool lands" can, therefore, be properly described as a domestic arrangement. The strict legal title still remains in the stool family and not in the stool. Therefore, logically, it is only the head of the stool family, who in Eweland is hardly ever the chief himself, who can, with the authority of the chief and the principal elders of the family, alienate title to such lands. However, as such lands differ from the other family lands because of their exclusive reservation for the purposes of the stool, both the chief and the stool-father have a special voice in the counsel of the family regarding such lands.

Unlike the Akan-type stool lands, title to stool lands among the Northern Ewe bears no relationship to the heirarchy of political superiority of stools. A lesser stool, though a political subordinate, may nevertheless have the paramount title vested in it in its own right in respect of its own stool lands. Such lands are not held by the subordinate stool as a lesser or sub-paramount title under the head stool. Moreover, the stool lands of a subordinate stool are not in any way subject to the proprietary control of the head stool. Every head chief interviewed in the Northern Ewe area confirmed that the head stool has no proprietary interest in the stool lands of the subordinate stools, nor has the head stool any proprietary

control over such lands. This is true of all such areas as Gbi, Aveme, Anfoega, Kpando, Peki, Matse, Awudome and Ho where some form of stool lands exist. There are even some cases where the head stool itself has no stool land, although the subordinate stools have their own. For the Ewe scheme of land titles is that it is independent of the structure of political power. It is because of the absence of stool interests in lands generally that the Ewe families directly hold the paramount title to land without holding it from the stool. It is by the same process of acquisition of the paramount title in its own right that even a subordinate stool may directly hold the paramount title to its own stool lands.

As the paramount title to their stool lands may be vested in subordinate stools in their own right, the title to stool lands either way is not derivative among the Northern Ewe. The general proposition about stool lands in Ghana, however, assumes that title to them is derivative, as seen in cases like Golightly v. Ashrifi,[1] the University College Acquisition Case[2] and Nana Kwasi Nkyi XI v. Sir Tsibu Darku IX.[3] Having discussed some of these decisions, Ollennu draws the conclusion that:

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1. (1955) 14 W.A.C.A. 676. Also known as the Kokomlemle Consolidated Cases.

2. (1954) 14 W.A.C.A. 472.

3. (1954) 14 W.A.C.A. 438.

> The ratio decidendi in all these cases cited is that a head stool or skin cannot acquire an absolute title to land unless that land belongs to or is vested in a sub-stool or sub-skin under the head stool or head skin. Therefore if any land is proved to be vested in a head stool or skin for an absolute estate, that land must of necessity belong to or be vested in a sub-stool or sub-skin or a quarter also for a sub-paramount estate ... 1

Then he continues:

> It will be seen from the principles of the custom thus stated that for any piece of land properly to be said to belong to a head stool, it must first of all belong or be attached to a substool or quarter under the head stool or head skin. Therefore to say that any land, particularly land in the occupation of members of a quarter or sub-stool, belongs to a head stool, and in the same breath to say that that very land is not attached or does not belong to a sub-stool or quarter, is to fall into a grievous error; it is contradiction in terms. Such a view is against all principles of customary land tenure. A head stool can never have the absolute title in any land vested in it, unless it can show first of all that that land is attached to a sub-stool or quarter under his head stool or head skin ... 2

It is with the greatest respect that we must disagree with the opinion so emphatically expressed by Ollennu. It is true that in Golightly v. Ashrifi[3] the Court found as a fact that the Ga Mantse held the paramount title to the disputed lands through the Gbese Mantse and the Korle We. Similarly the claim by the Osu Stool in the University College Acquisition Case[4] failed because the dependent interest in the disputed area was no longer vested in the Anarhor sub-stool under the Osu Stool.

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.20.
2. Ibid., p.21.
3. (1955) 14 W.A.C.A. 676.
4. (1954) 14 W.A.C.A. 472.

More examples can be cited but, as they are all from the Ga and Akan areas, we may now discuss the only Ewe case cited as authority for the derivative theory of stool lands.

One case to which reference is sometimes made[1] in connection with the derivative paramount title of a head chief is Yaw Nkansa v. Chief Wudanu Ewasi Djaba of Wusuta,[2] hereafter referred to as the Wusuta case. As Wusuta is in the Northern-Ewe speaking area of Ghana, we may explain the proper significance of that case and the decision therein. The version of the facts accepted by the Court is that the Wusuta people originally inhabited the disputed lands but that they were later driven away during the Ashanti invasion of Eweland.[3] After the retreat of the Ashanti forces the lands were then left to the Kwahu who had been Ashanti allies. Field research, however, shows a slightly different version of the facts, as narrated by the Wusuta and the Ewe people generally. As the lands involved remain the subject of litigation even today between the Kwahu and Ewe communities, it may well be that some of the information may be suspect. Nevertheless, that the story separately related to me is substantially the same in Aveme,

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1. e.g. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.16-17.

2. Yaw Nkansa & other v. Chief Wudanu Kwasi Djaba of Wusuta, Unreported, Land Court, Accra, 2nd May, 1947. Suit No. 1/1942. Hereafter referred to as the Wusuta Case.

3. This was in about 1868-69.

Wusuta and other areas bordering the Volta River may lend some credibility to the Ewe version. The Ewe version is that during the Ashanti war in about 1868-69, to which some refer as the "Tede Afram war", the Ashanti were in fact assisted by some Ewe communities in the crossing of the Volta River and general reconnaissance, just as the Kwahu did. Without such assistance the Ashanti, who were unfamiliar with the Volta River, would have found their crossing far more difficult. When eventually the invading Ashanti forces were beaten back, they retreated and left the lands to their Kwahu and Ewe allies. Among the Ewe beneficiaries of the fleeing Ashanti forces were the people of Aveme and Wusuta. The contention of Wusuta and Aveme people, therefore, is that the lands were donated to them as absolute gifts by the Ashanti. The Ashanti division specifically mentioned in the Ewe accounts is the state of Kumawu and it was alleged that in a recent litigation over these lands the present Omanhene of Kumawu gave evidence to that effect.

The Aveme story, a typical Ewe one, is that as the invading Ashanti army was driven back in flight across the Volta River, the Kumawuhene re-apportioned the lands to communities including the Bukuruwa, Akwatia and Pitiku (who are Kwahu) and Wusuta and Aveme (Ewe). These communities probably paid tribute to the Kumawuhene for some time but the payments later ceased. The Aveme gift, it was alleged, was made at that time to Togbe Desufoli I who became <u>fia</u> or chief over those areas donated to

him. For this reason, the present occupant of the stool, Togbe Desufoli IV, claims the following villages and settlements in the Afram plains to be under his jurisdiction, viz., Dadiase (his headquarters), Nyigbenu, Amuvinu, Bethal, Canaan, Kpegbadzi, Kodidi and several other small settlements. It is even suggested that the village of Donkorkrom got its name from the fact that Krobo Donkor, a Krobo man from the Eastern Region of Ghana, who had a European gun, had obtained permission from the Aveme (Ewe) chief, Togbe Kofi Abufuo, to settle there to hunt game in the area. The authority of the Ewe chiefs could hardly be exercised when the Volta River formed a boundary between the British colony of the Gold Coast and the then German colony of Togoland, the Ewe communities being under German jurisdiction. It was suggested that it was this intervention of a colonial boundary that blurred the historical facts.

These being the facts alleged on both sides, we may now examine whether the Wusuta case does in fact support the general proposition that the paramount title to stool land is always derivative. The statement from the Wusuta case which is now urged as a general proposition, is that, since the title of the head stool of Wusuta is derivative from the lesser title in the sub-stool in occupation, therefore any settlement by the sub-chief binds the head chief as <u>res judicata</u> in respect of the lands. Therefore, when the Kwahu contended that the head stool of Wusuta was estopped <u>per rem judicatam</u> by reason of a previous arbitration award against the chief of Nframa, a

sub-chief of Wusuta, M'Carthy, Ag.C.J., upheld that contention and said that:

> under customary law, assuming that the ultimate ownership rested in the Wusuta Head Chief, the local Wusuta Chief would have a vested interest in the land held under him. 1

Although the decision itself was unsuccessfully appealed against, this preliminary ruling was not questioned on appeal.[2] This statement of the learned Acting Chief Justice, however, stems from the error of viewing the Ewe land law in terms of the known law of the Akan. In Ewe law political overlordship has no bearing on land titles. Therefore, it is perfectly normal in Ewe law for the Wusuta head stool to hold the paramount title to these lands without deriving its title from any sub-stool. Similarly, in Eweland it is possible for a sub-stool to hold the paramount title to land in its own right which is not held of the superior stool. The Wusuta and Aveme claims to the lands in the Afram plains illustrate both positions. In Aveme, for instance, the lands were alleged to have been donated to Togbe Desufoli, a sub-chief of Aveme. Togbe Desufoli, however, claims the paramount title to these lands which are, therefore, not held of Togbe Gazari, the Fiaga of Aveme. Thus although Togbe Desufoli is under the political authority of the Fiaga of Aveme, yet the Fiaga does not lay any claim to these lands held by his sub-chief. Assuming that

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1. The Wusuta case, supra.

2. Wadunu Kwasi v. Nkansa, (1948) 12 W.A.C.A. 303.

title can be established by proving the gift to him by the Omanhene of Kumawu in Ashanti, the title of Togbe Desufoli is in no way invalidated by the fact that he does not hold the land on behalf of his head stool. As a corollary, any transaction with respect to these lands by Togbe Desufoli does not bind his head chief because there is no privity of interest between them in the property.

The converse situation is found in Wusuta. Here the head stool claims the paramount title in its own right without tracing title through a sub-stool. It is submitted that this is a possible situation, indeed the usual one, in Ewe law. If the land was donated by the Omanhene of Kumawu directly to the Fiaga of Wusuta, it is illogical to defeat the title of the Fiaga merely because he does not and cannot trace title through his sub-chief. If the alleged gift to the head stool of Wusuta can be satisfactorily proved, it is wholly irrelevant to advert to a lesser title in the sub-chief because this does not go to the proof of the original gift which is the root of title. Even in the Akan case, if a large tract of land was donated to a head chief, although he would apportion it among his subordinate chiefs, his title is no less recognised over any part of the land that he may choose to hold directly without allocating it to any sub-chief. As an Akan example, Rattray had recorded an interview with an old Ashanti man, apparently from a head stool family because of how he had described the allocations to

sub-chiefs, in which the informant had stated that his head stool still held some lands which it had not allocated to any sub-stools.[1] It would be incorrect to argue that in this Ashanti instance the head stool did not hold the paramount title to those unallocated lands simply because its title could not be proved through a subordinate stool.

It is respectfully submitted, therefore, that the learned Acting Chief Justice, especially when one considers the sweeping generality implied in the tone of his language, was wrong in his dictum that if the paramount title to the land was vested in the Wusuta head stool then the local sub-chief of Wusuta ipso facto had a vested interest therein. In Ewe law this deduction is a non sequitur. It is a conceivable position among the Northern Ewe that a subordinate chief would politically be in charge of a territorial area in the lands of which his stool has no proprietary interest. Field research has not disclosed a single instance in Northern Eweland where a sub-stool holds any land from its head stool. It is perfectly in accord with Ewe notions, therefore, that the chief of Nframa may rule over these lands as a political vassal of the head chief of Wusuta but without any proprietary right or interest in the lands under his jurisdiction. For political jurisdiction in this part of Ghana is neither synonymous nor coterminous with

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1. R.S. Rattray, Ashanti Law and Constitution, 1929, pp.350-351.

proprietary interests in land. Therefore, unless it is proved that the chief of Nframa, apart from his political office, was also an agent of the head chief of Wusuta in his proprietary capacity, the chief of Nframa could not bind his head chief on the principle of res judicata as regards the head chief's proprietary interests in those lands. It is respectfully submitted, therefore, that the ruling by the learned Acting Chief Justice on the question of res judicata was wrong because, having failed to discuss and inform himself on Ewe law on the point, he was content to apply the derivative principle of Akan stool lands to the peculiar circumstances of the Wusuta case.

The derivative theory of stool lands, it is respectfully submitted, is inapplicable in the Northern Ewe-speaking area of Ghana. In this part of the country, any stool of whatever status can have the absolute title to land vested in it without deriving such title from the title of a superior or a subordinate stool, a family or individual subjects. A subordinate Ewe stool can have the absolute title to land which it holds directly in its own right and not on behalf of or from its head stool. A subordinate stool holding the paramount title to land does not base its title on the occupation, title or interest of its subjects. In Peki, for instance, the head stool has no stool lands of its own but some of the subordinate stools have their stool lands to which they hold the paramount title. The Fiaga of Peki, however, does not hold or claim any interest

in the stool lands of his subordinate chiefs. Neither does the Fiaga of Peki control these lesser chiefs in the use or management of their stool lands. Conversely the head stool among the Northern Ewe may have its own stool lands to which it holds the paramount title but without tracing its title through any of its subordinate stools. An example of this is found in Anfoega. The head stool of Anfoega has its own stool lands to which it holds the paramount title. The paramount title to the stool land held by the Anfoega head stool, however, is not derived from the subordinate title in any of its sub-stools. It is a direct but paramount title. It is in no sense derivative. Some of the sub-stools of Anfoega also have their own stool lands; but their interests in them are paramount and they are not held from or on behalf of the head stool. Thus the head stool and the subordinate stools each hold the paramount title, of exactly the same nature, in their respective stool lands, the political paramountcy of the head stool notwithstanding. The scheme of direct, non-derivative but paramount title of head stools in their stool lands is also found in other places including Aveme, Kpando, Awudome, Wusuta and other Northern Ewe areas where stool lands exist. Contrary to what Ollennu says,[1] there is no "contradiction", either in terms or in concept, in such holding of a direct but paramount title to land by the head stool without deriving title from its sub-stools. Neither

1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.21.

is it against any principle of Ewe customary law. For the head stool's paramount title may be established only as a matter of evidence in Eweland, in the same way that family titles are proved. We would even go further to state that such a derivative title to lands held by head stools is unknown among the Ewe. There is no known stool land among the Northern Ewe to which title is held by a head stool through any of its sub-stools.

In concluding this part we may also draw attention to the discrepancy in the definition of "stool land" in Section 31 of the Administration of Lands Act, 1962,[1] and the nature of Ewe-type stool lands. The Act concerns "land controlled by any person for the benefit of the subjects ... of a stool ...". Assuming that this means proprietary control, then, as we have explained, the Ewe-type stool land is hardly controlled by the occupant of the stool. The ancestral stool lands are controlled by the stool-father or zikpuito; lands recently attached to stools as stool lands are treated essentially as family lands of the stool family and are controlled by the head of the stool family who is normally not the chief. The more striking feature of the Ewe-type stool land is that it is not controlled "for the benefit of the subjects" but is exclusively reserved for the purposes of the stool. Perhaps the definition in the Act was not formulated to contemplate Ewe-type stool lands.

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1. Act 123.

Communal Lands

The term "communal land" may on occasion be misleading. In the sense in which it is more often used in Ghana, it tends to be understood to mean land to which the paramount title is held by the whole community as an entity. Such a community may be, and indeed usually is, as large as a whole chiefdom or a division of it. If it is understood in this sense then it is hardly distinguishable from stool land of the Akan type. For, as was stated by Ollennu, J., as he then was, in Ameoda v. Pordier, "By stool land we mean land owned by a community, the head of which occupies a stool".[1]

In another sense, which is more relevant here, "communal land" is unappropriated land lying within the boundaries of a chiefdom, to which every citizen has a right of access and user. Such communal land is the type found among the Northern Ewe-speaking people of Ghana. The community as a whole, the head of which is the head chief of the chiefdom, has a common interest in such communal lands in the sense that every member of the community has a right of user. Nevertheless, contrary to the definition of "stool land" by the learned Judge in Ameoda v. Pordier, a Ningo case from the Ga-Adangbe area, such communal land is not regarded as stool land among the Northern Ewe. Such Ewe-type communal lands are appurtenant to particular divisions of the chiefdom. Hence the communal land is subject

1. Ameoda v. Pordier, (1962) 1 G.L.R. 200, 203.

to the overall control of the divisional chief or fia; but it is open to limited occupation by individual members of the whole division and those from other parts of the chiefdom. The occupation is limited because it cannot ripen into a paramount title. In other words, the paramount title is not vested in any stool, family or individual, but every individual has a several common right to take portions of the land into occupation. The stool or the stool occupant, therefore, has no proprietary interest in such lands, such as to constitute them into stool lands. They are thus different from the Ewe-type stool lands to which the paramount title in a proprietary sense is held by a stool or which are reserved exclusively for the purposes of a stool. For neither the stool nor the occupant of the stool has any greater right of occupation or use of the communal land as against any individual citizen. Perhaps the nature of Ewe-type communal lands may be explained by their origin.

Wherever an Ewe community settled, there was an eventual delimitation of the territorial boundaries of the community, even if somewhat imprecisely at times. This is the territorial area known as the chiefdom; for every Ewe chiefdom is contained within a defineable land area. Sometimes the boundaries were already fixed, such as when the community settled on unappropriated lands lying between other settled chiefdoms. At other times the boundaries were fixed and determined by the amount of land that citizens of the community were able to reduce

into effective occupation. The picturesque presentation of this phenomenon is that the inter-chiefdom boundary was determined at "the point of meeting of the hoes" of two farmers from the two adjacent chiefdoms. In the case where a large tract of land lay between two chiefdoms, the inter-chiefdom boundary was either deliberately fixed by negotiation, or by tacit consent it was sometimes regarded as the point up to which each chiefdom had the responsibility of clearing the footpath linking the two chiefdoms, known as motasefo.

. However determined, there is always a generally defineable territory known as the chiefdom. This is the land area over which the chief has political authority and jurisdiction, though the paramount title to the land itself does not belong to the stool or the chief in any proprietary sense. Once these inter-chiefdom boundaries were determined, original paramount title to parts of the lands could only be acquired by a family of the chiefdom or a stool on an equal footing. A family from a different chiefdom could not by the process of original settlement acquire unappropriated lands within the territorial boundaries of another chiefdom. Hence, even today, in cases of disputes as to title between families belonging to contiguous chiefdoms, proof of the territorial boundary is conclusive that the original paramount title to the land was vested in the family within whose chiefdom the land falls. In Doh v. Klu,[1]

1. Doh v. Klu, Unreported, Kpando District Native Court "A", Kpando, 30th September, 1957.

for instance, there was a dispute as to the paramount title to land between two families belonging respectively to Leklebi-Kame and Kuma-Apoti, Leklebi and Kuma being two different chiefdoms sharing a common boundary. The plaintiff family of Leklebi-Kame contended that the top of a mountain was the inter-chiefdom boundary and that, as the disputed land fell on the Leklebi side of the boundary, title to it was vested in them. In proof of the boundary the plaintiff family of Leklebi-Kame deposed:

> In olden times when people of Leklebi Kame and Kuma Apoti were about to perform 'Dzonyinyi' custom or to make peace or pact among them, since it is the top of the mountain that is the divisional boundary between the two divisions, the said custom was effected on the top of the mountain. According to custom, 'dzonyinyi' custom is never done on any man's land, except on a divisional boundary and, upon the boundary, some stone should be fixed as a stove or hearth on which animals killed should be cooked and later buried the articles used in performing the custom in a red pot on the boundary (sic) ...1

Dzonyinyi is the conclusion of either a peace pact or a treaty of friendship on the cessation of a war or the settlement of an inter-chiefdom feud. The Native Court accepted this evidence and, regarding it as very material, stated that:

> The Court believed the evidence of the Plaintiff that according to custom, where a mountain lies between two divisions, top of that mountain is always the divisional boundary for the divisions concerned ... The Court recognised, and accepted 'dzonyinyi' spot and the old 'anya' tree as the ancient and ancestral boundary marks. 2

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1. Ibid., at pp.89-90 of Civil Record Book.
2. Ibid., at pp. 175-176 of Civil Record Book.

Having thus accepted the evidence of custom as stated above, the Kpando District Court "A" held that this was conclusive of the matter and decided in favour of the plaintiff, since the disputed land fell on the Leklebi side of the inter-chiefdom boundary as defined and identified in accordance with the said custom. In oral interviews this conclusion was supported as the correct one. It is submitted, therefore, that the general proposition illustrated by this case is that within the territorial boundaries of a chiefdom, a foreign family cannot acquire the paramount title to land through the process of original acquisition of unappropriated land. This does not mean, however, that a foreign family cannot subsequently acquire paramount title to land in another chiefdom by alienation from the previous holder of the title.

The point here is that, although only they may acquire the lands of the chiefdom, the families of the chiefdom may not immediately go into actual occupation of all the lands within the boundaries of the chiefdom. In fact the process of acquisition was a gradual one of continued expansion until boundaries were agreed between the families in different directions. As no foreign families could acquire original paramount title to parts of the unappropriated lands, some of the lands within the boundaries of the chiefdom remained unappropriated. It is such unappropriated lands within the chiefdom that are regarded as communal lands.

Communal lands of this type are of two kinds, being either forest land or grassland. Indeed few forest lands or ave are ever left unappropriated. The forest lands were what the Ewe ancestors really regarded as "land" for purposes of acquisition. Today, therefore, unoccupied forest lands are extremely rare unless they are obviously barren or unsafe spots or are otherwise unattractive for the purposes of cultivation. Nevertheless, a few such unappropriated forest lands existed until recently. In Gbi-Kpeme in Gbi the title to the "Kodzofe lands" near the territorial boundary between Gbi and Likpe was not vested in any family or individual, nor were the lands appropriated or occupied until about 1925 when the then chief or fia of Gbi-Kpeme, Togbe Adzima, asked the citizens of that division to go into occupation. Similarly, the "Abudome lands", also of Gbi and near the border with Alavanyo, were only recently taken up and divided among the various divisions of Gbi. Another example to which we have already referred is the "Dra-to lands" of Aveme-Dra in Aveme, to which no family, stool or individual holds the paramount title. In Kpando also we are told of the "Kpatoe lands" near the Volta River which belonged to no family or stool until they were recently flooded by the waters of the Volta Lake.

The more common type of communal lands in the Northern Ewe area of Ghana are the grasslands, known as dzogbe. The dzogbe is the grassland as contrasted with forest land or ave.

The grassland or dzogbe was regarded as being of little economic value to the farmer because only annual food crops like cassava and maize could be cultivated on it. Such lands were, therefore, left untouched in the scramble for the acquisition of land by the families. The result was that until recently nobody held the paramount title to the grasslands or dzogbe and they remained communal lands.

It is perhaps necessary to emphasise the free and open nature of communal lands among the Ewe. They do not belong to the stool, nor does the paramount title to them vest in any family or individual. Therefore, every citizen is entitled to make farms on any unoccupied portions of the communal lands. "Occupation" as regards communal lands of the grassland or dzogbe is strictly construed. Occupation of dzogbe creates in the farmer an interest which lasts only until the harvesting of his crops. At the longest this may be only an annual interest. There is no recognition here of the concept of fallow land or afuu with any prior right of re-occupation in the previous farmer. Hence, although regard must be had to the right of the farmer to harvest his crops, the land falls into the common pool as soon as it ceases to be under active cultivation.

As a rule no permission was necessary to go into occupation of any unoccupied portion of the communal lands, not even the chief's permission. Occupation of such lands, therefore, was

not permissive but flowed as an inherent common right arising by law from citizenship. However, unlike the case of forest land or ave, such occupation of an unoccupied portion of communal lands could never ripen into the acquisition of a paramount title therein, based on the appropriation of a res nullius, because in law the paramount title was incapable of being acquired in dzogbe.

What, then, is the position as regards legal title? If we should ask any knowledgeable Ewe man about title to these lands his answer would be, Dzogbe nyigba menye amea deke to o: enye fia to. The meaning is "The grassland is owned by nobody: it belongs to the chief". This expression, however, needs a careful analysis. In the case of the Ewe-type stool land, where it exists, the Northern Ewe term it zikpui nyigba or kpukpo nyigba, which means "the stool's land". In the case of the communal lands a legal distinction is drawn between the "stool" (that is zikpui or kpukpo) and the "chief" or fia who occupies that stool. Hence, of the communal land it is said enye fia to or "it belongs to the chief". The reason for this distinction is that "enye fia to" is an elliptical expression which really means that it is under the jurisdiction of the chief as head of the community. Its full import is that it is communal land available for use by any member of the community. The chief, whether in his personal or official capacity, has no proprietary interest in communal lands. His right to the use of such land is none greater than that of any of his subjects.

It may be pointed out that the question of legal title to the dzogbe communal lands is a modern one which did not bedevil the indigenous law. The dzogbe or grassland being incapable of being the subject of an exclusive paramount interest but available to all, it was inalienable as well. Therefore, questions of title were never raised. It is only recently, after the inception of European rule, that the issue of title to these lands has been raised from time to time. Since then the tendency has been to assume that since every individual subject has a several common right to the use of the communal land and since the communal land is subject to the overall political control of the divisional chief or fia, the paramount title must be regarded as vested in the political head of the community, who is the chief. This, however, is only an expedient to answer the continued pressure from both the government and investors who would like to identify a title holder in cases of the acquisition of an interest in these communal lands. Some chiefs and stool families have, however, sought to extend the proposition by making claims to the paramount title in some communal lands.

In one case in the Wli area, the stool-father claimed that the communal land, known as "Haveme land" was the property of his stool family. In that case, Boniface Nkekesi, Zikpuitor of Wli-Afegame v. Marcelinus Anku of Wli-Afegame,[1] the trial Native

1. Boniface Nkekesi, Zikpuitor of Wli-Afegame v. Marcelinus Anku of Wli-Afegame, Unreported, Akpini Native Appeal Court, Kpando, 6th April, 1954.

Court rejected the plaintiff stool-father's claim on the ground that the paramount title to communal lands was incapable of being held by any individual or family, not even by the stool family. On appeal to the Akpini Native Appeal Court at Kpando, the appeal was dismissed and the Native Appeal Court stated the law thus:

> The above speaks by itself in that the land in dispute ... has always been succeeded by chiefs of the Division and not by any ordinary man or woman ... The Court is greatly convinced, too, that 'Haveme' land being the land in dispute is a communal land and not an individual person's land property ... That according to native customary law, the chief of a Division becomes automatically headman for communal land or lands in the Division, and that none of the said chiefs' families has the right to claim that communal land as their father's property ... 1

From the statement by the Native Appeal Court it can be seen that communal lands in the Northern Ewe area are not stool lands and even the stool family cannot claim any proprietary interest in them.

As regards litigation of title to such communal lands, especially when title is contested on behalf of another chiefdom, the proper person to prosecute or defend the action is the chief, usually the head chief. That, however, does not mean that communal lands are stool lands in the Ewe sense. That is why we have disagreed with the definition in Ameoda v. Pordier,[2] that stool land is "any land in respect of which an occupant of a stool is the proper person to conduct its extra-territorial

1. Ibid., at pp.192-3 of Civil Appeals Record Book.

2. (1962) 1 G.L.R. 200.

affairs". For, although we have submitted that the head stool in Northern Eweland does not hold the paramount title to all the lands of the chiefdom, yet there are cases in which Ewe chiefs have litigated title to communal lands. There is the case, for instance, of Togbe Gbogbolulu v. Togbe Hodo[1] in which there was a dispute between the two head chiefs of Fiagawo or Vakpo and Anfoega respectively concerning the title to certain lands. The dispute centred primarily around the question of the correct identification of the inter-chiefdom boundary between the two chiefdoms as delineated by Dr. Gruner, then German Commissioner at Misahohe, during the German colonial administration. The dispute assumed such form because, once the inter-chiefdom boundary was determined, all lands falling on one side of the boundary would belong to the chiefdom on that side.[2] When asked the capacity in which his predecessor had litigated over these communal lands, Togbe Tepre Hodo III, Fiaga of Anfoega, offered a written reply in which he stated:

> We have two systems of land holding in our area. (a) All forest lands are owned by individual families and stool families. These individual lands are almost always forest lands ... (b) The grasslands are our communal lands. These lands in aggregate are held in trust by the Fiaga for all the people ... All farming and hunting on these lands are done by both citizens and strangers without hindrance. In fact you need not obtain permission from either the Fiaga or a subordinate chief before farming or hunting on these lands ... In the case of litigation over such communal lands, the Fiaga leads as the trustee and the litigation is financed by the whole people, in that the land in law properly belongs to the people. The cost of that litigation was borne by the people. The Fiaga had no individual interest ....

1. Togbe Gbogbolulu v. Togbe Hodo, (1941) 7 W.A.C.A. 164.
2. On the principle in Doh v. Klu, supra.

Those comments of Togbe Hodo are typical of those from other Fiagawo in the Northern Ewe area. The Fiaga's reference to his position as trustee may be excused, as he explains that the Fiaga "leads" the people in contesting claims to such lands. It is a fight by the whole people, led by their Fiaga as he would have done in the days of tribal warfare. It is the same idea that the Akpini Native Appeal Court expressed in Boniface Nkekesi, Zikpuitor of Wli Afegame v. Marcelinus Anku[1] by saying that the head chief is "headman" for communal lands. For the communal lands belong to the entire people and not to the stool or the stool family.

The traditional view of Ewe law is what we have expressed, that grassland or dzogbe is communal land in which the entire community has the right of user and that the paramount title thereto cannot be vested in the families or the stools. However, since the inception of European rule, the law on this point has not remained totally unchanged. The regret of many informants is that the communal lands are rapidly disappearing through the avarice of those holding the paramount title to the adjoining forest lands. It is stated that the German colonial authorities had changed the law by declaring that the paramount title to the grassland or dzogbe nyigba was vested in those who held the paramount title to the adjoining forest lands. This

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1. Supra.

change has apparently been readily embraced in many areas. In most Ewe areas today, therefore, these grasslands no longer exist as communal lands of which one can say enye fia to or "it belongs to the chief". The law today seems to be that the family which holds the paramount title to the forest land also has title to the adjoining grassland in a straight line. This means that the forest land or ave is deemed to extend in all directions that it is bordered by a grassland or dzogbe, until a boundary is agreed in each direction with the holder of the paramount title to the forest land bordering on the other end of the grassland. If such a boundary cannot be agreed, it is arbitrarily settled mid-way between the two forest lands. So complete is the acceptance of the new rule that, in a place like Abutia, it is stated that from time immemorial the paramount title to the grassland or dzogbe has been vested in the holders of the title to the adjoining forest lands. The recent rule has been allowed to crystallise into a rule of customary law, not only in Abutia but also in Gbi. Thus in Noviewu v. Gazo,[1] a case from Gbi-Kledzo in Gbi, the plaintiffs sued in trespass but the substantive issue was the question of title to the "Dzogbekpo land" which was grassland or dzogbe. Before considering the question of trespass, the trial Atando Native Court, sitting at Hohoe, gave the dictum on grassland or dzogbe that:

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1. Noviewu v. Gazo, Unreported, Suit No. 46/52, Atando Native Court, Hohoe, 22nd October, 1952, at p.281 of Civil Record Book.

> According to the evidence of both parties and their witnesses, it is certain that both parties and Paul Yawo have forest lands at this Dzogbekpo respectively and for which a grassland is lying between their respective lands ... According to our Gbi native customary law, if some forest lands are having grassland between them every respective forest land among them should continue into the grassland. Hence the forest land on which this ant-hill (being a boundary mark) is standing should not simply stop at the end of the forest land but should normally enter into the grassland ahead accordingly 1

With this the plaintiffs succeeded on the question of title to the grassland or dzogbe. It is submitted on the strength of field research that this decision represents the current trend in the law in most areas.

Although a change has been brought about in the law, so that generally the grassland or dzogbe is being deprived of its communal character and is being claimed by individual families, there has been little change in the corollary to the original law of communal interests in dzogbe lands, whereby any citizen may cultivate the grassland without permission from anybody. Today, therefore, it is still generally the law that any citizen, and even a stranger, may freely cultivate the grassland or dzogbe, for the purpose of growing foodstuffs, without permission from anybody, not even from the holder of the paramount or dependent interest in the adjoining forest land, who may be adjudged to hold the paramount interest in the grassland. Any entry upon the grassland for the purpose of cultivating such a

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1. Noviewu v. Gazo, supra, at p.283 of Civil Record Book.

farm, therefore, does not constitute an act of trespass actionable at Ewe law. Thus in the case of Noviewu v. Gazo,[1] a case from Gbi to which we have just referred, although the substantive issue was the question of title, the plaintiffs founded their action in trespass because the defendants had cultivated foodstuffs on their (plaintiffs') grassland or dzogbe. The Atando Native Court, Hohoe, found for the plaintiffs on the question of title but rejected the claim for damages for trespass and said:

> According to our Gbi native customs, mere food farms made on grasslands show no trespass and do not give any title to ownership ... /Hence/ the trespass so alleged by the Plaintiffs to have been committed by the Defendants on their (Plaintiffs') land is unfounded. We therefore enter judgment for the Defendants ... 2

The decision in the above case is also supported by the written statement by Togbe Tepre Hodo III, Fiaga of Anfoega, already referred to, when he says of the grassland or dzogbe that

> all farming and hunting on these lands are done by both citizens and strangers without hinderance. In fact you need not obtain permission from either the Fiaga or a subordinate chief before farming or hunting on these lands.

This is the general opinion throughout the Northern Ewe area. It is the free access to the grassland or dzogbe which distinguishes it from the forest land or ave, which had properly been reduced into occupation and subjected to proprietary acquisition by the families holding the paramount title to them.

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1. Noviewu v. Gazo, supra, at pp. 284-285 of Civil Record Book.
2. Supra.

One cannot, however, predict for how long the ordinary citizen may continue to enjoy the open liberty of farming on the grassland or dzogbe without the permission of the holder of the paramount interest in the land. The attempt by the plaintiffs in Noviewu v. Gazo[1] to treat such farming on another's grassland or dzogbe as an act of trespass was not successful. But it is one of several cases symptomatic of the attitude developing among those who have now become holders of the paramount interest in the grasslands or dzogbe. With the continued pressure on arable land, it would appear that holders of the paramount title to grasslands would eventually assert their exclusive rights over the grasslands in the same manner as they do over the forest lands, so that farming without the permission of the families holding the paramount title might in future be wholly prohibited. Even in a place like Anfoega, where the Fiaga declares that any citizen and even a stranger may farm freely on communal lands, there is a qualification that, if the person carries on commercial activities like making charcoal for sale or planting semi-permanent cash crops, then some form of rent or tribute becomes payable to the traditional authority for development purposes which apparently do not include stool or chieftaincy affairs. In Kpando also it is stated that permission, now granted as a matter of formality, must be obtained from the divisional chief to use communal lands, thus very much resembling stool lands proper.

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1. Supra.

The Kpando and Anfoega examples are cases where the chief's authority is being asserted over communal lands. In places where the communal nature of these lands is disappearing, the families holding the paramount interest in the lands are even exerting greater powers of control. In Abutia it is stated that, although no permission was formerly needed to enter upon grassland or dzogbe for farming, such permission must now be obtained from the family in which the paramount title to the dzogbe is vested, even for the cultivation of foodstuffs. Similarly it is maintained in Taviefe that, although in the past the paramount title to grassland or dzogbe could not be held by any individual or family, the change of law which now confers title also makes it necessary to seek the permission of the title holder before entering upon the grassland for the purpose of cultivation of food crops. It will be realised from this that the case of Noviewu v. Gazo,[1] although decided along the lines of the rule applicable in most chiefdoms, would be decided differently in places like Abutia and Taviefe and the defendants would probably have been found liable in damages for trespass for cultivating foodstuff farms on the plaintiffs' grassland or dzogbe without permission. This trend, however regrettable, is a logical development because the paramount title to land becomes meaningless and void if any member of the public may enter upon the land at any time for the cultivation

1. Supra.

of a farm. For the right of the holder of the paramount title to exclude other persons from the land is one of the incidents which distinguish individual family property from communal lands.

Town Lands

By "town land" here we mean a territorial area permanently settled upon by the subjects of a chiefdom with dwelling houses thereon. It is thus to be distinguished from the farming lands which ordinarily form the bulk of the lands of the division or chiefdom. The term "town land" is, therefore, used here only as a matter of convenience and in conformity with local usage. In most cases the chiefdom territorially settles in separate and detached divisions. In most cases, therefore, "town land" or gbɔme nyigba refers to the land on which a particular division is settled. Where the constituent divisions are within a close proximity to each other or are joined, it may mean the settled area of the chiefdom as a whole; otherwise the "town lands" of one division may be separated from those of another division within the same chiefdom.

Among the Northern Ewe, town lands are regarded and treated as ordinary lands of the chiefdom as far as proprietary interests in them are concerned. The paramount title to town lands, therefore, is vested in the respective families, just in

the same way that the families hold the title to their farming and other lands. Usually it is one family or the other that releases its lands for occupation by the whole community as a town land. Hence, although political control over town lands is perhaps more pronounced because of the necessity to regulate social life, town lands do not thereby become stool lands. They remain family lands in which the stool as such has no proprietary interest, though as town lands they are open to every subject of the stool who wishes to build on them and no rent is payable for such use.

It seems that in many parts of Ghana, excluding the Northern Ewe area, town lands for building purposes are stool lands of which allocations are made to the respective families. The right to build on the town lands is, therefore, only conferred by a grant, express or implicit, to each individual in those parts of Ghana. Thus, although the individual is not ordinarily rationed in the use of his family land,[1] limits are set to the amount of building land in the township that he may use for building.

Regarding town lands it was stated by Ollennu, J., in Oblee v. Armah that:

> It is different in the case of lands adjoining the town which are ready for development for the extension of the town ... In the case of such lands, express permission of the stool is always required, and limits are set to

1. Oblee v. Armah, (1958) 3 W.A.L.R. 484.

> the extent of land which one subject may occupy ... It is in the case of such grants that the area granted to the subject is demarcated. 1

The above dictum is based on the assumption that the town lands are stool lands because "express permission of the stool is always required". We cannot, therefore, be guided by the dictum in Oblee v. Armah in the Northern Ewe area of Ghana where town lands are differently administered. For the basic position in Northern Eweland is that the paramount title to the town lands, like the rest of the lands, is vested in the respective families. The Ewe town lands, therefore, are not stool lands and the stools have no proprietary interest in them. Neither are the town lands communal lands. They are family properties.

Though the paramount title to them still remains in the respective families, town lands are nevertheless subject to public rights of user which largely derogate from the private nature of the property. The reason lies in the mode of acquiring town lands. The procedure is that the divisional chief and his councillors, on behalf of the entire divisional community, approach the family holding title to the lands with a request to release the lands needed for the settlement of the community as a township. The request is made at divisional level because each chiefdom settles on divisional basis. Although the family holding the paramount title to the lands is technically in a position to refuse to grant the request, the pressure of

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1. Ibid., p.484.

public opinion is so overwhelming that the request can hardly ever be refused without incurring public opprobrium and possible ostracism. The consent of the family is, therefore, normally obtained only as a matter of formality and as a matter of course.

Once the family's consent has been formally obtained for the occupation of the land as town land, it becomes family land with a difference. Individual members of the division have a common right in the land which is the right to build houses for dwelling purposes. This very severely restricts the exercise by the family of rights flowing from its paramount title to the lands. For the family thereafter has no effective control over the use of the land, as citizens cannot be rationed in their use of town lands by the title holding family. The citizens select places according to their individual choices, the only guiding principle being that in practice the members of the same sub-division or saa settle in close proximity to each other, so that the saa is an identifiable sector of the divisional township. That is why the sub-divisional elder or saame'metsitsi is usually informed through the head of family or dzotinu'metsitsi when intending to build on a plot within the sub-divisional area or saame.

Once the area has been settled upon as a township, the sites selected by individuals cannot be taken away from them even by the family holding the paramount title to the land. Not only can the individual not be dispossessed of his building site in his own life-time, but he also has in the site an

inheritable interest which he may hand down to his children and successors. However, the interest is not that of a purchaser of the paramount title and is far short of it. Therefore, although the builder may sell his house, he cannot alienate the paramount title to the land on which it stands by a transfer inter vivos or by a testamentary disposition. However, it is inheritable only by his children or members of his family or dzotinu. It is thus a very limited interest which does not go beyond the right to have a house on the land.

On the death of the individual builder, if the buildings are still standing they are inherited by his children or successors on intestacy. Should the buildings collapse after, or even before, the death of the builder, the site still remains reserved to members of his family and will not revert to the general pool of town lands unless there is the rare act of unequivocal abandonment by the individual or the family. Abandonment, however, is not only rare but difficult to establish. As was stated by Ollennu, J., in Total Oil Products Ltd., v. Obeng:[1]

> Abandonment has a special meaning in customary law. Mere neglect or non-user of land for a period however long, does not by itself constitute abandonment. Some act or conduct must be exhibited by the owner which shows intention not to use the land any longer. 2

Abandonment by the family even after the death of the original occupier is difficult to establish. Usually even when the

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1. (1962) 1 G.L.R. 228.

2. Total Oil Products Ltd., v. Obeng, (1962) 1 G.L.R. 228, 234.

buildings collapse it takes quite some time before new ones are erected in their place. If the children of the deceased are too young or incapable of erecting new buildings it may require some time. In the event of failure or inability of the deceased's children, the family or dzotinu of the deceased would eventually authorise another relative from the same family to build on the spot. Even when the visible walls or gli have been washed away, the old building site is still known as glidzi which literally means "on top of the walls". So long as it is somebody's glidzi, even though the grass may have grown, and indeed usually grows, there, it is different from an unoccupied land; for the glidzi cannot be sold by the holder of the paramount title to the land and it cannot be re-occupied by any other citizen except with the consent of the deceased's family or dzotinu. Because usually there is a long intervention of time even after the collapse of the original buildings, it is well-nigh impossible to say that a building site has been abandoned by the individual or his family merely because for many years a new building has not been erected in place of the collapsed one. Particularly in these days of the growing scarcity of land, families and individuals jealously guard their rights to the use of the glidzi or old building sites of members of the family or dzotinu, whether dead or living.

Abandonment may, however, be manifested by the individual and his family physically moving away to settle elsewhere. If the individual builder alone moves away, this is not abandonment

because the right to use the site so left by him passes to his family or dzotinu. There is abandonment only when the individual moves away as part of his family, and such occasions are rare today. An example, however, occurred in the 1930's in Gbi when a section of the division of Gbi-Kpeme, because of an intractable chieftaincy dispute, broke away to form the new division of Gbi-Abansi. In that case the building sites abandoned by those who left for the new settlement became available for occupation by other citizens. Similarly, the people of Gbi-Godenu abandoned their building sites in Gbi-Wegbe in the 1940's when they moved away to constitute themselves into a new division. Technically such abandoned sites become available to the family which holds the paramount title to the land, for sale or other forms of alienation, provided that no citizen earlier manifests his intention to build on them.

Generally the chief has no proprietary interest in law over town lands and cannot exercise proprietary control over them. They belong to the entitled families. However, in some places the chiefs have been attempting to influence the use of town lands, with the explanation that it is a function which forms part of the chief's general responsibility for the welfare and development of the township, the village or the settlement. In Kpando, for example, it is stated that any person wishing to build on town land must first obtain permission from the fia or divisional chief (not the head chief), through his sub-divisional chief or saamefia. The explanation for this procedure does not

lie in the existence of any proprietary interest of the stool or the chief in town lands, but in the assumption of responsibility by the chief for development and planning, in much the same way that the central government or local authority would today have to approve of building plans in the urban areas and townships. It has gone so far that in Kpedze and Awudome the law is stated that, even if the interest holding family refuses, the local chief can authorise a citizen to build on town lands, as it may result in the restriction of the growth and development of the town or village if the grant of permission is left to the unfettered discretion of the families holding the paramount interest in town lands. The rationale and justification for such a residuary power in the chief is that, by giving their original consent to the settlement of the community on the town lands, the families have surrendered their rights of exclusive control and have accepted some measure of common rights over the lands. Furthermore, the control by the chief is necessary as a political control, as seen in any system of government today. In spite of these limitations, the families have not lost the proprietary title to their lands which have become town lands. For the family holding the paramount title in the town land may sell any unoccupied portions of its land within the town just like any other of its lands. There are, however, restrictions generally accepted as regards which unoccupied portions of town lands may be sold in this way. In particular, as has already been stated, the family holding the

paramount interest cannot sell a citizen's old building site or glidzi merely because the building has fallen into ruins or has totally collapsed and there has been no attempt to rebuild there, unless there is a clear and unequivocal abandonment of the site. Similarly, the land holding family may not sell unoccupied town land which is a space left between existing buildings in the same compound, otherwise there can be no expansion and extension of existing buildings.

Gradually but somewhat effectively, families holding the paramount title to town lands are beginning to assert their power of control over town lands, partly because of the enhanced economic value of land since their ancestors consented to the settlement of these lands as townships. It is stated as still the law in places like Gbi, Aveme, Wusuta, Taviefe, Kpedze, Awudome, Ho and most other areas that a citizen needs no permission to build a dwelling house on town lands. However, in other places, notably Peki and Abutia, it seems to be the law now that formal permission must be sought from the holder of the paramount title to the land before building on town lands. Though it is explained that such permission for a citizen is only a mere formality and is granted as a matter of course, there is no reason to assume that this development may not in time lead to the crystallisation of the right to withhold such permission until valuable consideration is forthcoming. Signs of such a development are already noticeable even in a less urbanised place like Matse where it is now the law that a citizen must seek permission from the family holding the

paramount title to the land before building on town lands, and that such permission must be sought with such expensive drinks as whisky and schnapps. In the course of time the "drink" or aha may be commuted to cash payments. In Anfoega it has gone even further because not only must permission be obtained, but the traditional council has fixed the consideration for the grant of such permission as cash payment of about three to five guineas (i.e. between N₵ 6.30 and N₵10.50) in lieu of "drinks", depending on the size of land granted.

Owing to the growing commercialisation of land through buildings which are in the nature of capital investment, families holding the paramount title to town lands are naturally questioning the unrestricted right of the citizen to build on town lands. The question is whether a citizen may freely build on town lands in excess of what is reasonably necessary for dwelling purposes and with a view to letting out the rooms for profit. It is being contended that, where a citizen builds several houses which are clearly intended to be rented, then this exceeds the normal limits of free use of town lands and the citizen must pay some rent therefor. A case involving this issue arose a few years ago in Gbi-Kpeme in Gbi. In the case of Thomas Kuma v. Yawo Akoto,[1] a native of Gbi-Kpeme, who had only a small family, already had several houses in Gbi-Kpeme on different sites on the town lands. Most of the rooms in these houses were let out

1. Thomas Kuma v. Yawo Akoto, Unreported, Suit No. 32/53 of 1953, Gbi-Hohoe Native Court, Hohoe, at p.118 of Civil Record Book.

for profit. The said citizen then began constructing another large building of many rooms on an open space forming part of the compound of one of his premises. There could be no doubt that these rooms were only meant to be let out for profit.

The plaintiff, as head of the Xevi family of Gbi-Kpeme, the family that holds the paramount title to that part of the Gbi-Kpeme town lands, demanded that one room in the proposed new building be given to the said Xevi family in lieu of rent for the land. The demand was interpreted as an attempt to demand ground rent from a citizen for building on town lands and the matter was reported to the defendant, then the Regent of Gbi-Kpeme. The defendant Regent, without discussing the matter with the family in which the paramount title was vested, ordered the prospective builder not to comply with the request of the said family and authorised him to proceed with the building in exercise of his rights as a citizen.

The plaintiff, as head of the Xevi family, therefore, sued the defendant as Regent of the Gbi-Kpeme Stool, claiming £25 damages for "interfering with the inheritance of the Plaintiff's landed property ..."

The judgment of the Gbi-Hohoe Native Court, then constituted by a panel of members, is interesting when contrasted with the opinion of the Head Chief. In his evidence on behalf of the defendant, it was deposed by Togbe Kwasi Gabusu IV, Fiaga of Gbi, that:

> ... Since from the time of the Germans, no native of Gbi who wanted to build has to consult the town land owner or the chief or anybody before erecting the walls, and because of this the inhabitants of the town use to fight for the peace of the town ... 1

The Head Chief was fully supported by the senior divisional chief, Togbe R. Kofi Buami VI of Gbi-Bla, who said in evidence:

> Since I was born, I have never heard that a native of Gbi built a living house after obtaining permission from the landlord to do so. Any native has the full right to build a living house freely on town lands without obtaining any permission. If your father built and he died, his son has the right to build on his late father's premises (sic) ... 2

By "living house" Togbe Buami meant a dwelling house as distinguished from a factory or other business premises.

The clear evidence by the traditional rulers on the native law was brushed aside by the Native Court who gave judgment for the plaintiff as head of the family in which the paramount title was vested. In its judgment the Gbi-Hohoe Native Court said:

> In fact it is most annoying that Defendant gave L.A. authority to build on Plaintiff's land without the knowledge and consent of Plaintiff the landowner, and it is wrong on the part of the Defendant that when he received the report from L.A. concerning the conditions given him by the Plaintiff about his new building he the Defendant failed to call the Plaintiff landowner to interview him about the conditions the Plaintiff so gave ... On account of the above facts this Court sees it clearly that Defendant really interfered with Plaintiff's landed property as Defendant is not a member of Plaintiff's family and therefore has no interest in Plaintiff's landed property ... 3

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1. Thomas Kuma v. Yawo Akoto, supra, at p.176 of Civil Record Book.
2. Ibid., at p.188 of Civil Record Book.
3. Ibid., at pp. 190-191 of Civil Record Book.

The Native Court thus appears to have condemned the defendant Regent on the ground of having authorised the citizen to build on the town lands "without the knowledge and consent" of the plaintiff as head of the family holding the paramount title to the town land. Knowledge and consent, however, are not the same thing. As regards "knowledge" the Native Court elaborated by explaining that the Regent was wrong in not discussing the matter with the title holding family before authorising that construction work should proceed. On this point the Native Court had the support of the Fiaga himself who, in the course of his evidence, also stated that:

> It is the duty of every native whom a certain condition is given on building on the town land to report the condition to the chief of that town. It is the duty of the chief that receives such complaint to invite the landowner who gave the condition and warn him not to do so again ... The chief of that town should by all means invite the town landowner and talk to him and warn him. 1

While both the Native Court and the Fiaga concur in the opinion that the matter must first be discussed by the chief with the holder of the paramount title to the town lands, they disagree on the objective of such a discussion. The Fiaga makes it clear that the purpose of such an interview with the holder of the paramount title is not to solicit his consent but to "warn" him against the imposition of any conditions on the use of town lands by natives. In the Fiaga's opinion, therefore, the law is settled that no restrictions can be imposed on citizens

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1. Thomas Kuma v. Yawo Akoto, supra, at p.176 of Civil Record Book.

with respect to town lands and the holder of the paramount title is simply to be warned to desist from attempting to go contrary to established law and practice.

The Native Court, on the other hand, was not so explicit in its reference to the necessity for obtaining the consent of the holder of the paramount title before building on town lands. By giving only a brief and cursory treatment to the question of consent by the family holding the paramount title to the town lands, the Native Court, perhaps deliberately, avoided making a direct and authoritative pronouncement on the central issue of whether the chief can overrule the family which holds the paramount title to the town lands as far as the building rights of citizens are concerned. Though the trial Native Court rightly censured the Regent for failing to discuss the matter with the interest holding family, it did not provide the answer to the main question of what were the powers of the chief in the event of that family's consent being not forthcoming even after such a consultation. In other words the question which was left unanswered was whether the Native Court would still have found for the plaintiff, if the facts were that the Regent had discussed the matter with the land holding family but, failing to obtain their agreement to lift the condition, he nevertheless subsequently authorised the citizen to proceed with his building on the town lands. The answer given in Kpedze and Awudome, and which the Fiaga of Gbi also stated in the present case, is that the chief reserves

the power to authorise any citizen to build on town lands even if the family holding the paramount title to the town lands attempts to impose any limitations or conditions on the citizen's right; for without such a residuary but overriding authority in the chief, personal inclinations and even greed and mercenary motives of members of the families holding the paramount title to town lands could result in a restriction on the expansion and development of the town or even lead to its disintegration.

Much can be said for either side of the argument because it is an example of a crisis in the law as a result of changing social and economic conditions. When the rule of the unrestricted right of a citizen to build on town lands was formulated, the present townships were small communities and the renting of rooms for profit was not known. With urbanisation, general development and expansion, houses are now being built in most areas for the sole purpose of letting them out for profit, a phenomenon which was unknown to the old law and which it did not contemplate. The law itself must, therefore, also change to suit the changing economic and social conditions of today. In comparatively smaller places like Aveme and Wusuta, it is hardly a surprise that it is maintained that no lawful restrictions can be placed on the number of houses that an individual citizen can build. But even in such places there must be some measure of indirect control, such as public opinion, to impose some limit on the amount of town lands which an individual may

grab for himself alone. In the rapidly developing urban areas like Ho, Kpando and Hohoe (Gbi), there is some force in the contention of those who consider it unfair that individual citizens who already have dwelling houses should freely build on town lands for the obvious purpose of renting the rooms for profit. For this is a commercialisation of land for personal gain which exceeds the mere exercise of the traditional right to build a house on town lands for personal occupation. In such cases, it is submitted, the family holding the paramount interest in the town lands may be justified in insisting that such use of the town lands exceeds the permissive use contemplated by the old law and that either the plot of land concerned must be purchased by the builder or some form of ground rent must be paid for it. This could have been a reason for entering judgment in favour of the plaintiff in Thomas Kuma v. Yawo Akoto.[1] However, although the Native Court in that case appears to have generally arrived at the right decision by finding for the plaintiff as head of the family holding the paramount interest in the town lands, it did so for inadequate reasons because it did not direct its attention to the underlying social issues. The Native Court also unfortunately, but perhaps deliberately, let slip the opportunity for a clear exposition of the law on town lands.

However inadequate the Native Court's judgment may be, it leaves little doubt about the view it takes of town lands.

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1. Supra.

The view of the Native Court is that town lands retain their essential character of family property. Excusing the choice of language, this view is forcefully expressed by the Native Court when it says of the defendant in his capacity of Regent that

> this Court sees it clearly that Defendant really interfered wrongly with Plaintiff's landed property as Defendant is not a member of Plaintiff's family and therefore has no interest in Plaintiff's landed property.

The view of the Native Court, therefore, is that even the chief cannot interfere with the management and control of town lands unless he is also a member of the family that holds the paramount title to such lands. This is the view generally expressed as the law in most Ewe areas, though the extent of its application is blurred by the equally forceful view that the chief may exercise some political control over town lands.

Unfortunately Thomas Kuma v. Yawo Akoto was not taken on appeal. This was perhaps the deliberate intention of the Native Court because of the possible repercussions of a clear and authoritative pronouncement on the issue. For while the Native Court found for the plaintiff land holder, it disallowed the damages on the ground that no injury was in fact occasioned. The head of the family holding the paramount interest in the town land was, however, satisfied that his legal right had been upheld and he did not appeal. The Regent also did not appeal because he understood that his order was merely nullified because of his failure to have a prior consultation with the

land holding family and, while he incurred no damages, the matter was left to be settled between the citizen concerned and the family. Enquiries indicate that perhaps the full effect of the judgment was never really appreciated by either the parties, the builder or the citizens generally who had supported the Regent in the litigation. Be that as it may, it is understood that the builder concerned regarded the decision as a victory for the family holding the paramount interest in the town lands and has settled by agreeing to allocate a room to that family as demanded. No other instances have since arisen within the chiefdom and one cannot forecast the extent to which this principle may be pursued.

The strong argument against selling town lands to or demanding ground rent from citizens by the families which hold the paramount title to such lands is that, once the concession is made, no brakes can be placed on the desire of families to sell the land or demand rent in every case. Difficult cases would, for instance, arise where a citizen erects on town lands a large building, part of which he occupies but part of which he also lets out for profit. Would such a building be regarded as a personal dwelling house entitling the citizen to the free use of town lands? It is submitted that, if, in view of all the facts, including the general standards of the locality, it can be concluded that the building is in the nature of a capital investment mainly for the purpose of gain, then the

housebuilder must be given the choice of either paying rent for the land or purchasing it at its market value. It is suggested, however, that in deciding these issues the Court must on social grounds lean in favour of free building by citizens.

Another pressing issue today is the availability of town lands, particularly in the expanding townships. One facet of the problem is the determination of the precise extent of what is known as town lands. When the families ceded their lands for occupation as townships many generations ago, these communities were but small settlements. It was, therefore, not necessary to define with exactness the actual extent of the lands so granted. Today the population is growing fast and in every township the town lands are expanding outwards. Parts of surrounding lands not previously intended to be used as town lands or gbome nyigba are being occupied as such. The question is whether the citizens have a right of occupation by extending the limits of the town lands. To accede to such unlimited extension of town lands means the deprivation of families of their lands which they do not intend to offer or release for public use, which is an economic injustice arising from an invasion of their proprietary rights. On the other hand, to unduly restrict the expansion of the township to its small original limits would inhibit and even prevent the growth and expansion of the township, which is socially both indefensible and undesirable. The solution seems to be to balance the

proprietary interests against the social justification for the continued expansion of townships.

In Kpando the question came before the court in Ashiemoa v. Bani.[1] In that case, because of the expansion of the town, the plaintiff's land at Kpando became what the High Court described as "outskirt land", that is, land on the peripheral boundary of the township or what is known in Ewe as gboto nyigba. The chief contended that, inasmuch as the town had grown to those limits, the "outskirt land" or gboto nyigba became part of the town lands or gbome nyigba and, therefore, became stool property which was "absolutely vested in the stool for all purposes, namely, full title - ownership coupled with possession and occupation".[2] The High Court, constituted by Ollennu, J., as he then was, rejected the chief's argument and held that even if there was such a custom by which a person was divested of his title when his land became outskirt land, it must be rejected as "contrary to natural justice, equity and good conscience". Those were still the days when native customary law was regarded as foreign law to be proved in the statutory courts by evidence and when the High Court could invoke the "repugnancy clause"[3] to dispose of intricate problems of customary law.

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1. (1959) G.L.R. 130.
2. Ibid., at p.132.
3. Section 87 of the former Courts Ordinance, Cap. 4. Now repealed.

The "repugnancy clause" has ceased to apply since the Courts Act, 1960,[1] came into force on 1st July, 1960, and the Courts Decree of 1966[2] has not re-introduced it. Should the problem be posed today, therefore, it cannot be disposed of with the blanket declaration that the relevant customary law is "repugnant to natural justice, equity and good conscience", whatever that phrase means.

Indeed the correct position is that no such Ewe customary law exists which divests a family of the title to its lands when such lands become part of the town lands. Both the trial Native Court and the Kpando District Native Appeal Court rejected such a rule of customary law as non-existent. It was because of his knowledge of the non-existence of such a customary law that the second defence witness sought to treat the alleged law as a bye-law made by the stool; but he could not prove the passing of such a bye-law.

However, it seems that in Ashiemoa v. Bani,[3] the argument on behalf of the chief was misconceived in averring that the land became vested in the stool for absolute title because it became part of the outskirt lands or town lands. The misconception was certainly fatal. The Ewe law is that even when lands become town lands they do not thereby become stool lands.

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1. The repealed Courts Act, 1960 (C.A.9), Sections 66 & 67; and the Interpretation Act, 1960 (C.A.4), Sections 17 & 18.
2. N.L.C. Decree No. 84 of 1966.
3. Supra.

They still remain family lands though, because they are town lands, common rights of use for building purposes are a burden on the paramount title to such family lands. Therefore, the argument of the chief cannot be supported that such lands become stool lands in any sense. This could have been the basis of the judgment in favour of the plaintiff, who, in this case, claimed the paramount title to the land.

If the argument in Ashiemoa v. Bani[1] were simply that the "outskirt land" or gboto nyigba had become part of the town lands or gbome nyigba in consequence of the natural expansion of the township and should, therefore, be treated as such, it could hardly be resisted in the traditional customary law. For townships cannot, in the view of the customary law, be confined within rigid boundaries without a scope for expansion. That is why township sites were always chosen with an eye inter alia on possible future expansion. The proprietary rights of the families holding the paramount interest in the town lands must be respected, but they should not be allowed to prevent the expansion of townships. If the assertion of such proprietary rights over town lands and outskirt lands is not curtailed, the development is likely to result in a situation when even citizens will have to rent dwelling rooms from rich landlords because, although such citizens can just manage to build their own dwelling houses, they cannot afford the extra money to

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1. Supra.

purchase the building site or pay the ground rent. However desirable this may be in modern times, it is contrary to the Ewe way of life. Such a development would lead to the disintegration of the family and the disruption of the whole pattern of society in this part of the country.

CHAPTER VII

FAMILY PROPERTY

The Meaning of Family Property

Stated simply, family property is property to which the paramount title is vested in a family. The only question, then, is what is the "family". The answer we have suggested is that among the Northern Ewe-speaking people of Ghana there is only one type of family, generally known as dzotinu. There are thus no immediate as distinguished from wider families.[1] The Ewe family or dzotinu, as we have seen, is in principle constituted by the patrilineal descendants of a male ancestor, members of the group being identifiable as a legal entity inter alia by their exclusive entitlement to ancestral property and the right of succession to interests in property and certain hereditary offices.[2] Family property in the Ewe context, therefore, means property to which the paramount title is vested in the family or dzotinu. It is "dzotinu property". This characterisation excludes from the ambit of "family property" even undivided property in which the absolute interest is jointly held by the

1. See pp. 103-104 supra.
2. See pp. ~~103-105~~ 202 supra.

children and descendants of a deceased man as successors, insofar as such children and descendants do not constitute a family or dzotinu. Similarly it is not family property if property is acquired by two or more members of the family through their own exertions or as a result of a gift, a bequest or a devise made to them jointly and personally. Such property, inasmuch the interest in it is jointly vested in several individuals, is a group property; but it is not a family property because those holding the interest in it do not constitute a family as understood in Ewe law.

The essential nature of Ewe family property, therefore, is that the absolute title to it is held by the corporate entity known as dzotinu and not merely by some of its members individually. The ultimate control and management of such property, as well as the paramount title thereto, vest in the family as an entity and not merely in some part of it.[1] Disposition of such family property is valid only if effected by the head of the family or dzotinu'metsitsi, acting on the authority of the principal elders of the family.[2] In other words the property is family property or dzotinu property if, but only if, title to it is vested in the family or dzotinu as an entity, such that its alienation is invalid except when effected by the head of the family with the authority of the principal members of the family.

1. The nature of the family's paramount interest in property is discussed in pp. 292-295 supra.
2. See Chapter VII supra on the alienation of family interest in property.

Family property as described above is practically non-existent among the Northern Ewe-speaking people of Ghana, except for ancestral family lands. The reason for the non-existence of family property among the Northern Ewe is to be found in their system of succession to property. As explained below,[1] the Ewe family does not succeed to the intestate estate of its deceased members. Although members of the family severally have a spes successionis in each other's self-acquired property, the spes successionis is in the individual members and not in the family as a unit. The right to succeed to rights in property derives from membership of the family, but the family itself never succeeds to the property rights of its members. For the family is not an ultimus heres in Ewe law. It is individuals who succeed to property and in every case an entitled individual must be found as successor. The principle of succession by an individual, as against the family as an entity, means that there is no reversion in the family. The result is that the circumstances are inconceivable when, through the failure of successors, the property may devolve on the family as an entity. There is, therefore, no creation of or accretion or addition to family property today among the Ewe as a result of intestate succession.

The nature of the interest which a successor takes in inherited property also affords some explanation for the virtual non-existence of family property among the Ewe. The interest

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1. See pp. 625-626 infra.

which a normal Ewe successor takes in an inherited property is that of a purchaser.[1] This includes the absolute title if this was held by the predecessor in title; otherwise it is the highest interest held by the predecessor. The successor also has the capacity to alienate and dispose of his inherited interest in the property either inter vivos or post mortem by testamentary disposition. The inherited interest in the property, if not disposed of, is in turn inheritable by the successor of the original successor. The inherited property is, therefore, regarded for the practical purposes of Ewe law as a self-acquired property of the successor, even as regards alienation and disposal, and is thus transmissible to a series of successors ad infinitum. This means that in any event the family does not acquire any title or vested interest in the intestate estate of its deceased members. Furthermore, even the spes successionis of the individual members of the family is effectively destroyed if, as he is entitled to do, the successor disposes of the interest in the inherited property.[2] In such a scheme of succession to interests in property, utterly different from Akan law, there can be no family property as a result of intestacy of deceased members of the family.

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1. See pp. 708 and 713-4 infra.

2. For example, as did the successor who sold the property in Yawoga v. Yawoga, (1958) 3 W.A.L.R. 309.

There is a contrast here with the institution of family property among some of the other communities of Ghana, notably the Akan and the Ga. The law to be deduced from a long line of cases is that among some other Ghanaian communities the self-acquired property of a deceased person automatically becomes family property on intestacy.[1] It is the family and not individuals who succeed to rights in property in such communities.[2] Those who are appointed "successors" in such communities do not, therefore, enjoy more than a life interest in the property, thus lacking both the power of alienation inter vivos and of testamentary disposition as regards the inherited property. For the inherited property in such communities is indeed family property. In effect and in practice, therefore, there is a continuing addition to family property in those communities. This seems to be the origin of family property in some Ghanaian societies. As Ollennu puts it:

> Ancestral family property is property which was once the individual self-acquired property of a very remote ancestor, and which has become vested in a very wide family, consisting of a number of small families or tribes. 3

The same view is held by Bentsi-Enchill that "self-acquired property is for ever becoming ancestral property".[4]

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1. Larkai v. Amorkor, (1933) 1 W.A.C.A. 323; Amarfio v. Ayorkor, (1954) 14 W.A.C.A. 554; In re Eburahim, (1958) 3 W.A.L.R. 317; Ennin v. Prah, (1959) G.L.R. 44; Kwakye v. Tuba, Unreported, High Court, Accra, 20th September, 1961; and Krakue v. Krabah, Unreported, Supreme Court, Accra, 24th June, 1963.
2. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp. 70, 85.
3. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.33.
4. K. Bentsi-Enchill, op.cit., p.185.

However true these propositions may be of other communities, it is not correct to say that self-acquired property among the Ewe becomes family property on intestacy. The interest in self-acquired property in Ewe law is succeeded to as of right by entitled successors and is never stamped with the character of family property even on intestacy. As a result, in principle the only property which can be identified as family property among the Northern Ewe is the ancestral family land. This is not only legal logic; it is also the law as practised by the people. Throughout extensive field research a large number of heads of families were interviewed. Every single head of family stated that the only family property administered by him in that capacity were the family lands of ancestral origin. The interest in all other property, even though left intestate, is held by individual members of the family. The family as an entity has no title to such property, though each member of the family severally has a spes successionis of varying degrees of remoteness in the property belonging to another member.

It should not be understood, however, that apart from the ancestral family lands, other forms of family property cannot exist in Ewe law. Though on the empirical evidence such forms of family property, other than family lands, are noticeably rare, it is legally possible for them to be created by deliberate and conscious effort. In the first place any property purchased with money from the proceeds of the sale of family property would automatically become family property, on the principle of

the decision in Nelson v. Nelson.[1] It is also possible that a member of the family or even a stranger may make an absolute gift inter vivos or a testamentary disposition in favour of the family as an entity. In such a case the property becomes family property by reason of the gift, bequest or devise. Another possible genesis of family property is where members of the family contribute money or other resources as constituents of the family and not in their individual capacities. The money itself automatically becomes family money. Any property acquired out of such family contributions also becomes family property. Indeed it is possible that there are other origins of family property which Ewe law would recognise. It is the case, however, that such family properties are so rarely encountered that their existence is largely theoretical.

We may draw the conclusion that inasmuch as "family property" means property to which title is vested in the family or dzotinu as a unit, the main type of family property found among the Northern Ewe are the ancestral family lands. Title to all other forms of property is, as a rule, held by individuals and groups of individuals who do not constitute a family. Questions, however, may sometimes arise as to the title to property on family land, property acquired with some assistance from members of the family and family property redeemed by a member of the family. These questions will be discussed; but we shall first consider ancestral lands which are family property.

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1. (1951) 13 W.A.C.A. 248.

Land as Family Property

In the discussion of land titles, it was pointed out that originally the paramount title to lands was vested in the families of the chiefdom. We now state the general proposition that, as a general rule, the main type of family property properly so called among the Northern Ewe consists of the ancestral family lands. The paramount title to such lands vests absolutely in the family as an entity, which only has the rights of ultimate proprietary control, outright alienation and disposal. As already explained the paramount title to Ewe lands is thus held by the respective families but in their own right and independently of any stool interest in it. Hence, as far as the Northern Ewe are concerned, Deane, C.J., was right when he stated that "the presumption with regard to land in this country is that it is family land".[1]

The origin of ancestral family lands among the Northern Ewe is that their acquisition was on behalf of the family. The family title was not derived from any doctrine of intestate succession to the interests in the self-acquired property of its deceased members. We cannot, therefore, agree with Bentsi-Enchill's observation that

> The very notions of family, sub-family, and immediate family property carry with them the acknowledgment of an original individual acquisition by the founder of the family or branch of the family. 2

1. United Products v. Afari, (1929-1931) D.Ct.12.
2. K. Bentsi-Enchill, op.cit., p.81.

There is a non sequitur in the argument which assumes that every family property was originally self-acquired by a member of that family. In the old Ewe law it was the rule that individual persons could not hold the paramount interest in land. All acquisitions of land were, therefore, family acquisitions. They were not regarded as self-acquired properties of the individuals who had reduced the unappropriated lands into effective occupation. That explains why only ancestral lands are family property among the Northern Ewe.

The above explanation should also be viewed against the background of the Ewe law of succession. If the ancestral family lands were regarded as originally self-acquired individually by members of the family, the paramount interest in the lands would have been duly transmitted to the successors of those individuals as of right on their death intestate, as with other property. This, however, was not the case and the paramount title to the lands has been retained as a group title held by the respective families or dzotinuwo. Conversely, if it were true that self-acquired property of today would become family property of tomorrow, then this would not have been limited to land alone. The principle would have been applied to all other types of property so that, in addition to family lands, there would also be other kinds of family property. As pointed out already, however, as a rule there are no other kinds of family property, save family lands, among the Northern Ewe. We are driven to the conclusion, therefore, that original acquisition of and title to

land was subject to a different regime of property law among the Ewe. This was that, while the absolute interest in other kinds of property could be held as individual acquisitions, the paramount interest in land could only be vested in the family as a legal personality; for an individual lacked the legal capacity to hold the paramount interest in land. The law has since changed and the individual's capacity to hold the paramount interest in land is now recognised. Nevertheless the change has not affected family titles to ancestral lands, even as regards the individual member's interest in them. In Ewe law, therefore, there can be no succession to the paramount interest in family land by any individual. Membership of the family simply but automatically confers an inherent right of occupation and user which is shared with other members, thus conferring on the individual a dependent interest in that portion of the family land which he occupies.

Evidence of original acquisition for the family is also found in the absence of internal boundary marks between the holdings of members of the same family. If the acquisitions were originally on individual basis, certainly all the lands would not have fallen into intestacy and would not all have become family property as a result. In that case some members of the family, apart from the general family lands, would be exclusively entitled to some lands transmitted to them from the original acquirer, either by successive succession or a series of transfers <u>inter vivos</u>. Such exceptions, however, are not

known to exist. That is why no internal boundary marks indicative of paramount title are found as between lands occupied by members of the same family. The extent of individual cultivations are sometimes marked, but never with the special boundary trees which demarcate the area for purposes of paramount title.

Land, therefore, was a special type of property. The old rules of land acquisition were based on paramount title in the family. Ancestral land is thus the main type of family property among the Northern Ewe.

Property on Family Land

In Ewe law property built on family land does not thereby become family property. A house built on family land as well as a farm cultivated on family land are self-acquired properties of the builder and the farmer respectively, even though they are members of the family in which the paramount title to the land is vested. The land itself remains family land, but the house or the farm is a self-acquired property of the person who erected or cultivated it.

The above propositions are not supported by the judicial customary law. The rule of judicial customary law is as stated by Ollennu that

> A house which a person builds out of his private means on family land (as distinct from waste ancestral land) is family property. 1

1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.40.

The builder is considered by the judicial customary law as having only a life interest in such property on family land.

A number of decided cases illustrate the judicial customary law. For instance in the Ga case of Owoo v. Owoo[1] the testator purported in his will to devise title to a house he had built on family land. It was held by the West African Court of Appeal that the disposition in respect of that property was void because it was family property in respect of which he lacked the testamentary capacity. That it became family property, however, was only due to the fact that the house had been built on family land by a member of the family. The West African Court of Appeal said:

> The learned Judge held that there is according to Ga customary law a presumption that a house built by a member of a family upon family land is family property, or becomes so upon his death. He further held that the presumption had not been displaced, and we are of opinion that he was entitled to reach this conclusion upon the evidence. 2

No doubt both the trial and appellate courts were influenced by the fact that in the particular circumstances of this case some dwelling houses were torn down to enable the testator to erect the new building. However, it is equally clear that the decision was meant to establish the general proposition that a house built on family land becomes ipso facto family property.

In a subsequent case, Ansah v. Sackey,[3] the proposition was stated with greater clarity as a general one. Said Ollennu, J.:

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1. (1945) 11 W.A.C.A. 81.
2. Owoo v. Owoo, (1945) 11 W.A.C.A. 81, 86.
3. (1958) 3 W.A.L.R. 325.

> A building erected by a member of a family on bare family land, that is family land which has no family buildings on it, is property in which the builder has a definite life interest. The builder may deal with it in any way he likes except create an interest which can subsist after his life. Any interest he grants in it, unless created with the consent and concurrence of the head and principal members of the family, determines with his life, and the property becomes discharged from the incidents of the interest so created. The property then becomes family property not burdened with any incumbrances created by the builder during his lifetime. 1

With equal force it was also stated by the Land Court in Tetteh v. Anang that:

> The land is an ancestral property, therefore a member of the family who builds on it with his own money will have only a life interest in it, and nothing more; he cannot dispose of any interest in it which will extend beyond his life, and he cannot devise it under his will. 2

The general proposition in these cases is that, merely because the house is built on family land, the builder has no more than a life interest in it, as it is family property.

It is respectfully submitted that the judicial customary law, although it may be applicable to some Ghanaian societies, does not represent Ewe law. The decision of the West African Court of Appeal in Santeng v. Darkwa[3] which, however, was distinguished in Owoo v. Owoo, comes closer to the correct view of Ewe law. In Santeng v. Darkwa one of the issues before the court was whether a house erected on family land was a self-acquired property of the builder. The house in this case was

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1. Ansah v. Sackey, (1958) 3 W.A.L.R. 325, 329-330.
2. Tetteh v. Anang, Unreported, Land Court, Accra, 11th December, 1957.
3. (1940) 6 W.A.C.A. 52.

constructed on the ruins of a family house. The West African Court of Appeal held that it was not a family house because the simple fact that it stood on family land and on the ruins of a family house was not enough to brand it with the character of family property. It was said for the West African Court of Appeal that:

> No custom was proved that when a house is built on the site of the ruins of a family house it becomes family property, and I know of no such custom. The general rule is that which the learned trial Judge applied in the case of the other house, namely that if a house is built by the unaided efforts of the deceased and without using any family building materials, it is regarded as his self-acquired property and will pass under his will ... I can find no authority for the proposition that the mere using of the site brands the house with the stamp of family property; although, of course, the site on which the house is built remains family land. 1

This dictum was distinguished in Owoo v. Owoo on what appears to be a tenuous ground that in Owoo v. Owoo the new building was erected on a site obtained on the family land by demolishing existing buildings, whereas in Santeng v. Darkwa the new house was constructed on what was only the ruins of a family building. In both cases the essential fact seems to be that the building was erected by an individual person out of his own resources but on his family's land. That being so, so far as Ewe law is concerned, Santeng v. Darkwa is to be preferred. For, among the Ewe, a house built on family land is not a family property in any sense.

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1. Santeng v. Darkwa, (1940) 6 W.A.C.A. 52, 54-55.

The nature of Ewe town lands has already been explained.[1] We may re-state it briefly that, among the Ewe, citizens are not restricted to building on their own family lands within the township. Among the Ewe it is only in the case of farming that one is limited to the occupation of one's family lands. As regards town lands the position is that the paramount title to the lands is usually held by one or two families, or perhaps several of them, who release them for general occupation and settlement as a township. The vast majority of the citizens in any township, therefore, build their houses on lands to which their families do not hold the paramount title. This was illustrated in Thomas Kuma v. Yawo Akoto,[2] already discussed, when the family holding the paramount title to the town lands sought to restrict the building rights of a citizen who was not a member of that family. It is only a small proportion who build on their own family lands. Houses built by citizens who are non-members of the family holding the paramount title to the town lands belong absolutely to their builders, though the paramount title to the land itself remains vested in the family originally holding such title. It would be absurd to hold that, on the contrary, houses built by citizens who are members of the family holding the paramount title to town lands do not belong to the builders but to their families. If we were to

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1. See pp. 401-423 supra.

2. Supra.

apply the general rule of the judicial customary law as laid down in cases like Owoo v. Owoo,[1] Ansah v. Sackey[2] and Tetteh v. Anang,[3] an anomalous situation would result. In a typical Northern Ewe township there would be two categories of houses. Those houses built by citizens who are members of the family holding the paramount title to the town lands would be family properties on the strength of the decided cases, but those built by non-members of that family would be self-acquired properties of the builders, thereby placing the non-members of the land holding family in a more advantageous position. It is submitted that this is not Ewe law. Among the Northern Ewe, any house built by an individual on any land, on which he is entitled to build, belongs to that individual as his self-acquired property, whether the land in question is his own family's land or not. Similarly a farm cultivated on family land does not become a family farm. Indeed, while the land itself always remains family property, any development of family land by a member through his own exertions becomes a self-acquired property of that individual and is in no way branded with the character of family property. It is respectfully submitted, therefore, that, as applied to the Northern Ewe of Ghana, the decision in Owoo v. Owoo and other authorities to the effect that a house built on family land becomes family property is not good law.

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1. (1945) 11 W.A.C.A. 81.
2. (1958) 3 W.A.L.R. 325.
3. Unreported, Land Court, Accra, 16th December, 1957.

Property Built with Family Assistance

Among the Northern Ewe, property built with assistance from members of the family does not ipso facto become family property. Similarly family property is not created just because the individual who built it was assisted by the family, without more. In either case the property is a self-acquired property of the individual who benefits from such assistance, whether the assistance comes from some members of the family or from the family itself. It is an old form of mutual assistance among the Ewe that members of the family and other relations freely assist by direct labour, or donations of money or materials, when a member is building a house, cultivating a farm or executing any other worthwhile project out of his own resources. It is assistance given in fulfilment of the general moral obligation arising from the bonds of kinship and on the tacit understanding that there is a corresponding moral obligation on the person benefiting from such assistance to render similar assistance in return when others need it. It does not, however, mean that the property becomes family property in any sense. Among the Ewe, family property is created only if it is a corporate endeavour by the family as such, not by only some of its members, and with the unequivocal intention, whether express or implied, of instituting a family property.

The trend of judicial authority, however, is generally in the contrary direction. As a commencing point Redwar had stated a very general proposition as a doctrine of the customary law that

> ... even the slightest contribution of labour or materials in building a house by members of the deceased person's family gives these relatives a vested joint interest in the house as a family house. 1

This is a very sweeping proposition, inasmuch as it says emphatically that "even the slightest contribution of labour or materials" by some members of the family brands the property as family property. Pressed to its logical implications, even the contribution of a nail, a brick or a stone, or the casual supply of a head-load of sand, however slight a contribution, would convert the otherwise self-acquired property into family property. By this test there could hardly ever be a self-acquired property anywhere among the Northern Ewe; for it has always been of the nature of Ewe society that members of the family give all possible assistance to each other in building, farming and other endeavours. It is respectfully submitted that Redwar's proposition does not represent Ewe law.

There are, however, decided cases in which Redwar's proposition has been accorded judicial blessing that the contribution by members of the family in the building of the property automatically transforms the property into a family property. For

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1. H. Redwar, Comments on Some Ordinances of the Gold Coast Colony, 1909, p.35.

instance, in Mensah v. S.C.O.A.,[1] two brothers purchased a piece of land out of their own resources and title was conveyed to them by a deed of conveyance in English form as joint tenants. In the construction of a building on the said land, however, they received a small assistance from some members of their family. It was held by Ollennu, J., that, by virtue of the assistance given by some members of the family, the property had become a family property in which the acquirers had only a life interest. Hence it was held that on the death of the two brothers the building had become a family property which could not, therefore, be sold to satisfy a personal debt of one of the deceased brothers. In Ewe law also the property could not be sold or attached in execution to satisfy a personal debt of only one of the brothers; but the reason is not that it would be family property but because it would be a joint property of both brothers without a common law right of survivorship in the last of the brothers who died in indebtedness. In Ewe law, therefore, though arriving at the same conclusion, the reasoning of the learned Judge would be wrong insofar as, in refusing to allow the sale, he based himself on the ground that the property had become a family property simply because of the small assistance received from some members of the family. Mere assistance in such circumstances cannot create family property in Ewe law, unless there is to be inferred the intention to create a family property.

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1. (1958) 3 W.A.L.R. 336.

Reliance is also sometimes placed on Sarbah for the proposition that assistance from some members of the family converts an otherwise self-acquired property into a family property. Sarbah's words, however, do not directly state such a proposition. Sarbah limited himself to the definition of two types of "family property". According to him family property is property acquired "by the joint labour of two or more of the members of a family", or "by contributions from the members of a family".[1] Neither of these two modes of acquisition can be said to be based on mere assistance from some members of the family. A "joint labour" of some members of the family is certainly distinguishable from a casual assistance given to one member. Contributions from "the members of the family" seems to presuppose a general contribution by the family rather than occasional assistance given by only some members of the family. Sarbah indeed goes on to define one species of self-acquired property as that acquired by a person through his own exertions "without any help or assistance from his ancestral or family property".[2] This, however, should not be misinterpreted, as it seems to be, to mean that it ceases to be family property simply because some members of the family offer their assistance. What Sarbah seems to mean is that the property is no longer a self-acquired property if it was acquired with help from "family property", such as family funds or materials belonging to the

1. J.M. Sarbah, op.cit., p.60.
2. J.M. Sarbah, op.cit., p.60. Also at p.89.

family. His words, it is submitted, do not rule out from self-acquired property any occasional assistance by some members of the family who must be distinguished from the family as an entity. For, in any case, assistance by some members of the family is not the same as assistance by the family. The brevity of Sarbah's treatment of the subject may be partly responsible for the misinterpretation.

For example, the interpretation placed on Sarbah's words in Araba Tsetsewa v. Acquah[1] is that a property jointly acquired by three brothers was family property and not the self-acquired property of the contributors. In that case three brothers built several premises out of their own joint exertions, with only some minor assistance from some members of their family. The statement of Sarbah was endorsed and the West African Court of Appeal said:

> It has never, so far as we are aware, been suggested before this case that where two or more members of a family combine to acquire property, the property so acquired becomes the private joint property of the two or more and not family property. In our opinion the evidence adduced on behalf of the defendants is not sufficient to rebut the strong presumption in favour of 'family property' which is the rule among Fanti-speaking people. 2

Accordingly it was held that the property in Araba Tsetsewa v. Acquah was family property. If that case was correctly decided, then it is respectfully submitted that its application must be restricted to the Fanti to whom it relates. If Araba Tsetsewa

1. (1941) 7 W.A.C.A. 216.
2. Araba Tsetsewa v. Acquah, (1941) 7 W.A.C.A. 216, 221.

v. Acquah were an Ewe case, on the same facts the decision should be that the interest in the properties was jointly held as self-acquired by the contributing brothers. There is no presumption of family property in Ewe law where two or more members of a family combine to acquire property. The brothers would in such a case take the property with a joint interest in all of them. They would not, however, be joint tenants in the common law sense with a right of survivorship; consequently the last surviving brother could not validly dispose of the title to any of the properties by his will. Nevertheless they would not be family properties. In Ewe law, therefore, the successors to the rights in property of each of the three brothers would succeed to their interests per stirpes, all the successors of each brother counting as one.

Following Sarbah and Redwar, an equally strict attitude was adopted by the courts to the absolute interest in property in the construction of which even a small assistance was obtained from the family or family property was used. For example in Santeng v. Darkwa[1] the property was not held to be family property but only because the use of family property in its construction was not positively established. The West African Court of Appeal, however, did not fail to state the strict rule that:

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1. (1940) 6 W.A.C.A. 52.

> In the case of the store, if it had been proved that a single brick from the ruins of the former family house had been used by the deceased in building the store, the store would be family property. 1

Current judicial attitude, however, is changing and is becoming more conformable to the view of Ewe law. In Codjoe v. Kwatchey[2] the deceased had used wood, corrugated iron roofing sheets and a gate which had been removed from a demolished family house in building his own house. In addition he had received the sum of £100 from the family funds which either he directly utilised in the course of building the house or which was by way of assistance in trading, whereby he earned some profits which also went into the cost of the house. There is also the additional fact that a member of the family had lived in the house and had constructed a two-roomed swish building on the premises. On account of all these facts it was contended that the property was family property. The trial Judge rejected this contention and said:

> Is any assistance in money or in kind, however slight, sufficient to impress a block of buildings worth thousands of pounds, otherwise erected by a man entirely at his own expense and on a valuable land he himself has purchased, with the character of family property? Surely there must be some limit ... and I venture to suggest as such a limit, the proviso that the family's contribution, whether in money or in kind, must be a substantial contribution before this court will hold that the whole of the land and buildings in question in any case have been thereby impressed with the character of family property. What will amount to a substantial contribution must, of course, always be a question of fact depending on the particular circumstances of every case. 3

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1. Santeng v. Darkwa, (1940) 6 W.A.C.A. 52, 55.
2. (1935) 2 W.A.C.A. 371.
3. Quoted in Codjoe v. Kwatchey, (1935) 2 W.A.C.A. 371, 377.

Applying this criterion the trial Court held that the contributions from the family and members of the family were not sufficiently substantial for the property to be deemed to be family property. In the West African Court of Appeal, Kingdon, C.J., dissented from the test adopted by the learned trial Judge because it derogated from the strict rule enunciated by Redwar. The judgment itself, however, was affirmed and it is remarkable that all the members of the West African Court of Appeal concurred in the dictum of Webber, C.J., who said:

> Does the removal by a member of a family of a portion of the debris of demolished house stamp a property self-acquired by that member as family property? I say this is not the native law. 1

This is a significant departure from the strict dictum in Santeng v. Darkwa where it was stated that even the use of a single brick from the debris of the demolished family house would have been enough to brand the new house as family property. It is submitted that Codjoe v. Kwatchey is preferable because it accepts in principle the test of a substantial contribution from family resources. In Ewe law the use of such materials from a ruined family house would not convert the new house into a family property.

In the more recent case of Larbi v. Cato[2] when the problem arose again before the Land Court, Ollennu, J., significantly shifted in favour of the proposition that the new property would

1. Codjoe v. Kwatchey, (1935) 2 W.A.C.A. 371, 376.
2. (1959) G.L.R. 35.

not be deemed to be family property unless the contribution from the family or its members was substantial in relation to the cost of the property. In that case the deceased, a legal practitioner, had been educated with money from the proceeds of family property. Out of fees earned from his legal practice he erected a building on a piece of land purchased from his own resources. In erecting the building, however, he also utilised a small amount of money received by him as his personal share from the proceeds of family cocoa farms. It was contended that the building was family property. One reason for the contention was that he had partly used family money, received by him as a personal share, in constructing the building. This argument was rejected by Ollennu, J., who said:

> In my opinion, however, it would be repugnant and contrary to all principles of natural justice and good conscience to hold in modern days that where, for example, a man employs contractors to build on his land, the house so built would become family property simply because one member or another of the family occasionally visited the site of the work when it was in progress, and casually carried a pail of water, a piece of brick, or helped the contractors' labourers to lift a board or so. I should take the same view where a member of the family gave the member building on his own land some temporary financial assistance to an amount which was insignificant when considered in relation to the actual cost of the building. 1

An appeal against this decision was dismissed by the Ghana Court of Appeal and we may suppose, therefore, that the current judicial attitude has moved away from "the slightest contribution" test propounded by Redwar and applied in the earlier cases.

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1. Larbi v. Cato, (1959) G.L.R. 35, 37-38.

In the Court of Appeal an ingenious argument was urged on behalf of the family in Larbi v. Cato that, as the deceased had been educated mainly out of family funds, everything that was purchased or acquired by him by his own efforts and earnings as a legal practitioner assumed the character of a profit earned from the use of family funds. It was contended, therefore, that the house built from the earnings of his professional practice belonged, not to the deceased as his self-acquired property, but to the family. As would be expected this argument was flatly rejected by the Court of Appeal as an absurdity. It does, however, indicate the extent to which the issue can be pressed if it is to be presumed that contributions from some members of the family, without more, would transform into family property what would otherwise be regarded as self-acquired.

We may conclude this section by repeating that assistance given to an individual by some members of his family or the family itself, however substantial, cannot in Ewe law brand the property acquired with such assistance as family property. Such an assistance creates an obligation, moral or legal as may be inferred from the circumstances, on the beneficiary; but it does not affect the private nature of the property as self-acquired. Children, wives or husbands, brothers and sisters freely assist individuals among the Ewe, and so do other members of the family. Indeed such assistance is always expected in building a house and is often forthcoming in the cultivation of

farms. Such assistance, often unsolicited, is usually in the nature of direct free labour; occasionally it consists in a financial contribution or a loan. In all cases the property nevertheless remains a self-acquired property of the builder among the Ewe, regardless of whether the assistance was substantial or not. It does not even become a joint property of the builder and his benefactors, let alone family property. Were it otherwise many would reject even the most modest assistance offered freely and in good faith by members of their own families while welcoming the assistance of non-members, lest the property become family property against their wish. Perhaps the reason for this attitude of Ewe law lies in the fact that the notion of family property is not sufficiently developed among the Ewe. Apart from the ancestral family lands the presumption of Ewe law is in favour of individual property. There is, therefore, no presumption of family property in Ewe law arising from the fact of assistance given to an individual by the family or members of the family in building the property. In Ewe law family property is created only by a deliberate act with the necessary intention. It cannot be an inference from the mere operation of law based on the acceptance of family assistance; for otherwise assistance would cease to mean assistance and would become synonymous with collaboration.

Defence and Redemption of Family Property

Among the Northern Ewe of Ghana the defence or redemption of family property, even if undertaken unaided by a single member of the family, does not convert the property into a self-acquired property of that member. There is a joint and several responsibility on all members of the family to preserve, defend, maintain and redeem every item of family property. Restoring or defending property belonging to the family is, therefore, no more than a discharge of that general obligation and it does not affect the title of the family.

There are two capacities in which a person may expend his money or resources in the defence, preservation, restoration or redemption of property belonging to his family. He may be acting in the capacity of head of family or as an ordinary member of the family. In either case the defence or redemption of family property does not create title in the defender or redeemer. The property remains family property.

Defence of family property today mainly takes the form of litigating the family title. Among the Ewe the general practice is that, in litigating the title of the family to family lands, the member of the family who is in occupation of the spot in dispute bears the major part of the expenses, unless he obviously lacks the means. On many occasions such an individual is delegated by the head of the family to represent the family in the actual proceedings, as he is more likely to

know with greater precision and certainty the limits of the boundaries of the land. However, such an individual does not thereby assume the paramount title to the land as if it were his self-acquired property.

There is also a defence of family property if an individual pays off all or any balance outstanding on property purchased by the family. Even then the individual who pays such a family debt does not thereby acquire title to the property but only the dependent interest conferred on him by his membership of the family. As far as the redemption of family property is concerned, it seems that among the Ewe this is limited to the redemption of a pledged or mortgaged family property. If the property had been sold then there can hardly be a question of redemption because in Ewe law a sale is irrevocable. Redemption in such a case can, therefore, occur only if the purchaser consents to release the sold property to the vendor family upon a return of the purchase price. In all such cases the family, and not the person redeeming, regains the absolute title to the redeemed property.

The decided cases also hold generally that any family property defended or redeemed by a member of the family remains family property and does not become a self-acquired property of that member. In Bruce v. Adjah[1] it was contended that a family house had become a self-acquired property of the member who had

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1. (1921-1925) D.Ct. 192.

paid a family debt of £30 to recover it. The contention was rejected and it was held that the redemption was presumed to have been on behalf of the family and, therefore, that the house remained a family house. In another case, Akyirefe v. Paramount Stool of Breman-Esiam,[1] land originally belonging to the stool family was pledged. Later it was redeemed by a member of the family by paying the outstanding debt. The successors to the property of the individual member who had redeemed the land claimed it as a self-acquired property of the deceased. It was held by the West African Court of Appeal that on redemption the property still remained a stool family property. Similarly in Kwainoo v. Ampong,[2] when an individual member of the family redeemed family land which had been sold, it was held by the West African Court of Appeal that it did not become a self-acquired property of that member but resumed its original character of family property.

A case involving this principle which came before the courts from Gbi in the Northern Ewe area is Ahoklui v. Ahoklui.[3] In this case the parties were descended from the same grandfather but were not of the same father. The plaintiffs claimed the paramount title to the disputed land as the self-acquired property of their deceased father because, while in charge of the

1. (1951) 13 W.A.C.A. 331.
2. (1953) 14 W.A.C.A. 250.
3. Ahoklui v. Ahoklui, Unreported, Land Court, Accra, 1st June, 1959. Reproduced in N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.212.

land as head of family, their father had paid some money to the original vendors from whom the property had been purchased some generations earlier. The evidence in the trial Native Court was somewhat inconclusive as it was urged by the plaintiffs that that payment constituted the purchase of the land as a self-acquired property by their father. The Native Court, however, accepted that version of the story which suggested that the money paid by the plaintiffs' father was only a balance outstanding on the original purchase price. On these facts the appellate Land Court held that the property was family property and not the self-acquired property of the plaintiffs' father who had paid the balance of the money. As was said by Ollennu, J.:

> According to native custom any improvement which a successor makes on the family property under his control and any extension he makes to existing farms in the estate do not become his self-acquired property, they inure to the benefit of the family as a whole. [1]

The principle in Ahoklui v. Ahoklui conforms to that in another unreported decision of the same Judge in Boafo v. Staudt.[2] In Boafo v. Staudt the land to which the deceased had succeeded was originally sold by the Akanteng Stool but, on a fresh demarcation, part of the land was found to belong to the Asamankese Stool, whereupon the deceased had to pay £30 to the Asamankese

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1. Ibid., p.214.

2. Boafo v. Staudt, Unreported, Land Court, Accra, 17th February, 1958. Reproduced in N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.183.

Stool for that portion. For this and other reasons it was contended that the property had become a self-acquired property of the deceased. The Land Court rejected the contention and held that the property remained family property because the additional payment produced only a situation analogous to that of a family property under mortgage being redeemed by a member of the family with his own money.

The judicial attitude on the issue is largely the result of the influence of Sarbah. It does not appear, however, that the courts have noticed the direct manner in which Sarbah contradicts himself. First Sarbah says:

> If any property lost by the ancestor or any of his successors be recovered by a member of the family out of his own private resources, it is no longer considered as ancestral or family property, but is private property; unless such property had been recovered by the use of any part or portion of the ancestral or family patrimony; or it was acquired for the purpose of its forming part of the ancestral possessions, and this was made known to the members of the family. 1

About thirty pages later, however, he says:

> But where any land, lost by an ancestor or any of his successors, has been recovered by a member of the family out of his private resources, such land is considered to have been purchased for the family, and is not self-acquired property, unless the members of the family were made distinctly to understand at the time of the purchase that it will not resume its former condition as the ancestral property. 2

This latter statement, that family property recovered remains family property, is the principle applied by the Courts. In

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1. J.M. Sarbah, op.cit., p.60.
2. J.M. Sarbah, op.cit., p.89.

Kwainoo v. Ampong,[1] for instance, the family land had been sold. Later it was repurchased by another member of the family which had originally held the paramount title to it. After reciting this latter statement of Sarbah with approval, the West African Court of Appeal held that the repurchased property resumed the character of family property. If this was the implication intended by Sarbah in his latter statement, then we must with respect dissent from his view as applied to the Ewe. Among the Ewe, once property is effectively sold, whether it be family property or not, the vendor is divested of all title and the sale is irrevocable. If Kwainoo v. Ampong were an Ewe case, therefore, the starting point in the reasoning should be that the vendor family had no more title or interest in the property. Hence any member of that family who subsequently purchased the property would hold it as self-acquired. This proposition comes very close to the first contradictory statement of Sarbah. For it would become family property only if, though he was using his own resources, he re-purchased it in his capacity as a member of the family and because he was a member of the family.

We may elaborate the Ewe position thus. No individual person has the right to redeem for himself any property pledged or mortgaged by his family. For a third party or a stranger to the transaction cannot redeem property encumbered by a transaction to which he was not a party. Therefore, any person who

1. (1953) 14 W.A.C.A. 250.

undertakes to redeem his family's pledged or mortgaged property can only do so on behalf of the pledgor or mortgagor family. Consequently the redeemed family property remains family property on redemption, and does not belong to the individual who had redeemed it on behalf of the family. This reasoning is inapplicable if a member of the family purchases in his own right what was once family property but to which the family title had been effectively lost. It becomes family property only if the individual refunds the purchase price in his capacity as a member of the family, which implies the intention of restoring the property to the family.

If the family property had been lost in the sense that the family had been divested of its title by an outright sale or otherwise, then it is presumed that any member of the family who subsequently acquires the interest in that property by whatever process, in his own right and out of his own resources, becomes the holder of that interest in it as a self-acquired property. This is substantially the proposition in Sarbah's first statement.[1] If, however, the lost property is released to a member of the family, not only because of the consideration coming from him but also by virtue of his membership of the said family, then the released property automatically resumes its original character of family property. It is in that case a redemption or restoration of the property on behalf of the family.

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1. J.M. Sarbah, op.cit., p.60.

We have drawn a distinction between redemption of family property which had been encumbered but to which the family title had not been lost, and re-acquisition of what was once family property but the family title had been lost. In the case of the latter, that is where the family title had been lost, the presumption is that the acquisition is not for the family. In the case of the former, where the property was merely encumbered, we agree with Sarbah's second and more popularly known statement that it is presumed to retain its character of family property.[1] We do not agree with Sarbah, however, in saying that family property, which is merely encumbered but to which the family title had not been lost, can be redeemed by a member of the family on the understanding that the family consents that the redeemed property shall become a self-acquired property of that member. Perhaps the explanation for Sarbah's view is that among the Fanti and some other Akan this would not make much difference because, in any case, the property would eventually become family property on the death intestate of the member who had redeemed it. Such a proposition is not the law among the Ewe where the law of succession is such that a self-acquired property does not become family property even on the death intestate of the original acquirer.

Among the Ewe it is an irrebuttable presumption of law that any pledged or mortgaged family property redeemed by a

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1. J.M. Sarbah, op.cit., p.89.

member of the family remains a family property. It can hardly be otherwise, and it is difficult to imagine why the family should consent that an individual member may redeem a pledged or mortgaged family property for himself, so as to have the interest in it vested in himself as in the case of a self-acquired property. Such a concession would ignore the general responsibility of all members of the family to defend, preserve, maintain and restore every item of family property. More important, there is nothing to be gained by the family in allowing one of its members to redeem family property in order to acquire title to it as if self-acquired. In that case it is hardly different from selling the property to any willing purchaser, even if it is a sale by a decree of the court or under a power of sale. While the property remains encumbered with a customary law pledge, irrespective of the length of time, the family title is preserved because of the principle of perpetual redeemability.[1] Similarly the family title is not necessarily destroyed by other circumstances, such as a mortgage. It is to the disadvantage of the family if an individual assumes the absolute title to the property on redemption because in that case the family's right to redeem is effectively destroyed and its title determined. For these reasons the redemption of a mortgaged or a pledged family

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1. Agbo Kofi v. Addo Kofi, (1933) 1 W.AC.A. 284; Kuma v. Kofi, (1956) 1 W.A.L.R. 128; Dzanku v. Adza Kwadwo, (1960) G.L.R. 31.

property is deemed in Ewe law to be a redemption by and on behalf of the family and the property remains a family property.

In Ewe law, however, an individual who redeems family property out of his own resources has the prior right of user. He thus creates in himself an interest which is dependent on and inferior to the paramount title of his family. In the case of land, the main type of family property among the Ewe, this has practical consequences to the benefit of such an individual. Once the redeemer goes into occupation of the redeemed land, he also enjoys the accompanying right of re-occupying the fallow land or afuu. The right of re-occupation of afuu or fallow land, as we have seen, is self-perpetuating.[1] The right, furthermore, devolves on children and successors. In effect, therefore, the land will remain tied to the lineal descendants of the individual member who redeemed it. The paramount title to the property, however, remains vested in the family just as in the case of any other family property. It follows that, while the individual has the dependent interest in the nature of a right of occupation and user, he cannot make any inter vivos or testamentary disposition affecting the paramount title to the property. Like any other family property only the family can alienate the paramount title to it. Being a dependent interest in family property, the interest is not

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1. See pp.322-324 supra.

alienable to a non-member of the family; it may be transferred inter vivos and gratis to another member of the family, or else it devolves on the successors automatically on death. These limitations show that the property remains family property.

CHAPTER VIII

ALIENATION OF FAMILY PROPERTY

The Capacity to Alienate Family Property

A preliminary question, perhaps rather theoretical, is whether, if "land belongs to a vast family of which many are dead, few are living and countless members are yet unborn", a few of the few who are living possess the capacity to alienate the interest not only of themselves and their contemporaries but also of the dead and the unborn. Danquah espouses the cause of the dead and the unborn when he says:

> An absolute sale of land was, therefore, not simply a question of alienation of realty; notoriously it was a case of selling a spiritual heritage for a mess of pottage, a veritable betrayal of ancestral trust, an undoing of the hope of posterity. 1

Yet the theoretical problem remains unsolved. As far as the dead are concerned, although their continued membership of the family may be regarded as sentimental rather than real, the fear of their wrath is a considerable inhibiting factor in the

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1. J.B. Danquah, Akan Laws and Customs, Routledge, London, 1928, p.212.

way of the misuse or mismanagement of family property. There is always the fear that careless dissipation of family property may bring death to those responsible, as the deceased ancestors may, in their anger, summon the guilty persons to account before them for their misdeeds. Nevertheless the living get round the problem by assuming, like the Biblical Peter and his successors, that whatever is bound or unbound on earth is also bound or unbound by those silenced by death. It has been enough, therefore, merely to notify the dead by communicating with them through the pouring of libation and, at times, by the slaughter of a sheep. As for those yet unborn their consent is presumed. The assumption is that, even if those yet unborn were to be born at the material time, they would be junior members on whose behalf it would be enough that the principal members of the family gave their consent. For, even as regards those living, if they are still young or have not attained the position of a "principal member", their consent is presumed once the principal members of the family signify their consent and concurrence.

This may not be a satisfactory legal explanation for the assumption by the head and principal members of a family of the right and authority to alienate the family title to land, or any other family property for that matter. But it is a practical way to avoid being inhibited by the unexpressed and inexpressible wishes of the dead and those still unborn.

Having disposed of that preliminary question, the next one is whether any special reasons must exist for the valid sale

or alienation of the family title to family land or other family property. The answer in Ewe law is that alienation of family property, where such alienation is permissible by the law, is not conditional on the existence of any special circumstances or reasons. It is enough that the family, through its appropriate organ, authorises the alienation. Accordingly, the existence of a family debt is not a pre-condition for the valid alienation of family property in Ewe law. When the question was raised before Jackson, J., in Golightly v. Ashrifi,[1] his answer was that stool lands could not be sold outright except for the purpose of satisfying a stool debt. Although the learned trial Judge said that he had evidence before him which justified such a conclusion, it is more probable that he misinterpreted the evidence of the natural reluctance to alienate stool or family property, except in the special circumstances of a pressing debt or other financial obligation. Such reluctance to alienate stool or family property does not, however, mean that the existence of a stool debt is a necessary condition for a valid sale of stool land or that family land or family property cannot be sold except to satisfy a family debt. In any case the West African Court of Appeal properly set the matter at rest when it rejected that finding of Jackson, J., and proceeded to state in clear words that:

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1. (1955) 14 W.A.C.A. 676.

> In our opinion the existence of a stool debt was not at the times material to this inquiry a necessary preliminary condition to the sale of stool land. 1

Among the Ewe, therefore, in the areas where land is saleable, the non-existence of a family debt cannot, indeed no other condition can, vitiate an otherwise valid alienation of title to family land or family property. Otherwise a good reason may be found in Eweland for invalidating many of such transactions which are nothing but the result of mercenary irresponsibility and culpable disregard for the interests of the succeeding generations. However morally reprehensible such careless dissipation of family property may be, it cannot affect the legal validity of the alienation itself of family land or other family property.

Our next question is who may validly alienate property, especially land. The answer depends on the type of land or property with which we are concerned, that is whether it is the self-acquired property of an individual person or a family property, stool property or communal property.

An individual is fully competent to alienate property self-acquired by him. Today an individual person may acquire the paramount interest in land either through a personal gift to him or by purchasing it solely with his own resources. Such land is not family or stool land but individual private property. The individual is, therefore, capable of alienating his title

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1. Golightly v. Ashrifi, (1955) 14 W.A.C.A. 676, 681.

to such self-acquired property without reference to any other person or his family. For, as Ollennu, J., put it in Adjabeng v. Kwabla, when a son sought to impugn the sale of land previously purchased by his father with a small assistance from the son,

> By customary law a person is entitled to alienate his self-acquired property by way of sale or gift without the necessity of members of his family concurring in it ... All that customary law requires (to make an alienation of self-acquired property valid) is publicity. 1

Different considerations, however, apply in the cases of the sale of family property, stool property or communal property among the Ewe. As regards family property, the generally accepted rule in Ghana applies also among the Ewe that only the head of the family, acting with the authority of the principal elders of the family, can validly alienate title to such property.[2] Among the Northern Ewe, however, such family property in the main consists of family land.

The capacity to alienate title to Ewe-type stool lands[3] is not the same as for stool lands generally in Ghana and depends on the type of stool land. The general rule in Ghana is that only the occupant of the stool may, with the consent and concurrence of the principal councillors, alienate stool property.[4]

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1. Adjabeng v. Kwabla, (1960) G.L.R. 37, 40.
2. Agbloe v. Sappor, (1947) 12 W.A.C.A. 187; Nelson v. Nelson, (1951) 13 W.A.C.A. 238; Bassil v. Honger, (1954) 14 W.A.C.A. 569; Manko v. Bonsu, (1936) 3 W.A.C.A. 52.
3. For a description of Ewe-type stool lands, see pp.359-383 supra.
4. Allottey v. Abrahams, (1957) 3 W.A.L.R. 280.

As regards the Ewe-type stool lands, if it is in fact land only recently earmarked for the purposes of the stool, then it falls to be treated essentially as family land of the stool family. In that case only the head of the stool family, acting on the authority of the chief and the principal members of the stool family, can alienate title to the land. It is not necessary in this case to obtain the consent of those councillors of the stool who are not members of the stool family. It should be further noted that, as a general rule among the Ewe, the chief is not at the same time the head of the stool family; for chieftancy affairs are strictly distinguished from family affairs. In the transaction, therefore, the chief is in the somewhat anomalous position of an "elder", though more than an ordinary "elder" since his consent is vital because of the attachment of the land to the stool.

The Ewe-type stool land of ancestral origin is land which had been attached to the stool from time immemorial. As already pointed out, the derivative theory of stool lands is inapplicable among the Northern Ewe of Ghana. For each stool, whether a head stool or a sub-stool of whatever status, directly but competently holds the paramount interest in its stool lands. Therefore, the sub-stool does not require the approval of its head stool to alienate its interest in its stool lands. Conversely the head stool's paramount title is not qualified, burdened or encumbered by any sub-paramount interest of the

subordinate stools. Therefore, the head stool can also directly alienate its paramount title without the consent of, or even a reference to, any sub-stool. Having said this, however, it should be pointed out that the occupant of the stool is not the proper person to convey title to such Ewe-type stool lands. Such Ewe-type stool lands of ancestral origin are regarded as property of the stool and not of the chief. And the stool, as we have explained earlier, belongs to the zikpuito or kpukpoto, meaning "owner of the stool", who is generally known as the "stool-father".[1] The proper person in Ewe law who can alienate title to such ancestral Ewe-type stool lands is, therefore, the kpukpoto or stool-father; but he can only do so validly with the authority of the stool, that is with the authority of the chief and the principal councillors of the stool. The same provision applies to the alienation of any other item of stool property, except stool lands which are indeed stool family lands only recently earmarked for the purposes of the stool. Strictly speaking, the chief is here regarded as a "councillor" of the stool which is owned by the kpukpoto or stool-father. Yet the chief is more than an ordinary councillor because his consent is inescapably necessary to the validity of the alienation.

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1. The office of "stool-father" has already been briefly discussed in pp.74-75 supra.

Today, as a result of the reception of Akan ideas and the insistence of lawyers, the Ewe chiefs are arrogating to themselves the right to convey title to such stool property; but the change has not yet crystallised into a new rule of customary law. In Anfoega, for instance, the Fiaga and his elders stated that it was still the rule that only the stool-father or kpukpoto who, with the necessary authorisation, could convey title to stool property. In Kpando a recent example was given that when Togbe Dzeke, formerly chief of Kpando-Dzigbe, wanted a part of the stool lands to be sold, it was his stool-father who effected the sale and conveyed the title. Whether the old rule will survive for long, however, cannot be confidently predicted.

Communal lands, as we have explained, are those lands to which the paramount title is not held by either the stool or any family, but which are contained within the territorial boundaries of the chiefdom and to which every subject has a right of user.[1] The proper person to convey title to such communal lands is the divisional chief acting on the authority of his principal councillors. It is suggested in many areas that such a conveyance by the divisional chief requires the approval of the head chief, but this is doubtful.

In all the above cases we have suggested that, whoever conveys title, the conveyance must, in order to be valid, be

1. Communal lands are discussed in pp.384-401 supra.

with the authority of the principal councillors of the stool or the principal elders of the family as the case may be. This is the body of persons that Bentsi-Enchill would call the "management committee" of the family or of the stool.[1] The expression is hardly well-chosen. The idea of a committee pre-supposes that it is a committee of a larger group. In actual fact, however, the family head and his elders constitute the governing body of the family. They are not the agents of any principal but constitute the expression of the legal personality of the family. For that reason their decision is not subject to the ratification of the entire membership of the family. In fact even if the head of the family and the principal members, who numerically constitute only a small minority of the members, alienate title to family property in an irresponsible manner, there is no process by which the unanimous decision of the members, the great majority, can invalidate the alienation.

A further objection is that the "management committee" analogy imports the undertones of a board of directors of a company or other statutory body. Even such a faint suggestion can create problems for the efficient functioning of the family as a unit. For instance in Lartey v. Mensah,[2] Ollennu, J.,

1. K. Bentsi-Enchill, op.cit., pp.57-59, et passim.
2. (1958) 3 W.A.L.R. 410, 411-412.

virtually treated a family meeting as if it were a meeting of a board of directors of a statutory company, with requirements as to adequate notice, publication of agenda and quorum. To regard a head of family and his elders as a "management committee" may lead to the importation of rigid rules which are not known in that form to the customary law. For that body is not a "management committee" or a board of directors of a company, with any rules as to adequate notice, quorum, advance publication of agenda or matters of that nature. Generally all the principal elders of the family must be notified to attend the meeting and a substantial consensus, not a bare majority, is necessary before any important action is taken, such as alienation of title to immovable family property. If such a consensus cannot be obtained, the proposal is regarded as having been rejected. But, as pointed out in Ennin v. Prah, the absence of a few members cannot invalidate their action, for

> A member of a family who goes abroad does not, and cannot, expect family life to come to a stand-still whilst he is away. The rest of the family carry on without him, until he comes back to take his full share in the life of the family. 1

It is the same when a principal member of the family is, for any other cause, unable or unwilling to participate in the deliberations of the family.[2] That Bentsi-Enchill has in mind

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1. Ennin v. Prah, (1959) G.L.R. 44, 47.
2. Welbeck v. Captan, (1956) 2 W.A.L.R. 47.

the type of "management committee" of a statutory company is manifest from his other suggestion, not only that every succeeding head of family should obtain recognition or authority from the court, but also that all members of this "committee" should be registered and the list reviewed from time to time.[1] These are suggestions which would transform the body into a different one from that known to the customary law.

It is submitted that it is not necessary to devise any special terminology for referring to the head of the family acting with the principal members of the family. There has been no real inconvenience in referring to the group, as it is now, as the head of family and the principal members of the family. If we are pressed to find a name, perhaps the nearest to the customary law conception of the group is "governing body", which in fact the head and principal members of the family are.

Irregular Alienation: Void or Voidable?

Having determined the appropriate body of persons who can validly alienate interests in stool or family property, the next issue is whether any purported alienation is void or merely voidable when that body is not properly constituted.

1. K. Bentsi-Enchill, op.cit., p.59.

In Ewe law any purported alienation of family or stool property, if irregular, is totally void and not just voidable. Judicial authority, however, suggests that the answer depends on the nature of the irregularity in the composition of the body.

Any single individual, being not the head of the family or occupant of the stool, is incompetent to alienate the paramount title to stool or family property and, therefore, cannot convey it. Any such purported alienation of the family title or stool title by the individual, whether by way of gift or sale, is null and void. As Ollennu, J., stated in Ohimen v. Adjei:

> By native custom it is only the head, acting with the necessary consent, who can bind the family. It would be chaotic if any member could compromise the portion of the family by any act which, while benefiting him personally, was detrimental to the interest of the family as a whole. 1

Such alienation is, therefore, void and not merely voidable. For, as Coker puts it:

> It is an essential characteristic of a family property that it should exist for the benefit not of any individual or member, but of the family as a whole. 2

The next possible situation is where the elders alone, without the head of the family or the occupant of the stool, purport to alienate title to family or stool property. All the authorities are agreed that such a purported alienation

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1. Ohimen v. Adjei, (1957) 2 W.A.L.R. 276, 280.
2. G.B.A. Coker, Family Property Among the Yorubas, 1966, p.61. Also Ollennu, J., says the same in Ohimen v. Adjei, supra.

is not merely voidable but void ab initio and of no effect.

Sarbah states the view quite clearly that:

> 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. 1

Ollennu expresses it more forcefully that:

> The one indispensable person in the alienation of stool or skin land is the occupant of the stool or of the skin, and the one indispensable person in the alienation of family land is the head of the family. 2

In Agbloe v. Sappor[3] the competent body for the alienation of interests in family property consisted of the head of the family and five other principal members. Four of the five principal members, without the head of the family, purported to convey title to the family land by a deed of conveyance. If the family had met, this would have been a majority of 4 to 2 in favour of the alienation. The West African Court of Appeal, however, held that the purported conveyance was void ab initio. It said:

> In the first place we can find no authority for the statement that the principal members of the family can give any title in a conveyance of family land without the head of the family joining in the conveyance, even though he may be in agreement.... The head of the family may be considered to be in an analogous position to a trustee, from which it follows that it is quite impossible for land to be legally transferred and legal title given without his consent. The alleged deed, Exhibit 'B', was therefore void ab initio, and the Respondents derive no right to absolute ownership by virtue thereof. 4

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1. J.M. Sarbah, op.cit., p.79.
2. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.127.
3. (1947) 12 W.A.C.A. 187.
4. Agbloe v. Sappor, (1947) 12 W.A.C.A. 187, 189.

The above dictum of Harragin, C.J., in the West African Court of Appeal may be criticised for regarding the head of a family as a trustee, which would lead to the erroneous supposition that the legal title to family property is vested in the head of family. Nevertheless, such a criticism does not affect the fundamental proposition that, without the head of the family, any purported conveyance of title by the principal members of the family, even if by a clear majority of them, is void ab initio.

The other position is where the head of the family, or occupant of the stool, acting with the consent and concurrence of only a minority of the principal members or councillors, purports to alienate any interest in family or stool property. In Bassil v. Honger[1] the West African Court of Appeal held that a lease granted by the head of the family with the concurrence of only some, but not all, of the principal members of the family was "not valid as against the ... other principal members of the family" and, to make it clearer, that it was "of no effect as a lease". This, it is submitted, means that such a lease was void ab initio and not merely voidable. Ollennu was counsel for the respondents who, in Bassil v. Honger, succeeded in obtaining ~~with~~ the declaration that the lease granted by the head of the family, with only some principal members of the family concurring, was "of no effect as a lease".

1. (1954) 14 W.A.C.A. 569.

However, Ollennu seems to take a different view now and he says that such an alienation is not void ab initio but is only voidable at the instance of the family if the family act "timeously" to set it aside. As Ollennu puts it:

> An alienation of stool or family land which on the face of it purports to have been made by the occupant of the stool or the head of the family acting with the consent and concurrence of the principal elders, and with that consent and concurrence evidenced by at least one principal member of the family (e.g. a holder of traditional office like a linguist) is not void, but is voidable; that is to say, it is valid until it is declared void by a court of competent jurisdiction, at the suit of the family. But in order that the court may interfere, the family must act timeously, i.e. they should institute the proceedings for the avoidance of the transaction without undue delay so that the purchaser may be restored to the position he was in before the sale. In such a suit the onus is upon the family to prove that in fact no consent of the principal elders was obtained. 1

For this statement Ollennu relies on cases like Manko v. Bonso,[2] Bassil v. Honger,[3] Owiredu v. Moshie,[4] Allottey v. Abrahams,[5] Mensah v. Ghana Commercial Bank[6] and Quarm v. Yankah.[7]

Of all these cases, however, it is only in Quarm v. Yankah that there is some support for Ollennu's proposition of voidability. The case of Manko v. Bonso is not one of a sale by the head of the family with at least one other principal member concurring in it, but by the head alone. It does not, therefore, support the present proposition of Ollennu. Indeed it would

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.128.
2. (1936) 3 W.A.C.A. 62.
3. (1954) 14 W.A.C.A. 569.
4. (1952) 14 W.A.C.A. 11.
5. (1957) 3 W.A.L.R. 280.
6. (1957) 3 W.A.L.R. 123.
7. (1930) 1 W.A.C.A. 80.

appear that, in any case, Ollennu would not endorse that decision inasmuch as, in that case, a purported alienation of family property by the head of family alone was held to be not void but voidable, thus barring the intervention of the family by laches amounting to acquiescence. For Ollennu himself disagrees with the decision in Manko v. Bonso when he says that any alienation by a head of family alone or the occupant of a stool alone is void ab initio and not merely voidable.[1]

The decision in Bassil v. Honger also does not support Ollennu's proposition. For, on the contrary, the West African Court of Appeal held in that case that a lease granted of family property by the head of the family with the consent and concurrence of only a minority of the principal members of the family, more than one of them, was "of no effect as a lease". A purported lease which is "of no effect as a lease" is not merely voidable but void ab initio. Thus, while Ollennu contends that the consent of at least one principal member would leave the alienation voidable, the decision in Bassil v. Honger is that even if more than one of them consent, yet the transaction will not be merely voidable but void ab initio if those consenting are in the minority. Similarly, in Owiredu v. Moshie, the West African Court of Appeal, contrary to Ollennu's view, held that a lease granted by a chief was void

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.127-128.

because the chief did so with the consent of only three of his councillors and also because the superior stool's approval was lacking.

It is true that in Allottey v. Abrahams and Mensah v. Ghana Commercial Bank, both of which were decided by Ollennu, J., it was stated that a deed executed by the stool occupant or head of family and a linguist or other principal elder of the stool or family is only voidable and not void. However, in each of these cases the statement was not necessary for the determination of the issues before the court and must be regarded as an obiter dictum. In Allottey v. Abrahams it was the case of a deed executed by the stool occupant and the senior linguist and signed also by about five other principal elders and the reason why the deed was not set aside was that:

> The recital in the document that it was executed with the knowledge, consent and concurrence of the principal elders of the Sempe stool, but that it is only some of such elders and the linguist who signed and marked the document to evidence such knowledge, consent and concurrence of all the principal elders, has not been refuted. On the contrary, that recital is confirmed by the evidence of the linguist ... who deposed that although he, a linguist, and other elders were present at the execution and consented and concurred in it, yet they did not sign the document. 1

In that case, therefore, although all the elders did not actually sign the deed, the necessary authorisation was proved to have been given.

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1. Allottey v. Abrahams, (1957) 3 W.A.L.R. 280, 287.

In Mensah v. Ghana Commercial Bank, the real reason why the document was set aside was that there was not a sufficient proof that it had in fact been signed by the chief himself and that, even if so signed, there was a Government Gazette notice to the effect that the alleged signatory had ceased to be a chief at the time of the execution of the document.[1] The reason here, therefore, was not that the deed had been signed by only the chief and his linguist, but that the proper occupant of the stool, "the one indispensable person", had not signed the deed.

We now come to Quarm v. Yankah, the only authority with some apparent support for Ollennu's proposition. In that case the West African Court of Appeal referred to Sarbah's exposition that

> A person who desires to procure a grant of land or any concession from a local ruler, should make special inquiries and inform himself who the members of his council are, and get them or the linguist of the Council to join the head chief in making such grant. 2

By construing disjunctively the requirements of consent by the elders or by the linguist, the West African Court of Appeal held that the consent of the linguist alone was enough in lieu of the consent of the principal elders. It said:

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1. Mensah v. Ghana Commercial Bank, (1957) 3 W.A.L.R. 123, 129.
2. J.M. Sarbah, op.cit., p.67.

> It is clear, therefore, that in the opinion of the learned author it is sufficient for the linguist of the Council alone to sign in lieu of the elders and councillors in order to bind the stool - a rule that appears to me so useful and reasonable that I think this Court should, even if there was no good authority for it, lay it down so as to put an end to uncertainty that seems to be prevalent in this matter. 1

The West African Court of Appeal then proceeded to compare the chief and his linguist to the chairman and secretary of an English corporation and drew the analogical conclusion that the two of them should be able to bind the stool in much the same way that a company can be bound by its chairman and secretary. What the Court meant here was not merely to regard an alienation by only the chief and his linguist as simply voidable as Ollennu urges. The Court thought that such alienation should be absolutely binding in the same way that a deed executed by the chairman and secretary could validly bind their company in English law. This goes further than Ollennu's own proposition that such an alienation is merely voidable and it is almost certain that Ollennu himself would not accept it. In any case it is clear that the West African Court of Appeal did not consider Sarbah's work as a whole, for the same author has also said:

> The head of the family cannot, without the consent of all the principal members of the family, or the greater part thereof ... alienate the immovable ancestral or family property. 2

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1. Quarm v. Yankah, (1930) 1 W.A.C.A. 80, 83-84.
2. J.M. Sarbah, op.cit., p.78.

It is to be remarked that Quarm v. Yankah has not been followed in declaring as valid any alienation by only a stool occupant and his linguist. The trend, on the contrary, has been to declare invalid the alienations which have the approval of even a minority of other elders in addition to the chief and his linguist.[1] Indeed Quarm v. Yankah seems to have stood alone until the obiter dicta of Ollennu, J., in Allottey v. Abrahams and Mensah v. Ghana Commercial Bank. It is to be hoped that the rule stated in Quarm v. Yankah will not be followed by the Courts. In any case the actual facts of that case were that the deed in that case was not signed by only the chief and his linguist but also by three other councillors. This could well be the reason why the Court was anxious, perhaps over-anxious, to save the transaction and proceeded to lay down such a wide rule.

On the strength of the authorities, therefore, it is submitted that the better view is that alienation by the head of the family or the occupant of the stool, together with only a minority of his elders or councillors, is not just voidable but void ab initio. The cases in which this was the main issue to be decided are Bassil v. Honger, Owiredu v. Moshie and Quarm v. Yankah. In the first two the alienation was declared to be void. It was only in Quarm v. Yankah that it was decided that the alienation was only voidable and not void. As Quarm v. Yankah was decided earlier than the other cases, it would

1. e.g. Bassil v. Honger, supra, and Owiredu v. Moshie, supra.

probably have been followed if it were good law; but it has not been followed. It is submitted, therefore, that the proposition in that case is not good law.

The last possibility is where a head of family alone alienates title to family property. It would seem logical that, as title to family property does not vest in its head alone, he alone should not be competent to alienate such title. The decisions on this point, however, are surprisingly conflicting. In Awortchie v. Eshon[1] when family property was sold by the head of the family without the authority of the principal members of the family, the sale was set aside as void. Then later in Gaisiwa v. Akraba,[2] when the head of family sold family property for the perfectly legitimate purpose of defraying the expenses incurred in family litigation, the sale was set aside as void because it was effected without the knowledge, and therefore without the authority, of the principal members of the family. Also in Nelson v. Nelson[3] where, because of an English form of conveyance to him as head of family, the head alone sold the property, it was held to be null and void because the sale was without the consent of the appellants who were the principal members of the family entitled to the property.

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1. (1872) Sar. F.C.L. 170.
2. (1896) Sar. F.L.R. 94.
3. (1951) 13 W.A.C.A. 248.

Ollennu also supports the law set out in these decisions that alienation of family property by the head of the family alone is void. Having stated that the stool occupant or head of family is indispensable to the valid alienation of stool or family property, he says:

> But the occupant of the stool or skin alone, or the head of the family alone, is incapable of making a valid alienation of stool or family land. Any conveyance made by the occupant of the stool alone, or by the head of the family alone, is null and void ab initio. 1

This is also the view of Bentsi-Enchill.[2]

However, there are some decisions which point in a different direction. For instance, in Bayaidee v. Mensah,[3] stool land was sold by the occupant of the stool alone. At the time of the transaction a member of the stool family had warned the purchaser of the family character of the property; but the purchaser chose to ignore this warning and the sale was concluded. Instead of setting the sale aside as void, the court confirmed it and said:

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

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.127-128.
2. K. Bentsi-Enchill, op.cit., pp.50-59.
3. (1878) Ren. 45; (1878) Sar. F.C.L. 171.

> We are of opinion that whatever right of impeaching the sale the family possessed is barred by their acquiescence and the plaintiff's continued course of undisturbed possession. 1

Then in Insilhea v. Simmons[2] the principle in Bayaidee v. Mensah was upheld but, because the purchaser himself, by his conduct, had realised that the title conveyed to him by the head of the family alone was doubtful, the sale was set aside.

It was in Manko v. Bonso[3] that the principle of Bayaidee v. Mensah was fully applied. In that case the head of family alone had sold family land in about 1885 without the knowledge, consent or concurrence of the other members of the family. After over 45 years, the validity of the sale was called in question. The West African Court of Appeal held that, on the principle in Bayaidee v. Mensah, the sale of 1885 by the head of the family acting alone was not void but only voidable. Hence, as the family had been guilty of laches because of the long intervention of time, the sale was not set aside. Thereafter, in Kwan v. Nyieni,[4] the Ghana Court of Appeal stated that such an irregular alienation by a head of family alone is to be regarded as voidable, though on the facts of that case the alienation was declared null and void because the family was not guilty of acquiescence by laches.

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1. Bayaidee v. Mensah (1878) Ren. 45, 46; (1878) Sar. F.C.L. 171.
2. (1899) Sar. F.L.R. 105.
3. (1936) 3 W.A.C.A. 62.
4. (1959) G.L.R. 67.

The authorities are in apparent conflict and confusion. In a case like Bassil v. Honger the lease was set aside because it was executed by the head of the family acting with the consent of only a minority of the principal elders. And in Owiredu v. Moshie it was held to be void because the chief acted with only a minority of his councillors. It is, therefore, difficult to justify the principle on which the stool occupant alone, or the head of a family alone, can bind the stool or the family as in Bayaidee v. Mensah and the cases following it. It is submitted that as a matter of principle the law in Bayaidee v. Mensah is not good law and that where the head of family acts alone in alienating title to family property then such purported alienation is null and void ab initio.

In any case it should be stated that Ewe law does not recognise "voidable" alienation of property. The concept of a legal transaction hanging mid-way between validity and invalidity until the intervention of other factors is unknown to Ewe law. In that system of law, if the alienation is duly effected it is valid. If it is an irregular alienation vitiated by the lack of the requisite authority or otherwise, then it is void ab initio and the defect is incurable. The only way out of such a void alienation is to enter into a fresh contract with the proper persons, though perhaps on identical or the same terms and possibly with any previous payments being credited to the purchaser. It is presumably so also with the customary laws of some other communities in Ghana.

If the notion of a "voidable" alienation of family or stool property is unknown to the customary law, where can we look for its origin? The answer is that it is an equitable rule developed by the Ghanaian courts to save invalid transactions in which it appears to the Court that the equities are on the side of the purchaser. Bossman, J., describes it as "equitable rules administered by the Supreme Court" to modify the customary law.[1] For instance in Bayaidee v. Mensah[2] the validity of the alleged purchase was not challenged until over 14 years later. In Manko v. Bonso[3] the sale had been effected for over 45 years and the property had changed hands several times. It would certainly have resulted in considerable hardship to the purchasers and those claiming title through them if such transactions were nullified. Instead of stating that the transaction in such cases is itself void, but that the rights and title it purports to convey are recognised by the intervention of equity, the proposition is stated that the sale itself is not void but only voidable when irregularly effected. It is submitted that Ollennu, J., came nearer the correct position when he explained in Ohimen v. Adjei[4] that equity will not permit the true owner afterwards to recover possession of the land if that owner sits by and allows another

1. Ennin v. Prah, (1959) G.L.R. 44, 48.
2. (1878) Ren. 45, 46; (1878) Sar. F.C.L. 171.
3. (1936) 3 W.A.C.A. 62.
4. (1957) 2 W.A.L.R. 275.

person to improve his land in the honest, though erroneous, belief of title. The principle of the decisions upholding voidability is, therefore, defeasance of title by laches amounting to acquiescence on the part of the family. This principle of estoppel by laches was enunciated in Abbey v. Ollennu[1] by the West African Court of Appeal, applying the dictum of Fry, J., in Willmot v. Barber.[2]

If the underlying rationale of the decisions supporting the principle of the voidability of irregular alienation of stool or family property is the equitable doctrine of laches, then this principle is in conflict with another rule of customary law that there are no prescriptive rights in Ghana. The non-existence of prescriptive rights in Ghana means that the long possession of land cannot by itself mature into absolute title if title cannot otherwise be established.[3] In applying the equitable doctrine of acquiescence by laches, adopting the dictum in Willmot v. Barber,[4] the West African Court of Appeal significantly failed to discuss the implications of applying that doctrine to communities in which there is no recognition of prescriptive rights. It is submitted that, unless the doctrine of acquiescence by laches is trimmed to very limited proportions, its practical effect would be the introduction of a variant of prescriptive rights

1. (1954) 14 W.A.C.A. 567.
2. (1880) 15 Ch. D. 96, 105-106.
3. See, e.g. Kuma v. Kuma, (1936) 5 W.A.C.A. 4, 7, 9; Ado v. Wusu, (1940) 6 W.A.C.A. 24, 25; and Ohimen v. Adjei, (1957) 2 W.A.L.R. 275, 279.
4. Supra.

in a different guise. When Ollennu, J., grappled with the problem of the conflict of these principles in Ohimen v. Adjei[1] he found himself on the horns of a dilemma and almost contradicted himself. For, after stating that "undisturbed possession of land by a stranger for however long a time cannot ripen into ownership", he proceeded to say that, if the true title holder was guilty of laches amounting to fraud, yet "not that the stranger acquires title to it, though in actual fact he does thereby acquire title to the land."[2] It is submitted that, if "in actual fact he does thereby acquire title", then in law the stranger has acquired title to the land. In confirming the title of an irregular alienee, however, even these verbal distinctions are ignored and the title is deemed to be a valid one. This knocks at the very root of the principle of the non-existence of prescriptive rights in Ghana.

The problem here is to balance the interests of the purchaser against those of the family, both of whom have been defrauded by the unauthorised vendor. In doing this the courts seem to be inclined to protect the vendor who has spent his money. But where indeed do the equities lie? As Kingdon, C.J., put it in the Nigerian case of Adebubu v. Makanjuola, stressing the necessity of the authorisation of the family to the valid alienation of title to family land:

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1. (1957) 2 W.A.L.R. 275.
2. Ohimen v. Adjei, (1957) 2 W.A.L.R. 275, 279.

> The native law and custom throughout West Africa in regard to the alienation of family land quite naturally has as its basis the interests of the family and not the interest of strangers who may wish to acquire family land. 1

The interest of the family was similarly recognised as paramount by Ollennu, J., in Mensah v. Ghana Commercial Bank.[2] It should, therefore, be the policy of the law to protect the family by leaning in favour of family and stool titles. This cannot be achieved when, as in Bayaidee v. Mensah, it is held that the family can only recover the property

> provided they avail themselves of their right timeously and under circumstances in which, upon the rescinding of the bargain, the purchaser can be fully restored to the position in which he stood before the sale. 3

This exaggerates the interests of the purchaser against the family. The policy of this dictum implies that in any event the careless or reckless purchaser shall not be the loser; for either he retains his defective title as perfected by laches or he is fully restored to the status quo ante. It is respectfully submitted that this attitude of the courts is not commendable because it accords undue protection to the purchaser. The proper policy approach, it is further submitted, should be to preserve and protect the interests of the family as against those of the speculative purchaser, unless it is seen that the family has properly divested itself of its rights and title. In that case the onus would lie on the purchaser to prove that he has acquired a valid title.

1. Adebubu v. Makanjuola, (1944) 10 W.A.C.A. 33, 36.
2. (1957) 3 W.A.L.R. 123.
3. Bayaidee v. Mensah, (1878) Ren. 45, 46.

It may be objected that the suggested approach would leave the purchaser unprotected. The answer to this is that the purchaser has his remedy against the fraudulent vendor in an action for the return of his purchase-money for failure of consideration and damages for the breach of covenant of title. If the fraudulent vendor is impecunious, as is often the case, the careless purchaser must bear the loss. The point is that, in any case of the fraudulent vendor's impecuniosity, the loss would have to fall on either the purchaser or the family, and it is submitted that a lesser injustice will be occasioned if the loss falls on the shoulders of the purchaser. The principle of caveat emptor is fully applicable here, and the prospective purchaser must have his eyes wide open to satisfy himself as to the vendor's title even in the absence of a scheme for the registration of land titles. It is a presumption, though rebuttable, in Ghana and particularly among the Northern Ewe, that land is family land.[1] The prospective purchaser is, therefore, under a duty to himself to ensure that he acquires title from the proper person and with the necessary authorisation. If he fails to do this, it is his own fault and the purported alienation must be deemed to be void. In many cases this should not be particularly difficult because a stranger purchasing land always does so with the assistance of a native who becomes his sponsor or afeto. The afeto advises the intending purchaser on land titles.[2]

1. United Products v. Afari, (1929-31) D.Ct.12.
2. The role of the afeto in such transactions is explained at pp.510 -511 infra.

The principle on which the alienation of family or stool interest in property can be said to be irregular is that the person or persons purporting to alienate the group title do not possess the authority in that behalf. What is usually expressed as "the consent and concurrence" of the principal elders of the family is in fact the procedure for authorisation in the customary law. It is not merely a consent to what the head is competent to do. Without the proper authorisation the act of the head of family is simply ultra vires. An ultra vires transaction is void, not just voidable, and the defect cannot be cured by the intervention of time to make it intra vires.[1]

One implication of regarding such an irregular alienation of family property as not void but voidable is that, even without being guilty of laches, the family's title can be defeated by the intervention of a ius tertii. The principle of nemo dat quod non habet does not invalidate the title conveyed by the holder of a voidable title to a bona fide purchaser for value without notice. Therefore, the family's title may be lost if in the interim the irregular purchaser disposes of the property to another purchaser for value whose title would then become unimpeachable.

By holding an irregular alienation of stool or family property to be voidable and, therefore, confirming it if not "timeously" set aside at the suit of the family, the Courts are sanctioning the devaluation of the legal purpose of authorisation by the family. The essence of authorisation in customary law is that it is the only means of making the alienation of stool

1. Ashby Railway Carriage & Iron Co. v. Riche, (1875) L.R.7. H.L. 653, 672-673, 679.

or family interest in property valid. Authorisation by the family is thus not an alternative to any other means of perfecting title and certainly not an alternative to the efflux of time, the intervention of laches or the intervention of ius tertii. Otherwise the door may eventually be open for by-passing the requisite authority if it is known or suspected that the authorisation may not be forthcoming. Already there is an example in Bayaidee v. Mensah[1] when the vendor ignored with impunity the warning that the stool occupant alone could not alienate the interest in the property. It is submitted that the only way to insist on the necessary authorisation is to make it a sine qua non to the validity of any alienation of group titles, and to hold such alienation to be void ab initio in the absence of the requisite authority.

Alienability of Individual Interest in Family Property

The rule of Ewe law is that an individual person has no alienable interest in the family property which he enjoys by the right of membership of the family. As pointed out earlier,[2] an individual in occupation of family land among the Ewe cannot alienate the paramount title to the land either inter vivos or post mortem by testamentary disposition. He is in this respect in an analogous position to a joint tenant without any specifiable portion that he can alienate; but he is not a joint

1. (1878) Ren. 45; (1878) Sar. F.C.L. 171.
2. See pp.313-318 supra.

tenant because inter alia there is no right of survivorship or ius accrescendi. For this reason the rule in Lokko v. Konklofi[1] also applies that execution cannot be levied against an individual's interest in family land among the Ewe.

A contrary opinion is held by Ollennu.[2] In spite of the decision in Golightly v. Ashrifi[3] that it is not possible, Ollennu argues that an individual in occupation of stool or family property can alienate his interest therein, provided that the paramount title of the stool or family is unaffected. Supporting this contrary position are cases like Thompson v. Mensah[4] and Total Oil Products Ltd. v. Obeng,[5] judgments delivered by Ollennu, J. It is submitted that these authorities are inapplicable to the Ewe. The individual has an almost unlimited right to the occupation and use of family land among the Ewe but, as stated in Golightly v. Ashrifi, he cannot under any circumstances alienate his interest in the portion under his occupation. Even the family cannot authorise him to alienate his interest because the individual's interest in family property is inalienable. It is transferable to another member of the family but it cannot be alienated to a non-member of the family.

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1. (1907) 2 Ren. 450.
2. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.57-59.
3. (1955) 14 W.A.C.A. 676.
4. (1957) 3 W.A.L.R. 240.
5. Total Oil Products Ltd., v. Obeng, (1962) 1 G.L.R. 228.

As explained earlier, however, Ewe law draws a distinction between the land itself and the things on it. Therefore, while the individual cannot alienate his interest in the land itself, he may alienate his interest in the crops or building cultivated or erected by him on family land. This leaves intact the family title to the land itself.

CHAPTER IX

SALE OF LAND

Saleability of Land

There is little doubt that, from time immemorial, property other than land has always been alienable outright, either by way of sale or gift. We cannot say the same of land among the Northern Ewe-speaking people of Ghana; for among the Northern Ewe the rule was that the paramount title to land could not be alienated outright. It has, in fact, been seriously doubted whether land, the main type of family property among the Northern Ewe, could be alienated outright by sale in other Ghanaian customary laws. By outright alienation is meant here the alienation of the paramount title by sale or absolute gift as contrasted with transactions like tenancies and pledges of various kinds. Outright alienation in this context, therefore, implies divesting the holder of the paramount title of that paramount title either by way of sale or gift. It is submitted that in

this context outright alienation by sale or gift of the paramount interest in land was formerly unknown to Ewe law, but that such alienation is now recognised in most Ewe chiefdoms.

Some writers today contend that interests in land have always been saleable. Bentsi-Enchill, for instance, thinks that land has always been saleable. He says:

> Sales of land, for example, are matters of such common occurrence today ... But there is a view ... that in former times land could not be alienated. There can indeed be little doubt that sales of land were rare in former times; but it would seem desirable to distinguish between lack of willingness to sell land and lack of the capacity to do so. 1

Then he declares:

> Those who assert that land could not be alienated in former times have yet to account satisfactorily for the existence of indigenous and immemorial procedures for the alienation of land by sale or otherwise. 2

The "indigenous and immemorial procedures" refer in particular to the guaha custom for passing title and sealing the transaction in case of a sale of land among the Akan.

A similar argument also comes from Asante, who says:

> Contrary to many familiar assertions, outright alienation of land by sale, involving total divesture of the proprietary interest in land, was not unknown to the traditional legal process. 3

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1. K. Bentsi-Enchill, Ghana Land Law, Sweet & Maxwell, London, 1964, pp. 44-45.

2. Ibid., p.45.

3. S.K.B. Asante, "Interests in Land in the Customary Law of Ghana - A New Appraisal", (1965) 74 Yale L.J., 848 at p.860.

Then, like Bentsi-Enchill, Asante also makes the point that if land were not saleable in the past there would not have existed the guaha custom which is the indigenous procedure of breaking a leaf, a twig or a blade of grass to conclude the sale of land and pass title.[1] He also says that self-restraint in the sale of land, which one also discovered among the English especially in the last century through the creation of entailed interests, should not be mistaken for the supposition that land was not formerly saleable.

Woodman, who also discusses the question, is inclined to think that perhaps land was formerly not saleable but he does not go further than mentioning the probability. He says:

> It is now established that a family can alienate its entire interest in land. It is probable that at one time such alienations were unknown, but changes in economic conditions have brought changes in the law. 2

When Allott first considered the question in relation to the Akan generally he said:

> It is a commonplace to the student of African customary law that the sale of land itself was not formerly recognised ... /but/ there can be no doubt that at the present day in the Gold Coast ... the land itself has been the subject of sale. 3

Some twelve years later, however, Allott seems to have changed his opinion. Writing about the Ashanti, he now says:

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1. See also C.K. Meek, Land Law and Custom in the Colonies, O.U.P., London, 1949, p.180, where the same argument is attributed to Sir W. Brandford Griffith, Chief Justice of the Gold Coast, 1895-1911.
2. G.R. Woodman, "The Alienation of Family Land in Ghana", (1964) 1 Univ. of Ghana L.J., p.23.
3. A.N. Allott, The Akan Law of Property, Unpublished Ph.D. thesis, Univ. of London, 1954, pp.283-284.

> It is often stated, not only for Ashanti law but for other systems of African customary law as well, that alienation of land (in the sense of its sale) was entirely unknown before modern times ... Statements of this sort tend to be misleading unless one takes care to analyse the position a little more deeply. It is quite certain that in Ashanti a land-controlling stool could decide to sell its lands, i.e. sell the absolute title to its land, if it so chose; it would not choose to do so if it could possibly find some alternative means of meeting its obligations; but its legal power to do so is unquestioned. 1

We thus have considerable support for the opinion that land has always been saleable. The support, however, is by no means unanimous.

Danquah seems to suggest that in the early times land was not saleable among the Akan. He states that:

> Tradition has it that absolute alienation of land was until recent times not generally practised by the Akan people. 2

In the next sentence, however, he admits limited types of sale because

> Alienation or transfer of land as between family and family, tribe and tribe, or even between state and state, was certainly common, but sale of land for private or non-communal purposes was foreign to the people. 3

This type of limited alienation is in fact reported also by Rattray when the Offinsohene, having become impecunious when fined for an unsuccessful rebellion against the Asantehene, had

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1. A.N. Allott, The Ashanti Law of Property, Stuttgart, 1966, pp.173-174.
2. J.B. Danquah, op.cit., p.212.
3. Ibid.

to sell some villages to the Bekwaihene.[1] Busia records the information that "only the stool can sell land" in Ashanti,[2] but without indicating whether the sale of land had been recognised from the early times.

Sarbah goes further in giving the impression that, although the sale of land was known in his days, it was an innovation. He says it is observable that

> Of all things, land is about the last thing which became the subject of an out-and-out sale. Owners of land were as reluctant and unwilling to part with their land and inheritance as was Ephron, the Hittite, to sell a burying-place to Abraham, as recorded in the Holy Writ. Rather than sell his land, the Fanti landowner prefers to grant leave to another, a friend or alien, to cultivate or dwell upon it for an indefinite period of time, thus reserving unto himself the reversion and the right to resume possession whenever he please. 3

He explains that the sale of land has become more frequent since the abolition of slavery because, in the past, members of the family would volunteer to be sold into slavery rather than see a part of the family land sold.

Rattray is emphatic in his view that in the past land was not saleable in Ashanti. In his earlier work he said that in Ashanti

> the idea of sale /of land/ as an ordinary legal process did not have any place in the old legal code. 4

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1. R.S. Rattray, Ashanti Law and Constitution, 1929, p.149 and n.3 on p.149.
2. K.A. Busia, op.cit., p.50.
3. J.M. Sarbah, op.cit., pp.85-86.
4. R.S. Rattray, Ashanti, 1923, p.231. Also ibid., pp.234, 236.

After a further study of the Ashanti, Rattray was confirmed in his opinion on this point and was able to say that:

> The next important point ... was the virtual impossibility of the idea of anything in the nature of alienation of the land ... Land could not be sold, land could not be given away, land could not be willed, or be the subject of inheritance outside the tribe. 1

These are strong views in support of the proposition that in the early law the sale of land was not recognised.

The weight of judicial authority, it is submitted, also leans in favour of the view that land was not formerly saleable. It is true that in the early case of Awortchie v. Eshon[2] it was implied that land was saleable, because it was stated that family land was not alienable except for the purpose of satisfying a debt incurred by the family. However, it is not justifiable to argue that, because in 1872 land was presumed to be saleable, we have to assume that land has always been saleable.

Sarbah relied on the dictum in Awortchie v. Eshon in stating that, although family land was alienable,

> the alienation must be for the benefit of the family, either to discharge a family obligation, or the proceeds of such alienation must be added to the family fund. 3

It was this principle, enunciated in Awortchie v. Eshon and restated by Sarbah, that Jackson, J., applied in Golightly v. Ashrifi[4] when he held that stool land could never be sold

1. R.S. Rattray, Ashanti Law and Constitution, 1929, p.346.
2. (1872) Sar. F.C.L. 170.
3. J.M. Sarbah, op.cit., p.90.
4. (1955) 14 W.A.C.A. 676.

outright except to satisfy a stool debt. That principle was exploded on appeal to the West African Court of Appeal. The finding by the learned trial Judge, described as too sweeping, was reversed by the West African Court of Appeal and Foster-Sutton, P., accepting that stool land was saleable, said:

> In our opinion the existence of a stool debt was not at the times material to this inquiry a necessary preliminary condition to the sale of stool land. 1

Following this decision by the West African Court of Appeal, the saleability of land has been generally accepted as the modern law. For instance in Sasraku v. Naja David[2] when, as co-defendant, the Kokofuhene contended that land was not saleable in Ashanti, the Ghana Court of Appeal held that, whatever may have been the case in the past, land was now saleable.

Although in Golightly v. Ashrifi the West African Court of Appeal rejected the restriction on the alienability of stool land, and, therefore, of family land, it did not hold that land has always been saleable. For it said:

> Reference to the works of Redwar and Casely Hayford shows that outright alienation of land, although originally unthought of, has for many years past come to be recognised by native usage. 3

This is an express finding that the notion of sale of land is an innovation to the Ghanaian community. This also agrees with the earlier view of Danquah that

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1. Golightly v. Ashrifi, (1955) 14 W.A.C.A. 676, 681.
2. (1959) G.L.R. 7.
3. Golightly v. Ashrifi, (1955) 14 W.A.C.A. 676, 681.

> Tradition has it that absolute alienation of land was until recent times not generally practised by the Akan people. 1

So also does it agree with the view of Rattray just quoted above. It is submitted that this is the correct view, at least as far as the Northern Ewe of Ghana are concerned. Among the Northern Ewe land was not saleable in the early times.

Among other communities in West Africa, Elias tells us of Nigeria that

> There is perhaps no other principle more fundamental to the indigenous land tenure system throughout Nigeria than the theory of inalienability of land. 2

Of the Yoruba, also in Nigeria, Speed, Ag. C.J., has said:

> It is perfectly well known that by strict ancient native law all property was family property and all real property was inalienable. 3

Of the same Yoruba, Coker says:

> Strict and orthodox native law and custom does not recognise the sale of land,

and that

> The methods of absolute alienation are few and simple, for such dealings with family property were unknown to the indigenous native law and custom and have only crept into the law as a result of modern ways of life, coupled with the growing influence of Western civilization. 4

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1. J.B. Danquah, op.cit., p.212.
2. T.O. Elias, Nigerian Land Law and Custom, London, 1962, p.181.
3. Lewis v. Bankole, (1908) 1 N.L.R. 82, 84.
4. G.B.A. Coker, Family Property Among the Yorubas, Sweet & Maxwell, London, 1966, p.94.

We similarly have it on the authority of Lloyd that the notion of sale of land is an innovation to the Yoruba because it was formerly unknown.[1] The same, it is submitted, may be said of the Northern Ewe.

Among the Northern Ewe-speaking people of Ghana, although changes have now occurred, the general rule was that absolute title to land was inalienable, whether by gift or by sale. Land could be pledged for however long a time, but it was not saleable. For this reason, although the notion of sale of land has now been accepted in many Ewe areas, the formalities do not only differ in the various chiefdoms but they are generally simple and they do not date from time"immemorial".

We may at this juncture suggest that the Ewe had not been adequately considered by those who support the proposition that land has always been saleable in Ghana. The argument, for instance, by Bentsi-Enchill and Asante, that the existence of the guaha custom for passing title to land is evidence of the saleability of land from time immemorial is one which is inapplicable to the Ewe. The argument itself even as applied to the Akan for whom it is intended, is suspect and unconvincing; for there is no evidence that the guaha custom dates from time "immemorial". There is no reason why we should assume that the native genius could not have devised such a custom if the sale of land were introduced only a few generations ago. In any case,

1. P.C. Lloyd, Yoruba Land Law, O.U.P., London, 1962, pp.11-12, 17-18, et passim.

among the Northern Ewe-speaking people of Ghana not only is the Akan custom of guaha generally non-existent but, as stated above, the formal ceremonies evidencing sale of land in the Ewe areas where land is now saleable vary from place to place. The Ewe ceremonies are generally improvised formalities which can scarcely be said to have originated from time immemorial. In many Ewe areas imported items like wax prints and imported drinks like schnapps form part of the ceremony, which would lead to the supposition that the ceremonies were devised after the advent of Europeans, unless the imported items are recent substitutes for indigenous articles.

Of those who have conducted a study of the Ewe, Spieth records that land was formerly not saleable among the Ewe and that, rather than sell the family land, the debtor or another member of the family might be sold into slavery to obtain the money needed.[1] Manoukian, though she could not be specific on the point, speaks of the rarity of the sale of land even today and then goes on to say:

> Portions of lineage land may be temporarily transferred to members of other lineages, though never by alienation ... The grantor lineage, however, always retains the right to resume ownership of the land. 2

Manoukian, however, is right only if she is referring to the old Ewe law. For the sale of land is now recognised in most parts of Eweland.

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1. J. Spieth, Die Ewe-Stämme, Berlin, 1906, p.112.
2. M. Manoukian, op.cit., p.40.

Although the sale of land is now recognised in most of the Ewe chiefdoms, it has been emphasised in interviews that this is a modern innovation and that originally land could not be sold. Some of those chiefdoms in which land could not be sold in the early times, but which have now accepted the change, include Gbi, Anfoega, Kpando, Abutia, Ho and Awudome. In the Gbi case of Ahoklui v. Ahoklui,[1] for instance, the claim of the plaintiffs was based on the contention that the land in dispute had been purchased by their grandfather for seven bags of cowries. Though that case was decided on other grounds, the possibility of a purchase of land went unchallenged by the defendants. Indeed the root of title to the disputed Blave lands, now lying at Gbi-Abansi, is that they had been purchased at a price of seven bags of cowries from a family from Gbi-Kpoeta some generations ago.[2]

In Peki and Kpedze land is now saleable, but it was not possible to ascertain the old rule.

In most Ewe areas the question of saleability of land in the past may now be simply academic. The justification for the present discussion, however, is that the old rule has persisted in a few areas. It is the survival of the old rule in these few places that we would like to offer as extant evidence that, in the past, land was not saleable among the

1. Ahoklui v. Ahoklui, Unreported, Land Court, Accra, 1st June, 1959. Reproduced in N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.212.
2. Ahoklui v. Ahoklui, supra. These facts are from the proceedings in the Gbi-Hohoe Native Court, Hohoe, before the appeal to the Land Court. Ref. Suit No. 61/56 of Gbi-Hohoe Native Court.

Northern Ewe of Ghana. For it is still the law in Taviefe and Matse that land is not saleable. Similarly it is still the law in Aveme and Wusuta that land is not saleable. The only exceptions in Aveme and Wusuta are the Afram plains lands across the Volta, lands which, as we have explained, are sui generis because title to them is based on an alleged gift from the Kumawuhene of Ashanti. In the Taviefe, Matse, Aveme and Wusuta chiefdoms, therefore, any transaction affecting land must be presumed to be not a sale. Whether the Courts will accept such a contention is yet to be seen. Perhaps the Courts will follow the decision in Sasraku v. Naja David[1] and rule that land must be presumed to be saleable even in those chiefdoms, relying, if need be, on the principle in Golightly v. Ashrifi,[2] that native law is flexible enough to allow such changes. Whatever the attitude of the Courts may be to the substantive rule, it is submitted that the examples of these four chiefdoms establish the evidence that probably land was not saleable among the Ewe in the early times. For these chiefdoms have withstood the innovating onslaught of the western European influence and the introduction of a cash economy.

Although the sale of land was formerly unknown, its compulsory alienation or seizure was known from the earliest times.[3]

1. (1959) G.L.R. 7.
2. (1955) 14 W.A.C.A. 676.
3. The contrary view is stated by Rattray that in Ashanti an offender's land could not be seized because land was family property. See R.S. Rattray, Ashanti, 1923, p.231.

One type of compulsory alienation, to which we have already referred in connection with the origin of some Ewe-type stool lands, was the forfeiture of family lands to the stool in satisfaction of an oath penalty.[1] This was not a voluntary alienation but it divested the family of its paramount title to the land.

Compulsory alienation of land was also known in the earliest times, in settlement of obligations arising from feuds between families and even between individuals. If a member of a family committed a serious delict for which compensation could not be adequately exacted in any other way, lands could be ordered to be forfeited to the injured party and his family. Such offences included the killing of a human being, or arson resulting in a great loss of property or the loss of life. Such offences were regarded as implicating the whole family. Therefore, even today the Ewe say of such a tortfeasor that edo hlo or "he has implicated the whole of his people", that is he has brought a great calamity and liability onto his people. Since the family was in those days ultimately answerable for the serious delicts of its members, in lieu of or even in addition to any other penalty, some lands of the tortfeasor's family were forfeited to the injured family as compensation. This is how some family lands had changed hands among the Ewe.

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1. See pp.365-366 supra.

In Awuma v. Anukuma,[1] which was heard by the Asogli Native Court "B" at Ho, the plaintiff, claimant of a disputed parcel of land, founded his contention on such forfeiture to his family in the past. He deposed:

> In our claim we said the ownership of Ahorlor land is for Awumaviwo ... In Akwamu War the people of Ho dispersed, and as such the 'Yebute' clan, in which Awumaviwo also was, travelled together towards Klepe side to Palime Wegbe. On their way going the Klepes waged war on them and killed Awuma Mortsu at the spot, and wounded one person known as Vovlo. The killing and wounding of the above persons was about to create war between Klepes and Hos; but the matter was settled and the Klepes were asked to pay for their act. They gave out their land formerly known as Torlele which we now called 'Ahorlor' for the person Awuma Mortsu killed and also cowries ('tuowieve') and calico for the person Vovlo who was wounded ... 2

One effect of such a compulsory alienation was to convey the absolute title.

As regards gifts of land, the position was basically the same as for the sale of land. When the sale of land was unknown, outright gift of land resulting in the transfer of the paramount title was also not known among the Ewe. Relatives and even strangers could be permitted to occupy the land for as long as they wished, even as gratuitous tenants or licensees, but an outright gift of land as such was not recognised by the law. Changes which now allow the sale of land also allow the making of outright gifts of land in those areas where the changes have occurred. Hence, although the outright gift of

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1. Awuma v. Anukuma, Unreported, Asogli Native Court "B", Ho, 23rd September, 1959.
2. Awuma v. Anukuma, supra, at p.238 of Civil Record Book.

land is now possible in most Ewe areas, it is still the law that outright gifts of land cannot be made in places like Aveme, Wusuta, Taviefe and Matse where land is not saleable.

Whatever was the past position, the present position, as already indicated, is that the paramount title to land is now alienable by way of sale or gift among the Northern Ewe of Ghana, with the exception of the four chiefdoms mentioned above and possibly a few others. The capacity to alienate, the requisite formalities and the effect of the transaction will, therefore, be now discussed. It should be understood, however, that whatever is said on these issues does not apply to Taviefe, Matse, Aveme, Wusuta and those other places where it is still the law that land is not saleable and cannot be the subject of an outright gift.

Formalities for the Sale of Land

In the sale of land, as in that of any other property, there are some preliminaries which must be satisfied. The contract of sale must as usual be negotiated. This means that the land to be sold must be identified or identifiable, and its size determined or determinable, before the purchase price is agreed. This process usually forms part of the publicity which is vital to the validity of the alienation in Ewe law. Therefore, assuming that this is family land, the head of the family

and his elders, or their accredited representatives, visit the site together with the intending purchaser. In the case of self-acquired property it is enough that the vendor goes with some members of his family. If the intending purchaser is a native, his relatives and friends accompany him. If he is a stranger, he must be accompanied by a native whom he would have adopted as his sponsor or afeto, together with any other persons of his choice.

The position of the afeto in this connection may be explained here. When discussing naturalisation it was stated that every stranger or amedzro settling in the community must have a respectable, usually an elderly, man who is to him in loco parentis.[1] Because this is usually the man in whose house the stranger resides, the word afeto is usually translated as "landlord". In actual fact, however, there need not be the relationship of landlord and tenant between the stranger and his afeto. It is a relationship in which the afeto, as it were, sponsors the local residence of the stranger. The afeto is answerable to the traditional political authorities for the acts of the stranger or amedzro, and he also champions the cause of the stranger in all matters. Any important act of the stranger or amedzro, such as important contracts or the defence or prosecution of claims at customary law, must be done through the afeto. It is suggested, therefore, that the meaning of afeto

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1. See pp.173-174 supra.

here is "sponsor", though where one lets out a land or other premises one is also known as afeto in the sense of "landlord".

As just stated, a stranger cannot by himself alone enter into an important contract at Ewe customary law, such as one for the purchase of land. Therefore, any stranger intending to buy land, even if not locally resident, must have an afeto or sponsor through whom he may enter into the transaction. It is the duty of the afeto in this connection, as a native with local knowledge of land titles, to advise the prospective purchaser whether the land belongs to the family or the individual purporting to sell, whether the person conveying is the head of the family, and whether the principal members of the family are those who have signified their consent and concurrence. When satisfied on these matters the land is identified and measured, usually with the afeto or sponsor present.

The area or size of the land was formerly measured in terms of "ropes". A "rope" in some areas is twenty times the length of the out-stretched arms of the tallest man in the locality, that is about twenty fathoms. In other areas it is sixteen arm-stretches. The total length of one "rope" is, therefore, approximately 120 feet in some areas and 96 in others. Today, however, most people use the tape in measuring town lands in terms of feet, but the "rope" is still used in the forests.

Once the land is identified and its size is determined, the purchase price is agreed by negotiation. The contract is, however, not binding at customary law until the prospective

purchaser signifies his intention to be bound. This he may do by sealing the transaction with a drink as "earnest money". This is known as aha tutu anyigba dzi or "stamping a land purchase with drinks". It is essentially the same as the tramma among the Fanti and other Akan communities; but, among the Ewe, as the name implies, drinks, usually an expensive one such as schnapps, must literally be provided, which are shared by all who have participated in the identification and measurement of the land. If the purchaser has not provided the customary drinks for this purpose or effectively bound the transaction in another way, the agreement is not regarded as binding and the vendor may sell to another willing purchaser. If after aha tutu anyigba dzi the purchaser fails to carry out his part of the contract by paying the purchase price, the cost of the drinks or aha is lost. Today he may also be liable at common law for the breach of contract.

If on the other hand, after the aha tutu anyigba dzi, the vendor resiles from the contract, the purchaser has a choice between a refund to him of the cost of the drinks or applying to the local chief for a customary law order to enjoin performance by the vendor. Damages against a vendor in such circumstances are unknown to the Ewe law. The position was that the vendor could in the olden days be compelled by the chief to honour his agreement. Such an order compelling a vendor to sell was very rare, though not unknown. Because the remedy was known to the

customary law, it has been held that today an action will lie for an order of specific performance either as an equitable relief or as a customary law remedy.[1] This proposition is expressed by Ollennu, J., thus:

> It is true also that specific performance is an equitable relief. But it does not follow that every claim which a Ghanaian makes to compel another Ghanaian to fulfil a promise or an agreement is a claim for specific performance under English principles of equity. Long before the introduction of English law into this country a person could be compelled by the Council of the Chief to fulfil his promise or comply with the terms of an agreement he enters into with his neighbour where such compulsion could be effectively carried out. Thus where a person bargains and sells land to his neighbour, but fails to put him in possession, the elders would compel the vendor to give possession of the land sold to the purchaser, and upon his default the elders themselves would go upon the land known to belong to the vendor, and out of it demarcate for the purchaser a portion equal in size to the dimensions agreed between the parties. 2

The aha tutu anyigba dzi or payment of the earnest money, however, is not a sine qua non to the making of a contract binding for the sale of land. It is only a preferred method of evidencing an agreement to be bound, because the provision of the drinks or aha in the circumstances is a most unequivocal expression of an intention to be bound. Sarbah, it is submitted, went too far in stating that without payment of the earnest

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1. Hervie v. Wiresi, (1947) 12 W.A.C.A. 256.

2. Lartei v. Fio, (1960) G.L.R. 119, 120. On appeal, this decision was affirmed by the Supreme Court for different reasons which, however, do not affect the above proposition. See Lartei v. Fio, (1961) G.L.R. 124.

money, known to the Fanti as tramma, "no contract exists" and the vendor may re-sell the land to another purchaser.[1] Where, for instance, the purchaser makes a substantial payment on account or pays the whole of the purchase price at the time of the agreement, no earnest-money is necessary to make the agreement binding.

Publicity is always emphasised as necessary for the validity of alienation of land, whether by sale or by gift.[2] Publicity is indeed necessary and even vital. However, it is submitted that, contrary to the judicial attitude, absence of publicity cannot per se be a ground for setting aside a sale of land. The reason why lack of publicity vitiates a sale of land is that in that case the proof of the transaction becomes impossible without written evidence. The question of publicity is discussed further in connection with gifts.[3] In addition to what is said there, we may emphasize here that as a necessary rule of caution the purchaser should insist on adequate publicity. For publicity means that there will be witnesses on both sides who can testify to the sale having taken place. Thus publicity was particularly necessary in the days when writing was unknown and proof of the transaction depended on witnesses. Publicity also enables other members of the family or the true holder of the interest in the land to intervene and

1. J.M. Sarbah, op.cit., p.93.
2. See, e.g. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.109, and Kwakuwah v. Nayenna, (1938) 4 W.A.C.A. 165.
3. See pp.527-533 infra.

and protest or stop an irregular or unauthorised sale. Then, because of publicity, those holding interests in adjoining lands are able to protest if by error or by design parts of their holdings are included in what is being sold and, in any case, they are vital witnesses. The absence of publicity may, therefore, prove fatal, but only insofar as it also means the absence of these safeguards and insofar as proof of the sale may be impossible.

In any sale of land, a few people are engaged to demarcate the area by cutting bush paths connecting the boundaries of the land. They are known as motsolawo or "those who cut the path". They are entitled to a fixed rate of payment of about 5 per cent of the purchase price, and this is known as motsoga or "path cutting fee". The motsoga is payable by the purchaser. Whatever may be the other purposes, one main objective of employing these people, usually young men, is to obtain additional witnesses. Their employment and remuneration, however, are also consistent with a gift of land, but not with a pledge or a tenancy. That motsolawo were employed and paid, therefore, is a vital evidence distinguishing a sale and gift (which are forms of outright alienation) on the one hand from other transactions which do not imply outright alienation of the paramount interest in the land.

The fixing of boundary marks has already been discussed and is essentially the same for both the sale and the gift of land.[1]

1. See pp.297-306 supra.

Today, however, as regards town lands, most people only erect concrete pillars in the soil as boundary marks.

Among the Akan a special ceremony of guaha exists for the final transfer of title when land has been purchased.[1] This conveniently distinguishes a sale from a gift, a pledge and other transactions. The Akan ceremony seems to consist in pulling asunder a piece of string, threaded cowrie shells, a leaf or a blade of grass from the land, by two young representatives from the families of the vendor and the purchaser. The breaking of the piece of string, a leaf or a blade of grass is a symbolic dramatisation of the severance of the previous connection of the vendor with the land. This also seems to be largely of evidentiary value, for which reason young persons perform the actual ceremony so that they can pass on the story of the sale even when the older generation has passed away.

The guaha custom as such, especially as an immemorial custom, is not known among the Ewe generally. Perhaps the reason is that land became saleable among the Northern Ewe but only recently. Hence the custom does not exist in some places. In others it exists but is simple and in yet others it is obviously of a comparatively recent origin, perhaps copied from the Akan.

In the chiefdom of Awudome, for example, no special ceremony exists for the transfer of title to land. When the sale is

1. See e.g. J.B. Danquah, op.cit., p.217 and Tei Angmor v. Yiadom, (1959) G.L.R. 157, and A.N. Allott, The Akan Law of Property, 1954, pp.353-357.

concluded and the purchase price is paid, title is presumed to pass.

In Gbi the ceremony is described thus. The head of the vendor family, or in his absence the most senior elder present, says prayers to the ancestors, first with palm wine and then with imported spirits like schnapps or whisky, at the spot being sold. The vendor provides the drinks. The land belongs also to the ancestors and so they must be given an explanation why the sale is necessary and then be implored to intervene, through their spiritual medium, to ensure that in future the family should not find itself in such difficult circumstances. After the full purchase price has been paid, the purchaser must additionally provide a sheep to be slaughtered, a pot of palm wine, two bottles of schnapps and a twelve-yard piece of wax print or dokpo. Even without these additional payments the purchaser is nevertheless entitled to the land and is let into possession; but until they are provided the transaction is not final and the vendor still has a locus poenitentiae whereby he can recover the land by refunding the purchase price. When the additional payments are made the sale is complete and can never be revoked. The device of land vendors in these days of deeds of conveyance is to refuse to execute the deed until the additional payments are made.

In Adaklu the ceremony is described in the following passage from a judgment of the Native Court "B" of Adaklu:

> The court was greatly astonished to hear that the alleged custom of sale was performed under a tall oil palm tree, which is about 86 years old and is still standing. The court is aware that, from time immemorial, when one purchases land, a custom is performed by the elders of the different clans who ascertain and confirm the sale. When the custom is performed, animals are slaughtered and the bones are buried under the heaps of sand as evidence against any future land dispute and a quantity of beads called "soe" are buried there because they last long ... Then two guns are fired to complete the ceremony ... The Defendant who said his grandfather had purchased the said land could not point out anything about these customary ceremonies. The transaction was therefore a pledge and not a sale. 1

In Peki there is a special ceremony for concluding a sale of land and it is known as gbetsotso de anyigba ta or "breaking grass on land". Two young male representatives, one from the vendor's family and the other from the purchaser's, pull a roofing thatch or ebe until it breaks in two, symbolising the severance of the vendor's title to the land. Each representative holds the roofing thatch at the opposite end with his left hand passed under his left leg, with the two facing each other to pull it to break.[2] The ceremony in Peki may be performed either on the site being sold or at home. It is the belief in Peki that after this ceremony any party who denies the sale will be afflicted with an incurable consumption or ekpee.

As can be seen from the above examples, there is no uniformity in the final ceremonies for sealing the effective purchase of land among the Northern Ewe.

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1. Glamor Kuma v. Amega Kofi, Unreported, Native Court "B", Adaklu, 2nd April, 1955, at p.82 of Civil Record Book.
2. This is very similar to the Aburi (Akwapim) ceremony, as given by Allott, except that in Aburi threaded cowrie shells are used and the hand is passed under the right leg. See A.N. Allott, The Akan Law of Property, Unpublished Ph.D. thesis, Univ. of London, 1954, pp.353-354.

The Effect of Sale of Land

Among the Ewe the dependent interest of an individual member of the family in family land cannot be sold or alienated to a non-member. The only interest in land which can be sold in Ewe law is the paramount interest itself. In Ewe law, therefore, a sale of land completely divests the vendor of the paramount title to the land. The opinion of Ollennu, however, is that the paramount title to land is not transferable to an individual person. He says the principle is that "absolute title in land is inalienable except to a foreign stool which comes to settle".[1] Again he says:

> The absolute title, it is affirmed, is inalienable to an individual ... What purports to be the purchase price of land allegedly sold is but part-performance in advance of customary services or tolls which a stranger-purchaser is liable to perform and to observe, as having stepped into the shoes of a subject of the stool (skin) or of a member of the family in whom the determinable title is vested for the time being. 2

Ollennu's proposition is based on the assumption that the individual lacks the capacity to hold the paramount title in land.[3] This is also the old rule of Ewe law. However, it is no longer true of Ewe law since the introduction of the notion of the sale of land.

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.52.
2. Ibid.
3. E.g. Ibid., p.71.

More fatal to Ollennu's proposition, as applied to the Ewe, is that the paramount title to Ewe lands is held by the respective families and the individual member's right to the user of family land is not conditional upon the performance of any customary services to the family, the stool or any other body. Unlike the Akan individual's dependent interest which, as Ollennu suggests,[1] can be determined among the Akan for disloyalty to the stool, the Ewe family cannot determine the individual member's right of occupation and user of the family land under any circumstances. Performance of customary services not being the basis of the individual's right to the use of the Ewe family land, a sale by the Ewe family of its lands cannot be regarded as a commuttal for cash payment of any customary services due to the family or any stool.

Ollennu's proposition is also based on a further assumption that the individual can also alienate his "determinable" or "usufructuary" title in stool or family land.[2] Hence he regards the stranger-purchaser as merely having "stepped into the shoes" of a subject of the stool or a member of the family. Therefore, he warns the prospective purchaser to satisfy himself as regards the nature of the estate or interest to be acquired by the sale.[3] This warning is not necessary in the purchase of family land among the Ewe because, as already explained, the individual's

1. Ibid., p.55.
2. Ibid., p.57.
3. Ibid., p.108.

dependent interest in family land is inalienable. It is, therefore, only the family which can sell the original paramount title to land and, when it does so, it alienates the paramount title vested in it. To quote the Privy Council in the Nigerian case of Oshodi v. Balogun:

> In the olden days it is probable that family lands were never alienated; but since the arrival of Europeans in Lagos many years ago a custom has grown up of permitting the alienation of family lands with the general consent of the family. These alienations in the great majority of cases have been to persons not members of the family to whom the lands have been allotted, and their Lordships see no reason for doubting that the title so acquired by these purchasers was an absolute one and that no reversion in favour of the chief was retained. 1

This, it is submitted, also expresses the basic principle of sale of land among the Ewe. It is further submitted, therefore, that among the Ewe it is the law that:

> If the proper authorities with the proper consenting parties purport to make an outright grant without any reservations, ... they cannot later be heard to say that reservations of some kind were implied. 2

For a sale by the Ewe family is an alienation of the family's paramount title, and there is now no incapacity on the part of the individual to acquire or hold the paramount title to land.

A point urged by Ollennu is that, if the stranger can by purchase acquire the paramount title, then it means that for

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1. Oshodi v. Brimah Balogun, (1934) 4 W.A.C.A. 1, 2. Emphasis supplied.

2. Golightly v. Ashrifi, (1955) 14 W.A.C.A. 676, 681.

money he acquires an interest higher than that of the individual member of the family or subject of the stool who would have had to lay down his life in defence of the property in the ancient days.[1] That may well be so. One reason for this is that it is the family itself which gives the authority for its interest to be alienated, so that the alienee rightly succeeds to the whole of the interest held by the family. Furthermore, this also shows the difference between an inherent right of the individual member of the family and the interest acquired by a purchaser for value. For Ollennu himself would accept that a stranger who purchases a movable property (e.g. a gold nugget)belonging to a family acquires the absolute title which is greater than the right of use which an individual member of the family had in that movable family property. The same reasoning applies to the sale of land among the Ewe, and it extends also to absolute gifts.

In any case, the Ewe law is that a sale or an outright gift completely divests the vendor or the donor of the paramount title to the land. The purchaser or donee, therefore, acquires the paramount title. The sale of an interest in land less than the paramount title is not known to Ewe law. If the transaction conveys anything less than the paramount title then it is not a sale in Ewe law: it might be a tenancy or a pledge. A sale

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.11.

of land in Ewe law means only one thing and that is the alienation of the paramount title free from any reversion or reservation in the vendor. That is why, while an individual may sell his self-acquired land, only the family can sell family land among the Ewe.

A sale of land among the Ewe is an irrevocable transaction. There is no right in the vendor to re-open the transaction in order to recover his interest in the land. In this respect Ewe law may be different from Ashanti law. For Rattray says that a sale of land in Ashanti was not an "alienation of the land beyond all hope of redemption" because it could be regained by refunding the original purchase price and making an extra payment.[1] This procedure is unknown to the Ewe law.

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1. R.S. Rattray, Ashanti, 1923, pp.236-237.

CHAPTER X

GIFTS

The Nature of Gifts in Ewe Law

A gift is a form of alienation of interest in property. Its effect is to transfer the title and interest of the donor to the donee. When validly effected it has the same effect in Ewe law as a sale in divesting the donor of his title and investing the donee with the same. The only basic difference between a sale and a gift, therefore, is that, whereas a sale is a contractual arrangement involving the payment of money or other consideration, a gift is not contractual and is essentially a unilateral offer.

Although a gift is not a contractual transaction, the Ewe law is that, once perfected, it is irrevocable. This means that it is binding on the donor and he cannot recall it. The donee, however, may at any time renounce the gift previously accepted by him and return the property to the donor.

It seems that originally among the Ewe an outright gift of land was unknown, so that gifts were confined to only movables and immovables like houses and farms which were not strictly regarded part of the land itself. This was because the notion of divesting the holder of the paramount title of his title to land was repugnant to Ewe ideas. Accordingly, what appears to be a gift of land in the olden days was in fact a gratuitous tenancy whereby the beneficiary was permitted a free use of the land for an indefinite period, with a right of succession, but with a reversion always in the grantor family. Since land became saleable in most Ewe areas, however, the outright gift of land has also been recognised and is known in many areas.

A special gift of land in consideration of marriage was known to exist, fôr instance, in Kpedze, though it is not common today. When a daughter of the family was married into another family, some part of her family's lands could be given to her husband to the use of the children of the marriage and their descendants. Title to the property was then vested in the descendants of the body of that woman, similar to the entailed interests in English law. The descendants were traced in the male line, so that the entailed interest resembled the tail male, with a reversion in the donor family. This type of land was known as mama-ve or "grand mother's land" to distinguish it from the husband's family land. It did not belong to the husband or his family and was not inheritable as such property. Therefore,

if no issue survived the marriage, or if the patrilineal descendants died out, the land reverted to the donor family. Otherwise it was an outright gift conveying absolute title to the land.

Today a gift of land may be made under any circumstances. No reason is necessary for the validity of such a gift, but usually there are reasons therefor, extending from considerations of blood relationship to friendship or appreciation of services or kindness. In the same way that the sale of land among the Ewe implies the transfer of the paramount title, an outright gift of land for whatever motive transfers to the donee the paramount title thereto. Hence, if it is family land, then the gift can be validly made only through the head of the family, on the authority of the family, as in the case of a sale of family land.

The notable exception should be stated that in those Ewe chiefdoms like Taviefe, Matse, Aveme and Wusuta where land is not saleable, it is also the rule that there can be no outright gift of land. In those places the old rule still prevails that a gift of land is no more than a gratuitous licence to occupy and use the land for an indefinite period, even extending into generations.

As far as chattels are concerned, they have been the subject of gift from time immemorial. Similarly, from time immemorial gifts could be made of property like buildings, trees and crops standing on the land, as distinct from conveying title to

the land itself. The effect of such gifts, as in the case of land, is to transfer title to the donee.

Certain preliminaries must be satisfied in the case of any gift. These are generally the same as in the case of sale of property.[1] They include the identification of the subject-matter, that is the location, size and nature of the land or the object of which the gift is to be made. The nature of the property will, especially today, determine the interest conveyed; otherwise this should also be ascertained. In the past the identification of the nature of the interest was unnecessary if it was a gift of land because the "gift" amounted to no more than the creation of a gratuitous tenancy in favour of the "donee". Today also the identification of the interest in a gift of land is not necessary because in modern Ewe law a gift of land means the transfer of the paramount title to the donee and just that.

To make a gift effective there should be publicity and, in addition, a formal acceptance of the gift by the donee. These will now be discussed.

Publicity

Publicity is an essential requirement in the making of an unimpeachable gift in Ewe law. The main objective of publicity in this context is to bring the alienation to the notice of the

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1. Discussed in pp. 509-512 supra.

general public and especially to the notice of those who would, but for the gift, be entitled to the property. It creates, if we may say so, a sort of "estoppel by notice". If it is a self-acquired property, publicity ensures that those with a spes successionis are made aware during the lifetime of the donor that he has divested himself of title to the property. It thus goes to the proof of title and forestalls adverse claims even after the death of the donor. The essence of publicity is that, in the old customary law which knew no writing, it was only by means of publicity that the making of the gift itself could be proved. Today, therefore, publicity is not necessary per se in Ewe law, except insofar as the gift cannot be proved without adequate publicity.

However, the requirement as to the publicity of gifts in customary law has been applied at times with such rigidity that its main purpose appears to have been misunderstood. An example of such a mechanical application of the rule as to the publicity of a gift is to be found in the decision of Kwakuwah v. Nayenna.[1] In that case the plaintiff claimed that, in consideration of the financial assistance she had given him, her deceased husband had made a gift to her of some part of his building, with the other parts to his sister and his nieces. There had, however, been no publicity of the gift to her. The Native Tribunal of

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1. (1938) 4 W.A.C.A. 165.

Yamoransa (not an Ewe area) held that the alleged gift was invalid because of the lack of publicity. It said:

> The Tribunal find that, although it might be that Assimaku intended to make a gift of a portion of his building to the plaintiff, his wife, the course adopted seems to have been improper; it is tantamount to private transaction or dealing; gifts of this kind must be made public: relatives of both the donor and the donee and some outside persons must be present to act as witnesses, and the donee in accordance with custom acknowledges or accepts the gift by giving some present or presents in return as thanksgiving. This is not so in this case and it cannot therefore be said that the gift is valid in accordance with Native Customary Law. The claim of the plaintiff fails, and the building left by Kobina Assimaku on his death automatically goes to his family. 1

The Provincial Commissioner's Court reversed this decision. On a further appeal, however, the West African Court of Appeal referred to the statement of law by Sarbah that publicity was necessary for the validity of a gift,[2] and then reminded itself that the native courts were the repositories of the customary law. There being an agreement between the exposition by Sarbah and the Native Tribunal, the West African Court of Appeal restored the judgment of the Native Tribunal and held that "the gift relied on in this case was invalid according to native law and custom".[3]

In applying the rule as to the publicity of gifts in this case, the Native Tribunal as well as the West African Court of Appeal treated publicity as if it were a requirement of intrinsic value in itself. It was an inflexible approach as though the

1. Kwakuwah v. Nayenna, (1938) 4 W.A.C.A. 165, at p.165.
2. J.M. Sarbah, op.cit., p.81.
3. Kwakuwah v. Nayenna, (1938) 4 W.A.C.A. 165, 167.

need for publicity were an absolute and unalterable formal requirement of a statute which did not permit of an enquiry into the reasons for the provision. It was as though a claim were being dismissed because the formal statutory requirement of obtaining the Attorney-General's fiat had not been complied with. It is submitted that this approach is wrong. Publicity is not necessary per se. The only need for publicity, albeit an important one, is that in a system of law which knows no writing, publicity facilitates the proof of the gift or sale by providing witnesses who know of the transaction. Contrary to what the Native Tribunal had said, there is nothing wrong in Ewe customary law in a "private transaction or dealing" in the nature of a gift.

The only problem raised by the lack of publicity in a system of law which knows no writing is that it is difficult, if not impossible, to prove the gift. Therefore, if, in spite of the lack of publicity, the donee is able to prove the gift satisfactorily, there can be no basis on which the gift can be set aside. Such a method of proof is now available where the gift, though a "private transaction or dealing", is properly reduced into writing in a manner which leaves no room for doubt. A deed of gift, for instance, may not have been accompanied by the usual publicity known to the customary law. It is nonetheless a customary law gift, because the use of such a form does

not necessarily import English common law.[1] Such a gift cannot be set aside merely because it lacks the amount and kind of publicity normally required at customary law.

In the Kwakuwah v. Nayenna case itself, the issue could have been decided on the sufficient ground that the alleged donee could not satisfactorily prove the making of a gift to her. It was stated that even the mother of the deceased donor did not know of the alleged gift and nobody else did. As the alleged donor himself was dead, the donee wife could call no independent witness to prove the alleged gift. The Court was, therefore, left with only the bald declaration by the wife alone that a gift had been made to her of the property. Even in English law this would not have been enough to satisfy the Court that a gift had in fact been made to her. It is submitted, therefore, that although the lack of publicity was the main obstacle to the plaintiff in her claim in Kwakuwah v. Nayenna, the actual reason for her failure was that she could not lead appropriate evidence in proof of the alleged gift. The Native Court admittedly did not reason along this line. However, if the issue of the gift had been raised in a different context during the lifetime of the donor husband, and the donor husband had given evidence confirming the gift to the plaintiff, could the Court have set it aside as invalid because of the lack of publicity?

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1. Nelson v. Nelson, (1932) 1 W.A.C.A. 215.

It is submitted that in that case, notwithstanding that it could be described as a "private transaction or dealing", yet it could not have been set aside. The gravamen of the problem, then, is one of proof and not of publicity per se.

In any case, it is submitted that in Ewe law publicity is not an absolute necessity in itself. If the gift can be otherwise proved satisfactorily, it will not be vitiated by the lack of publicity as such. The only reason why one must insist on publicity, even in Ewe law, is that it is the safest and most practical means of proving alienation of property in customary law. To pursue the requirement of publicity in a mechanical way would lead to such difficult enquiries as to what would constitute adequate publicity in particular circumstances. Would it, for instance, have been enough in Kwakuwah v. Nayenna if only the donor's mother knew of the gift? What if she was also dead at the time of the enquiry? Would it have been different if about five members of the family knew of the gift but were all dead when the gift was being questioned? It is submitted that the solution of the problem lies in treating publicity as essential only to proof. In that case the onus will be on the donee to prove the gift only as a matter of evidence.

There are other reasons also why a donee would be well advised to insist on publicity. As the property, especially immovable property, may be family property, publicity enables

the prospective donee to satisfy himself that the intending donor has the capacity to make the gift. For, by giving publicity to the transaction, members of the family are given the opportunity to draw attention to the family nature of the property if it is such, and to object if they wish to.

In the case of a gift of self-acquired property, publicity serves only as a notice of alienation to those who have a spes successionis in the property. The purpose of publicity of a gift of self-acquired property is not to obtain the consent of the donor's family. Contrary to what Allott says of the Akan,[1] among the Ewe the consent of the family is not necessary for the validity of a gift of self-acquired property, whether of a movable or immovable property. Perhaps the reason for the difference here is that, as we shall see, the Ewe family does not succeed to the self-acquired property of its deceased members.

The question of publicity, as affecting proof of the gift, is also linked with the mode of acceptance. We go on now, therefore, to consider the acceptance of gifts.

Acceptance of Gifts

It can hardly be disputed that in Ewe law a gift, to be effective, must be accepted by the donee. Without acceptance the purported gift remains but a unilateral act which does not

1. A.N. Allott, The Akan Law of Property, Unpublished Ph.D. thesis, Univ. of London, 1954, p.519.

take effect. The question, however, is what constitutes a valid acceptance in the eyes of the customary law.

As far as movables of small value are concerned, there is an effective acceptance if the donee is placed in possession by the donor with a donative intent. The transaction is then complete, and there is no need in law to give the donor formal thanks therefor, though the donee's gratitude is almost invariably expressed, even if only informally, among the Ewe.

In the case of gifts of such immovables as land, houses and farms, apart from taking legal possession, the alienation is marked with a formal acceptance to indicate the change of title. Similarly a gift of very valuable movables is also marked with such formality. The mode of acceptance of immovables and very valuable movables, therefore, really consists of two separate acts. One is an act of possession and the other is a formal expression of thanks for the gift.

Taking possession of the subject of a gift is a question of legal possession which is basically the same in both the customary law and the common law. In either case there is possession if the donee has the animus possidendi coupled with that amount of physical control which is commensurate with the nature of the object and the circumstances of the case. The animus possidendi here is the donee's intention to accept the gift. Physical control depends on the nature of the property.

Small objects like a gold necklace or nuggets may be delivered by physically placing them in the hands of the donee while expressing the donative intent. Possession is normally taken of a gun when it is physically presented to the donee. Such physical possession of the object, however, is not necessary nor practicable in all cases, so that a symbolic act may suffice. Thus the delivery of the key to a house may be an effective act of giving possession to the house. However, in all cases, if the object or the key is deliverable by some other person and the appropriate instructions are issued by the donor, then physical delivery is not necessary. If the donee is already in possession of the property it may not be necessary to deliver it to him afresh.

Land is, however, in a different category because it is immovable. The practical way to give possession to land, therefore, is to identify it to the donee. Of the giving of possession to land in the case of a gift, Ollennu says:

> The actual transfer is made by taking the donee round the boundaries of the land, and making him touch a tree or leaf on it, while the donor or his representative says the words of transfer. 1

While this may be substantially correct, Ollennu has over-formalised the process. The essential thing in Ewe law is that the donee must know the land he is taking. For that reason he

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.113.

is taken to the land to be shown the physical boundaries or the property in question. In Ewe law it is enough that he is shown the boundaries of the land or the farm or that the building is identified to him. No symbolic act of touching a tree or a leaf on the land is necessary. If the donee already knows the land, the farm or the building which is the subject-matter of the gift, it is not necessary to take him to the site at all.

The second act of accepting important gifts, especially a gift of a land, a farm or a house, is to provide a small thanks-offering to the donor in return for the gift. This is known as akpedanu, translated as "thanks-offering", the equivalent of aseda among the Akan. The akpedanu or thanks-offering must include some actual drink or aha, such as schnapps, whisky, or sometimes palm wine. The other objects included differ in the several chiefdoms. In Gbi, for example, it is stated that in the case of a gift of land the akpedanu consists of a sheep, two bottles of schnapps and a small amount of money. If the gift is being made of family property, then the sheep is slaughtered and the meat is shared among the principal members of the family who also share the drinks and the money. In the case of a gift of self-acquired property, only the drinks and the meat of the sheep are shared among the witnesses. In most other chiefdoms it is enough to provide the sheep and drinks, even palm wine. In all areas, if the gift is property other than land, it is enough to provide only drinks as thanks-

offering. As was stated by Ollennu, J., in Asare v. Teing:

> The acceptance must be evidenced by the presentation of 'drink' or some small amount of money to the donor, part of which is served to or shared among the witnesses to the transaction. 1

Danquah says:

> Whenever a gift is made, and especially when the thing given is in the form of landed property, it is always customary to give drink or money thank-offering to the person making the gift in the presence of witnesses. When this is done the transaction is complete. 2

As a formal requirement, the presentation of the akpedanu or thanks-offering to the donor finally seals the gift and makes it effective.

Among the Ewe the donee formally expresses his or her thanks through a special delegation to the donor for the purpose. The donee joins the delegation which must be led by either the donee's father or another male member of the donee's family who is in the position of "father" to the donee. There must be representatives from the families of both the donor and the donee, as well as their maternal relations. They serve as witnesses. It is not necessary, however, that the chief or other traditional dignitaries should be present.

The Ewe method of presenting the thanks-offering to the donor appears to differ from that of other communities. In

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1. Asare v. Teing, (1960) G.L.R. 155, 160.

2. J.B. Danquah, Akan Laws and Customs, 1928, p.219.

Addy v. Armah,[1] a Ga case, the question to be determined was whether a gift by a man was made to his wife or to his daughter. The plaintiff daughter was an infant at the time of the alleged gift. The evidence was uncontradicted that the defendant wife, mother of the plaintiff, was in the delegation which went to present the thanks-offering to the donor. It was equally uncontradicted that the plaintiff daughter was not in the delegation. It was held by Ollennu, J., that the law is that the donee may not be personally present when the thanks-offering is presented to the donor and, therefore, that, as between the two, it was presumed that the gift had been made to the plaintiff daughter, the party who was absent at the presentation of the thanks-offering. The learned Judge said:

> Custom lays it down that the donee does not join such a delegation (to present the thanks-offering), members of his family and his friends are the proper persons who must go on his behalf, though he himself should supply the articles to be presented. And where the donee is a child, and the donor happens to be one of his parents, the other parent provides the articles and leads the delegation to make the presentation to the donor parent assembled with members of his or her family ... Upon the undisputed facts and the evidence of custom referred to above, the only irresistible conclusion which can be drawn from the circumstantial evidence is that the gift made in accordance with customary law could not have been made to the first defendant, and that the only person to whom it must have been made is the plaintiff. 2

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1. Addy v. Armah, Unreported, Land Court, Accra, 23rd June, 1960. Reproduced in N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.240.

2. Ibid., at pp.242-244.

The final decision of the learned Judge can itself scarcely be criticised. The donor himself was still alive and gave evidence that the gift he made was to the plaintiff and, except for the question of credibility, that could have been conclusive of the matter. The dictum of the learned Judge expounding the law does, however, invite some comments.

In the first place, it is not usual among the Ewe for a child to thank his parents formally for gifts made to him. The Ewe say vi medaa akpe na to o, that is, "a child does not thank his father". The rationale of this maxim is that the father is presumed to be always showing his kindness to his child and the child cannot be repeatedly expressing his thanks. To thank one's parent formally for ordinary gifts is, therefore, regarded as an indication that the parent had been unkind but had bestowed only an occasional bounty. This principle extends also to classificatory parents. Among the Ewe, therefore, it is only in the case of a special gift, such as valuable land (self-acquired), a farm or a house that a child may thank his father formally, openly and in the presence of witnesses.

It is difficult to agree with the learned Judge that, when a gift is made to a child by one of his parents, then the other parent leads the delegation to express formal thanks for it. This is not Ewe law. If the gift is made by a mother to her child, the child's father leads the delegation to express thanks; but it cannot be vice versa. Among the Ewe a woman, however old

she may be, is incapable of leading any important delegation. An important delegation of this kind must always be led by a male member of the donee's own family of which, as a rule, the Ewe mother is not a member. Therefore, if the gift is made by a father to his child, it is not the child's mother but a paternal uncle, that is a brother of the donor, or another male member of the patrilineal family acting in loco parentis to the child, who should lead the delegation to express formal thanks to the donor father.

The most important, and therefore the most controversial, part of the law laid down by the learned Judge, however, is that in customary law a donee may not join in the delegation to thank the donor formally for a gift. It is respectfully submitted that this proposition is not true of the Northern Ewe. The Ewe law is that, unless unavoidably prevented, the donee himself must be present at the formal thanking of the donor. To be sure, the donee himself does not lead the delegation. The delegation is led by the father, or the "acting father" of the donee if the donor is the father himself. Almost all verbal expressions of thanks are uttered on behalf of the donee by his father or the leader of the delegation. The essence of the presence of the donee is to dramatise his personal appreciation, lest it be thought that it is only a routine being followed on behalf of a disinterested donee. Another reason for the personal presence of the donee is that this is also an opportunity to, advise him on general good behaviour and the wise

management of the subject-matter of the gift. If, therefore, Addy v. Armah were a case from the Ewe area, the fact of the mother's presence on the delegation to thank the donor formally would, if anything at all, rather strengthen the supposition that the gift was intended for her. In any event, in the Ewe area that fact would not operate to her disadvantage in establishing her case. Conversely, as the daughter did not go to the formal expression of thanks, this would in Ewe law raise a presumption against her, which is rebuttable, that she was not the donee. In Addy v. Armah perhaps the absence of the infant donee may be excused on account of her infancy.

The purposes of a formal acceptance of a valuable gift are the justification for the formality. Its primary purpose, no doubt, is formally to stamp or seal the transaction. It signifies beyond doubt the acceptance of the gift by the donee and the acceptance perfects the gift.

The occasion also presents a unique opportunity for adequate publicity of the gift, especially to the family of the donor, if there had not been previous publicity. The confirmation of the gift by the donor accepting the thanks-offering or akpedanu is publicity to all who did not know before. Because of the attendant publicity it is also a guarantee against compromising the interests of the family of the donor. At this stage it is still open to the members of the donor's family to object that the subject-matter of the gift is family property

which the donor acting alone lacks the capacity to alienate. Therefore, the gift also binds the family if they consent or acquiesce in its perfection through a formal acceptance in their presence.

As regards the donor it is an opportunity for him to deny the gift if his intentions had been misconstrued by the supposed donee. If he did not intend to make an outright gift but had been misunderstood, he has the chance to remove the misconception. He may now also rectify any errors as to the location, nature, extent or size of the property conveyed. The donor also has at this stage what we may call a locus poenitentiae. It is possible that, although he did make the gift in the first instance, it was made in exuberance of joy or was prompted by a temporary fit of wrath or anger producing a momentary desire to deprive others of the benefit of the property. It could also have been made under the influence of terror or under the pressure of some other undue influence. The gift could also have been made in a state of intoxication or through inadvertence or when the donor was not compos mentis. In any such case the donor can, at this stage, withdraw the offer he had made. His acceptance of the akpedanu or thanks-offering, therefore, is his confirmation of the gift after he has had time to reflect on it.

It should be pointed out, however, that the failure to offer akpedanu or thanks-offering will not necessarily invalidate

the gift. As pointed out by Sarbah, the acceptance of the gift may take other forms, such as using or enjoying the subject-matter of the gift or exercising rights of title over it with the knowledge and concurrence of the donor.[1] This was also the main issue in Boakye v. Broni.[2] In that case the successor to a deceased brother claimed a cocoa farm as being the property of the said brother. The defendant contended that it was not a property of the deceased because, although he had made a gift of it to the deceased, the necessary ceremony of acceptance with formal thanks before witnesses had not been performed and that the gift was, therefore, revoked by him. This argument by the defendant was rejected by the Land Court and Ollennu, J., said:

> Now, the defence that the gift made forty years ago to Owusu could be revoked because it was not made in the presence of a witness, is to my mind untenable. An essential element in alienation of land by native custom is publicity of the fact that title in the land has passed from the transferor to the transferee. The usual way of publicising this is by carrying out the transaction of transfer in the presence of witnesses. But this is not by any means the only method of giving publicity to a transfer. Any act done or steps taken or conduct of the transferor which manifests to persons, other than parties to the transaction, an intention to transfer, or amounts to an assertion that the property in the land has passed from the original owner to the other party, is quite sufficient. 3

Thus even in the absence of the aseda or akpedanu, that is the thanks-offering, the gift may still become effective and, as held in this case, irrevocable.

1. J.M. Sarbah, op.cit., p.81.
2. (1958) 3 W.A.L.R. 475.
3. Boakye v. Broni (1958) 3 W.A.L.R. 475, 479.

Revocability of Gifts

A gift of any kind among the Ewe, until effectively accepted by the donee, is revocable. However, once effectively accepted, whether formally or informally, a gift as a general rule becomes irrevocable. The maxim of Ewe law is womenaa nu ame gaxoe o, that is "a gift cannot be recalled". The application of this maxim means that a gift of movables becomes effective and irrevocable once accepted by taking possession. In the case of a gift of land, a house or a farm, the gift becomes effective and irrevocable when the akpedanu or thanks-offering has been presented to the donor and received by him.

It is, however, argued by Bentsi-Enchill that, as a gift in customary law is on the basis of a general assumption of continued good relations and gratitude, it may be revoked for serious misconduct.[1] The objection to this contention is that if gifts were revocable in such circumstances then the right and grounds for the revocation would extend to the relationship between the successors of both the donor and the donee. In that case even a gift made some generations ago could be revoked today by the successor of the donor for ingratitude, bad relations or general misconduct. It cannot, however, be seriously contended that this is the law.

Bentsi-Enchill dismisses the value of the decision in Bimba v. Mansa[2] which held that a gift is irrevocable. Bentsi-Enchill

1. K. Bentsi-Enchill, op.cit., pp.366-367.
2. (1891) Sar. F.C.L. 137.

makes a valid criticism of that case on the ground that, although Redwar had said:

> A further point was raised by the plaintiff's counsel that, according to native custom, a gift is revocable. He has produced no authority for this proposition, and the cases cited tend rather the other way, 1

yet Redwar went on to declare that:

> In the absence of any authority as to the native law on this point, I feel myself bound to be guided by the settled principles of English law on cases of this kind, and hold that ... even as a voluntary gift it is good against the grantor himself, and those claiming under him. 2

Bentsi-Enchill points out that the learned Judge erred in applying the principles of English law. He suggests instead that what the Judge should have applied were "the principles of natural justice, equity and good conscience" under the then Courts Ordinance. While disagreeing with the learned Judge in applying the principles of English law in those circumstances, we differ also from the opinion of Bentsi-Enchill. If the authorities cited to the learned Judge "tend rather the other way", then he should have decided the issue along the way indicated by the cases cited. From the context "the other way" was that gifts were irrevocable. Hence, although Redwar erred inasmuch as he did say that he was guided by the principles of English law, yet his ruling that a gift is irrevocable is in conformity with the general trend of the authorities cited to him.

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1. Bimba v. Mansa, (1891) Sar. F.C.L. 137, 142.

2. Ibid.

Even then Bentsi-Enchill argues further that in any case Bimba v. Mensah had been overruled by Adai v. Daku.[1] He, therefore, prefers to rely on Adai v. Daku for the proposition that customary law gifts are revocable. With great respect it is submitted that a careful perusal of Adai v. Daku shows that it is not an authority for the general proposition that customary law gifts are revocable. The facts are that the holder of the paramount title to the land sought to eject a grantee from the land because, having made a "gift" to him of part of the land, the grantee claimed absolute title to the whole land. The ejection of the grantee was tantamount to a revocation of the gift and it was held that the grantor could revoke it. In his judgment affirming the decision of the Court of the Omanhene of Akwapim, Brandford Griffith, C.J., said:

> It is a well-known native custom or law that a gift of land is not irrevocable, and evidence has been given to the effect and is not contradicted. 2

It is because this view of the law was later confirmed by the Full Court that Bentsi-Enchill argues that it is to be preferred.

What the learned Chief Justice meant in this case, however, was not just the proposition that gifts were revocable. His proposition was that the particular "gift" could be recalled because land could not be the subject-matter of an absolute gift and that, in any event, the donor in the present case did

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1. (1905) Ren. 348, and 418.
2. Adai v. Daku, (1905) Ren. 348, 350. Emphasis supplied.

not intend to make an absolute or outright gift. In the Full Court, after referring to answers given by the donor to questions put to him by the Court, Brandford Griffith, C.J., said:

> This clearly indicates to me that he /i.e. the donor/ never intended by his answers to the questions to convey to the Court that he had made an absolute and irrevocable gift of the land to the appellant. 1

Then the evidence was recited that the land was only given to the appellant "to eat on".[2] In that case the transaction was not a gift properly so-called but only what we have described as a gratuitous tenancy for an indefinite period. Such a gratuitous tenancy is often referred to as a "gift" in many of the Ghanaian languages; but it is not a gift conveying the title to the property. It is only a "grant" of a right of user. As such a "gift" does not transfer the paramount title to the property it can be determined at any time, especially for misconduct such as that of the appellant in setting up an adverse title against the grantor.[3]

On the general question of outright alienability of land by way of a gift, the Full Court in Adai v. Daku said:

> It was admitted by learned Counsel for the appellant that lands are not absolutely given away by natives, and it is for this reason that lands are so frequently and willingly given away by natives. The native knows that the land is still his, and that he can take it back should an adverse claim be made by the person to whom it is given. The

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1. Adai v. Daku, (1905) Ren. 418, 418-419.
2. Adai v. Daku, (1905) Ren. 418, 419.
3. Rattray says that this was a familiar type of alienation of interest in land in early Ashanti law and it was revocable. See R.S. Rattray, Ashanti, 1923, pp.231-232.

> person to whom it is given knows that he can use the land as long as he likes, provided he recognises title in the owner. No gifts of land would be made by the natives if such gifts are to be taken as absolute gifts. 1

From the above dicta it is submitted that the decision in Adai v. Daku is a narrow one which must be confined to gifts of land. Even if valid, which we submit it is not, yet it cannot be extended as a general proposition to cover all gifts. The reasoning of the Court was that the paramount title to land was incapable of being alienated absolutely, whether by gift or by sale. Therefore, the Court regarded the purported "gift" as no more than a gratuitous tenancy which was determinable. In Adai v. Daku, therefore, the donor, to reduce the decision of the Full Court to its logical terms, was not actually revoking a gift but terminating a gratuitous tenancy, which he was entitled to do. It has already been pointed out that this is still the rule in some Ewe areas, notably Aveme, Wusuta, Taviefe and Matse where, because the paramount title to land is inalienable, a "gift" of land means only a gratuitous but determinable tenancy of an indefinite duration. The theory of the inalienability of land, however, has now disappeared in most parts of the country. The rule formulated on the basis of that theory, therefore, is no longer good law. At best it can only apply in the few places where the principle of inalienability of land still survives. It is submitted,

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1. Adai v. Daku, (1905) Ren. 418, 419.

therefore, that we cannot rely on Adai v. Daku for the proposition that gifts of land, let alone all gifts, at customary law are today revocable.

If we reject Adai v. Daku, what are the authorities on this point? Sarbah contradicts himself by giving grounds on which a gift may be revoked and yet stating immediately thereafter that:

> Every gift when completed is irrevocable, except in gifts between parent and child, which can be recalled or exchanged at any time by the parent in his or her lifetime, by his will or dying declarations. 1

Danquah considers the matter in doubt and says:

> To withdraw or recall a gift is always a matter of controversy. It can hardly be done, but if a father grant his son or daughter a piece of cocoa farm in anticipation of filial services and the child deliberately fail to do any service for the father, the gift may be taken back. 2

We may say, however, that both Sarbah and Danquah lean in favour of the principle that gifts are irrevocable.

The modern authority is Boakye v. Broni.[3] In that case the defendant claimed back property of which he had already made a gift, his reason being that he had recalled the gift because the appropriate ceremonies of acceptance had not been performed. It was held that, notwithstanding that there was no formal acceptance, the gift had nevertheless been effectively accepted. Having made a finding that the gift had been validly accepted and had become effective, the Court held that the

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1. J.M. Sarbah, op.cit., p.81.
2. J.B. Danquah, op.cit., p.219.
3. (1958) 3 W.A.L.R. 475.

defendant could not revoke it because a gift was irrevocable. It was said by Ollennu, J., that:

> A gift of land made inter vivos is irrevocable once it is completed and the donee is placed in possession. The defendant, therefore, is not entitled to revoke the gift ... 1

It is submitted that Boakye v. Broni, taken together with the earlier case of Bimba v. Mansa,[2] is to be preferred to the narrow decision in Adai v. Daku. In any case, the law as stated by Ollennu, J., in Boakye v. Broni represents Ewe law. In Ewe law a valid gift, once made, is generally irrevocable; for womenaa nu ame gaxoe o. The gift, however, can be nullified by the donee returning the property previously accepted by him.

To the general rule of irrevocability of gifts among the Ewe, however, an exception must be made. Gifts to children are in a different category because of the special parent-child relationship. Therefore, as pointed out by both Sarbah[3] and Danquah,[4] a gift made by a parent to a child is revocable by the parent for a variety of reasons such as ingratitude, failure of filial services, gross disobedience or general misconduct. Ollennu does not seem to agree that even a gift to a child may be revoked, because he only grants the donor parent the right to "exchange the land for other land of the

1. Boakye v. Broni, (1958) 3 W.A.L.R. 475, 479.
2. (1891) Sar. F.C.L. 137.
3. J.M. Sarbah, op.cit., p.81.
4. J.B. Danquah, op.cit., p.219.

same or a higher value".[1] It is submitted, however, that among the Ewe a gift to a child by a parent or a person in the position of a parent is revocable by the donor for the reasons stated above and only during the lifetime of the donor.

The converse position is not very clear. Can a child revoke a gift he has made to his parent? If the child was still very young when he made the gift, there is no doubt that on his attainment of majority he may revoke the gift. This, however, does not cover a gift made by an adult child to his father or mother. The view expressed in a majority of the Ewe chiefdoms is that, although a parent may revoke a gift previously made to his child, an adult child cannot revoke a gift validly made by the child to his parent or a person in the position to him of a parent. The reason given for the rule of irrevocability of a child's gift is that, having been the beneficiary of the parent from the cradle, his gift is indeed a manifestation of gratitude which must be irrevocable.

In the other chiefdoms it was stated that a gift by a child to his parent is revocable for cruelty, ill-treatment, lack of consideration or ingratitude of the parent. A further explanation in support of revocability is that there is always the possibility that a gift by even an adult child to his parent may be a result of subtle but undue parental influence on the

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.115.

child. This latter view seems to be more logical, though logic is not always the law. If a parent can revoke a gift to his child because of the parent-child relationship, it seems logical that by reason of the same special relationship the child should also be able to revoke a gift to his parent.

Special considerations also apply to gifts between a husband and his wife. Although a man is under a duty to maintain his wife, all gifts, including clothing and personal effects, supplied to the wife are recoverable on the dissolution of the marriage. This forms part of the tanu or "head money". The only item excepted is the traditional underwear or godotse which is not recoverable if the marriage has been consummated. The cost of maintenance with food is also not claimable. If the actual clothes are returned, even badly tattered or threadbare, the cost is not recoverable. Other gifts to a wife, such as a land, a farm or a house, are governed by the ordinary rules as to revocability of gifts but are recoverable on the dissolution of the marriage. The wife is also entitled to claim back all gifts made by her to her husband during the pendency of the marriage, and this is usually set off against the bill reckoned by the husband.

Surprisingly, the Ewe law is that gifts to concubines are governed by the ordinary rules as to revocation. Hence gifts like clothing, trinkets or money are irrevocable. This places a concubine in a more favourable position than a wife in this respect.

A Gift in Contemplation of Death

A gift made in contemplation of death, or even in expectation of death, is in Ewe law essentially in the nature of a testamentary disposition. For it does not take effect, and the gift does not become vested, until after the death of the "donor". This is discussed in connection with succession to property[1]. Here it is only necessary to say that a "gift" in contemplation or expectation of death, even if accepted by the "donee", is revocable at any time by the "donor" before his death. After the death of the "donor" his family and his successors in title are not bound by the disposition.

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1. See pp. 726 - 731 *infra*.

CHAPTER XI

PLEDGES

Old Style Pledges

A pledge of the old style is what we normally read about in the books. It is described by Ollennu as

> the delivery of possession and custody of property, real or personal, by a person to his creditor to hold and use until the debt due is paid, an article borrowed is returned or replaced, or obligation is discharged. 1

This is essentially what it is also among the Ewe. In the past human beings could also be pledged to work for the pledgee, but the pledging of human beings disappeared with the abolition of slavery when it was made illegal by statute.[2]

Because a pledge in customary law bears a close resemblance to a pawn, it is sometimes suggested that the transaction would be better known by that latter name. Others suggest the term

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.94.
2. Secs. 2 and 3 of the Slave-Dealing Abolition Ordinance, 1874; Cap. 109.

"customary mortgage" because in English law realty cannot be pledged. However, as Ollennu rightly points out, judicial usage has fastened so much on the term "pledge" that it is too late now to substitute another one. In Ewe itself it is known as nu dede megbe or nu dede awoba; hence a pledge of land is known as anyigba dede megbe or anyigba dede awoba. The Ewe word awoba is so similar to and has the same meaning as awowa in Twi that it suggests the possibility of the institution having a common origin or having been copied by the Akan from the Ewe or vice versa.

The understanding of the purpose of an old style customary law pledge is essential to the appreciation of the legal incidents flowing from it. In the first place the property pledged is not a security that can be realised on the failure to pay the debt due or to discharge the relevant obligation. It is a transaction in which the property is held by the creditor as a "security" only in the sense that, because of the value of the pledged property, it reasonably ensures that the relevant obligation shall be discharged, because the pledgor cannot leave property of that value permanently in the hands of the pledgee. There is, therefore, no implied power to sell the property in default. Bentsi-Enchill casts doubt on this proposition because, when stated by Ollennu, no authority could be cited in support of it.[1] There is indeed no direct authority in the decided

1. K. Bentsi-Enchill, op.cit., p.381, n.49.

cases to this effect. We agree with Ollennu, however, that it is of the very nature of a customary law pledge that a pledgee is not entitled to sell the pledged property even in default.[1] If nothing else establishes it, the perpetual redeemability of a pledge, which will be discussed more fully later, means that a power of sale is not implied. For a power of sale would defeat the right to redeem after a sale in default. In any case a recent interview in the Northern Ewe area confirms that in that area there is no power of sale in a customary law pledge. It is submitted, therefore, that a power to sell a pledged property in default can only be obtained from the court.

Apart from ensuring the performance of the obligation due, a pledge in customary law also has the objective of dispensing with the payment of interest on the money borrowed or the debt due. The pledgee, therefore, has the possession and use of the pledged property in lieu of interest, so that only the principal debt is due at any time. It is for this reason that the pledgee is not accountable to the pledgor for the profits derived from the use of the property.

Again, Bentsi-Enchill criticises the principle of non-accountability of the pledgee in possession.[2] In the case of the old style customary law pledges among the Northern Ewe,

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.103.

2. K. Bentsi-Enchill, op.cit., p.382.

however, there is nothing unconscionable in holding the pledgee to be unaccountable. What perhaps does not strike the critic of this arrangement is that land given for such purposes in the past was undeveloped land, usually a thick forest. The benefit derived from it by the pledgee, therefore, consisted mainly in the right to farm on the land. Before the introduction of permanent cash crops like cocoa, the pledgee exercised his right of user by growing only foodstuffs on the land. The profits were, therefore, not as substantial as one would today be misled to suppose. Similarly, on a pledge of movables such as a ring or nugget, no measurable profits accrued to the pledgee beyond the right to wear them. When the pledging of cocoa farms was introduced, a new form of customary law pledge, based on accountability, was also evolved and we shall discuss this new type of pledge hereafter.[1] As regards the old style pledges, non-accountability does not mean any unfair advantage to the pledgee. To make the old style pledgee accountable would transform the pledge into the kind of self-liquidating arrangement that we shall discuss under modern pledges. If accounting were to be applied in a case like Agbo Kofi v. Addo Kofi,[2] where property pledged in about 1869 was not redeemed until about 1930, the results could be startling. With the accruing

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1. See pp.573 - 579 infra.

2. (1937) 1 W.A.C.A. 284.

profits over these years the sum due to the pledgor-debtor as in excess of the original debt would have been astronomical. The pledgee, on losing the land by releasing it on redemption, would probably have become indebted to the original pledgor-debtor. It is submitted that this is not the nature of an old style customary law pledge among the Ewe.

A distinguishing feature of a customary law pledge is that the pledgee must be placed in possession. This feature is particularly important when a pledge is to be distinguished from a common law mortgage. In a common law mortgage, the mortgagee need not be in possession, and he is strictly accountable if he goes into possession. Thus in Adu Sei v. Ofori,[1] where the mortgage deed was not properly drawn up, the fact that the debtor remained in possession of the land induced the Court to hold that it was not a customary law pledge but an equitable mortgage. For in a customary law pledge the debtor does not remain in possession: the pledgee takes possession. Conversely, in Norh v. Gbedemah[2] where a deed expressed to be a mortgage was executed by the illiterate parties, it was held to be a customary law pledge because, inter alia, the creditor was let into possession without the liability to account. The Full Court thus distinguished Adu Sei v. Ofori on the main ground that in the present case the pledgee was placed in possession of the

1. 1926-29, Full Court, p.87.
2. 1926-29, Full Court, p.395.

property. Again in Asafu Adjei v. Yaw Dabanka[1] the possibility of a pledge was excluded because the deed expressly provided that the mortgagor shall be in possession and not the mortgagee.

This feature of a pledge, that the pledgee must be placed in possession without any liability to account, is one which makes it easy to confuse with a sale. For it is also of the nature of a sale that the purchaser shall be placed in possession. Many land cases in both the native courts and the superior courts turn on the question whether the transaction giving possession to land many years ago was a sale or a pledge. The question has always been difficult to resolve. This type of problem confronted the Native Court "B" of Adaklu in Glamor v. Amega Kofi[2] when one party alleged a pledge but the party in possession contended that it was an outright sale. The trial Native Court's decision was that:

> The Defendant who said his grandfather had purchased the said land could not point out anything about these customary ceremonies /of sale/ ... The transaction was therefore a pledge and not a sale. 3

The transaction was alleged to have taken place about 86 years before the dispute. It was, therefore, not surprising that the defendant could not adduce convincing evidence of the customary ceremonies for sealing a sale, even if there were such ceremonies. Yet the Native Court was faced with an almost impossible

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1. (1930) 1 W.A.C.A. 63.
2. Glamor v. Amega Kofi, Unreported, Native Court "B", Adaklu, 2nd April, 1955, at p.14 of Civil Record Book.
3. Ibid., at p.82 of Civil Record Book.

decision and was driven to rely on the performance of the ceremonies of sale, as the only conceivable criterion for distinguishing a sale from a pledge. The fact of possession alone was not regarded as conclusive because possession is inconsistent with both a pledge and a sale. The High Court has also expressed the difficulty of the problem. In Dotse v. Komla, Sowah, J., referring to the perpetual redeemability of ancient pledges, said:

> The problem however arises when the Judge has to assess the evidence in order to come to a conclusion whether or not the transaction is one of pledge or sale ... The evidence in almost all these cases is traditional and the Judge is called upon to say which set of witnesses he believes. It is, however, difficult to say one is lying and the other is speaking the truth when both of them tell the Court that they are only reproducing the oral history they had learnt from their fathers. In my view none can be said to be lying. 1

It was a similar problem that faced the court in Agbo Kofi v. Addo Kofi when Horne, J., said:

> If this court were bound to apply the principles of English law to this matter, then the arguments ... relating to possession would have force, if not compelling force ... /But/ all that the defendant could set up was possession which, in customary law, is consistent with either sale or pledge. 2

The learned Judge then concluded that as "There was no evidence of tradition as to the price paid, whether as guaha or mtrimmsa (sic)", the transaction was a pledge, though guaha and tramma are not Ewe customary ceremonies.

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1. Dotse v. Komla, Unreported, High Court, Ho, 28th May, 1965. Digested in (1965) Current Cases, paragraph 148.
2. Agbo Kofi v. Addo Kofi, (1933) 1 W.A.C.A. 284, 284-285.

Apart from placing the pledgee in possession, there are no special formalities for the creation of a customary law pledge. That is why in Glamor v. Amega Kofi[1] the Native Court conveniently but somewhat simply relied on the absence of proof of the special ceremonies of sale to decide that the transaction was only a pledge. An essential feature deduced from the absence of formalities in a pledge is that no special boundary marks are fixed. The absence of boundary trees or marks, therefore, pre-supposes that there was not a sale. However, such a rule of thumb is not a very reliable or safe guide because, quite often, the pledgor simply pledged all his land in the particular locality, thus touching all the boundaries.

The other important feature of a customary law pledge is that it is always redeemable, regardless of the length of time. The redeemability of pledges is discussed in the next section.

Perpetual Redeemability of Pledges

A notorious feature of the Ewe customary law pledge is that it is perpetually redeemable. The principle, to plagiarize the maxim of another system of jurisprudence, is "once a pledge, always a pledge". The principle means that nothing in the transaction or thereafter may defeat or clog the right of the

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1. Supra.

pledgor to redeem his property at any time, however long after the pledge. This principle is so entrenched in Northern Eweland that that area has produced most of the classic cases which illustrate the frustrating effect of this rule in Ghana.

The locus classicus of the principle of perpetual redeemability of pledges is Agbo Kofi v. Addo Kofi,[1] the case that opened the flood gates to similar claims in the Northern Ewe area. In that case the Tribunal of the Fiaga of Peki held that a pledge could be redeemed at any time, regardless of the long intervention of time, and therefore that the Dove lands pledged in about 1869 could be redeemed in about 1930 on tendering the principal debt of six shillings and sixpence. The decision of the Fiaga's Tribunal was confirmed on appeal by the West African Court of Appeal and the principle received judicial endorsement. Following that decision the Land Court also held in Kuma v. Kofi[2] that land pledged for a keg or half a keg of gunpowder many years ago in Adaklu, another Northern Ewe chiefdom, could be redeemed at any time. The words of Lingley, J., are that:

> It is established law that a pledgor can redeem his land after any lapse of time. 3

Also in Dzanku v. Adza Kwadwo,[4] the Court of Appeal held that land near Ho, which was pledged many years ago for six shillings

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1. (1933) 1 W.A.C.A. 284.
2. (1956) 1 W.A.L.R. 128.
3. Kuma v. Kofi, (1956) 1 W.A.L.R. 128, 130.
4. (1960) G.L.R. 31.

but now valued "about £500", could be redeemed even after the long efflux of time. Delivering the judgment of the Court of Appeal, Korsah, C.J., said:

> There are decided cases which establish that, by native customary law, the long duration of a pledge (no matter how long it may last) does not prevent the successors of the original owners from exercising their right to redeem the property whenever they decide to do so. And since by native custom a pledgee is entitled to use the property pledged, for his own benefit and without accounting to the pledgor, the fact that the pledgee has spent money to improve the property cannot bar the pledgor from recovering the property upon payment of the debt. 1

If, therefore, a pledge can be proved today, the right to redeem is unchallengeable. The unsettling effect of this rule on property rights cannot be over-estimated, if claims can succeed merely because the ceremonies of a sale cannot be proved to have taken place generations ago. The realisation of the mischief in the rule of perpetual redeemability of pledges led Sowah, J., to say that:

> It seems to me that the time is ripe when there should be enacted in our laws the laws of prescription and limitation. 2

The learned Judge was constrained to appeal for a legislative remedy because he felt himself bound by authority under the principle of stare decisis. Without the intervention of the legislature, it is suggested that one way to close the door to absurd and frivolous claims is to place the onus on the party alleging a pledge to prove it, instead of the present tendency

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1. Dzanku v. Adza Kwadwo, (1960) G.L.R. 31, 33.
2. Dotse v. Komla, supra.

which requires the party in possession to prove a sale in order to retain the disputed land. It is submitted with respect that the learned Judge in Agbo Kofi v. Addo Kofi erred in stating that in the customary law, unlike English common law, possession is a neutral factor because it is consistent with both a sale and a pledge.[1] At common law the possession of realty is by itself alone equally consistent with a sale, a mortgage and a lease. Yet at common law the fact of possession raises a presumption of title which can be dislodged with evidence of other facts. There is no basis on which one can agree with the learned Judge that the same rebuttable presumption of title is not raised by possession in the customary law. There is no reason why in the customary law the fact of long and uninterrupted possession for generations cannot raise a prima facie presumption of title, so that the onus must lie on the party disputing that title to prove that possession was obtained only through a pledge. When a similar problem arose in a Vakpo case before the Native Court of Appeal for Akpini State, Kpando, that Court adopted a more realistic and reasonable approach. There being a doubt whether the transaction was a sale or a pledge, the Native Court of Appeal treated the fact of long and uninterrupted possession and occupation as prima facie evidence of title. The onus accordingly lay on the alleged pledgor to

1. Agbo Kofi v. Addo Kofi, (1933) 1 W.A.C.A. 284, 284-285.

rebut the presumption of title and, failing to discharge that onus, he failed in his claim. The Native Court of Appeal said:

> Neither the Plaintiff-Respondent nor the Defendant-Appellant could clear the doubt as to whether the land was pledged or bought ... Now the Court below admitted in its judgment that the Defendant-Appellant was in possession of the said land for a very long time, indeed over 70 years ... The benefit of the doubt ought to have been given to the Defendant-Appellant because he possessed the land for long years without anybody disputing it with him and he was known as the owner of the land to Vakpo people. 1

It is submitted that this should be the correct approach of the Courts in admitting proof of ancient pledges. It is not indeed a case of a "benefit of the doubt", a phrase which is ill-chosen. It is a case of failure to establish positively on either side whether it was a sale or a pledge, much as the learned Judge in Dotse v. Komla[2] said that in his view it was difficult to believe one party as against the other. The general rule in civil cases, when the evidence is inconclusive either way, is that that party fails who should prove the issue in order to succeed. Therefore, if possession is held to raise a prima facie presumption of title, then in the case of inconclusive evidence on either side, the rebuttable presumption should tilt the balance in favour of the party who had been in long and uninterrupted possession in the character of the holder of an absolute title.

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1. Akpo v. Dzeble, Unreported, Native Court of Appeal for Akpini State, Kpando, 4th March, 1950, Civil Appeal Record Book, p.463 at p.465.

2. Supra.

In one case which came before the Privy Council the combination of the two facts of long and uninterrupted possession and the failure to give the customary reminder was held to defeat the claim of title by the plaintiff. These two facts have always been considered by the Ghana Courts to be inconclusive one way or the other.[1] In Adjeibi Kojo v. Bonsie,[2] however, the Privy Council said:

> Two facts stand out as established: The first is that the defendants have enjoyed the profits of the land without interruption for 80 years. Three or four generations have passed and no suggestion has been made that it was the subject of a pledge. The evidence shows that, if there had been a pledge, it is customary on the death of the pledgee for a reminder to be given to his successors, whereas none such was given. Even if the custom were the other way round (as was suggested), still no reminder was given: and surely, if no reminder was given, the plaintiff ought to have taken steps long since to draw the defendants' attention to his claim. The failure of the plaintiff and his predecessors to do this goes far to negative his claim. 3

It is submitted that this decision of the Privy Council, as well as that of the Native Court of Appeal for Akpini State in Akpo v. Dzeble,[4] state the correct approach to the proof of ancient pledges.

Having proved the pledge, it is nevertheless a principle of the customary law that, while redemption may be allowed at any time, it may not be claimed with such lack of notice as

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1. See e.g. Glamor v. Amega Kofi, supra; Agbo Kofi v. Addo Kofi, supra; Kuma v. Kofi, supra.
2. (1957) 1 W.L.R. 1223.
3. Adjeibi Kojo v. Bonsie, (1957) 1 W.L.R. 1223, 1227.
4. Supra.

will result in the pledgee's losing the fruits of his labour. Hence the pledgee is entitled, even after redemption, to harvest current crops on the land. The difficulty today is with permanent cash crops like cocoa and coffee. The principle that the pledgor must give adequate notice before redemption, and the general principle that the customary law abhors ill-gotten gain, have combined to mitigate the loss to the pledgee when there is a redemption today of ancient pledges of lands planted by him with permanent cash crops. The result is that although the successor of the pledgor may be permitted to redeem the property pledged some generations ago, he may at times be allowed to do so only on terms. The discussion of the law on perpetual redeemability of pledges has not given enough prominence to the rule that redemption after a long interval of time may be on terms. The terms usually imposed on redemption of such ancient pledges are that the pledgee shall continue to be entitled to at least part of the proceeds of permanent cash crops planted by him on the redeemed land. For instance, in the case of Agbo Kofi v. Addo Kofi,[1] the rights of the defendant pledgee were recognised by both the Fiaga's Tribunal and the West African Court of Appeal. The West African Court of Appeal, after declaring that the plaintiff was entitled to redeem, said:

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1. (1933) 1 W.A.C.A. 284.

> A word may be said as to the position of Addo Kofi the defendant, who has according to the Fiaga's Tribunal 'cocoa farms in some parts of the Dove lands'. There is authority for making an order in this Court protecting his rights thereto, but as the Tribunal of the Fiaga has ordered that this matter be settled amicably between the parties, there appears to be no necessity for such an order. 1

The amicable settlement contemplated was that the proceeds of the farms on the redeemed land shall be shared in agreed portions. The Court of Appeal went even further and stated the nature of the pledgee's right in another case thus:

> The Native Appeal Court in the instant case went to the trouble of defining the exact nature of Dzanku's interest in that portion of the land cultivated by his predecessors when they said: 'The respondent Dzanku to pay 6s. to redeem the disputed land from the appellant Kwadwo. Any farm or farms made by the appellant or by his agents to be used on dibinamdibi system with the respondent'. 2

It is not altogether clear what type of dibinamdibi or dibimadibi is contemplated here. It shows, in any case, that the pledgee did not lose all his rights over the crops on the land. For the Ewe dibimadibi is an arrangement whereby a farm is made on the land of another, so that the physical area of the farm itself, or sometimes its proceeds, may be shared in agreed ratios, usually equal halves but sometimes in 2 to 1 ratio.[3]

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1. Agbo Kofi v. Addo Kofi, (1933) 1 W.A.C.A. 284, 284.
2. Dzanku v. Adza Kwadwo, (1960) G.L.R. 31, 34.
3. See pp.584-594 infra for discussion of dibimadibi under "Tenancies".

It is submitted that the condition imposed here is both fair and reasonable. Where after a long delay the redemption of property is allowed, the pledgee who had improved the land in the reasonable belief of paramount title thereto should be entitled to share in the fruits of his labour. This, however, cannot apply to a pledgee or his successor who had been aware all along that he occupied the land as a pledgee. Such awareness can be inferred from such facts as a formal introduction to the family of the pledgor on the latter's death.

It is a rule that, in the case of pledges, the pledgor should introduce himself to the family of the pledgee-creditor if the pledgee predeceases him. In the same way the pledgee should introduce himself to the pledgor's family if he survives the pledgor. However, as the property pledged is usually of a greater value than the debt due, as a practical proposition the pledgor or his family should particularly ensure that there is a proper introduction on the death of any of the parties, lest title to the pledged property be lost. For it may be in the interest of a dishonest pledgee that there is no such introduction, so that he may in the course of time raise a presumption of absolute title to the property in his favour. The introduction is done with drinks a few days after the burial, or as soon as possible thereafter. Among the Ewe this introduction is not permitted while the body lies in state as

suggested for some other communities.[1] While the body lies in state it would be a gross and unforgivable insult to the family of the pledgor to proclaim publicly his indebtedness. As regards a deceased pledgee the bereaved family would be concerned with more pressing problems than listening to the list of creditors. Introduction of either a pledgor or a pledgee is always a quiet family affair some reasonable time after burial, when the members of the family can be considered as mentally prepared to listen to such claims.

The necessity for introducing oneself after the death of the other party is only a device for refreshing the memory of the families as regards the transaction. It was, therefore, of a special evidentiary value because of the absence of writing. It has been attempted now, however, to elevate the procedure to a sine qua non in establishing the existence of a pledge, so that failure to observe it may be construed to mean that the transaction was a sale and not a pledge. This attempt was rejected in the Adaklu case of Kuma v. Kofi by Lingley, J., who said:

> I do not think that the custom referred to is anything more than the usual attempt of systems of law that had no writing to endeavour to lay down methods of proof by means of a large number of oral witnesses. I do not think that it can be regarded as affecting the continuing validity of a pledge.

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1. Ollennu says this is done while the body lies in state. See his Principles of Customary Land Law in Ghana, 1962, pp.105-6.

> I do not think it will be equitable to allow a pledgee to rely on the breach of this custom to defeat the rights of redemption. 1

It is submitted that, if the learned Judge was right, there is an anomaly in the law. The introduction of the pledgor to the pledgee's family on the death of the pledgee, or vice versa, is only incidental to the existence of the pledge itself. Similarly the customary ceremonies sealing a sale of land are also merely incidental to the transaction itself. It is submitted that in both cases they are essentially only of evidentiary value. Why then should the failure to introduce the pledgor or pledgee be excused, while the failure to describe the performance of the customary ceremony of sale many generations ago is regarded as fatal to the claim of title by a party who has been in undisturbed possession for generations? It is submitted that the only rational and practical approach is to regard both ceremonies as technicalities, proof of which would, however, aid the parties in establishing a sale or a pledge as the case may be. In that case the question of a sale or a pledge would be decided on the totality of the evidence, relying all along, however, on the principle that long and undisturbed possession raises a rebuttable presumption of absolute title.

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1. Kuma v. Kofi, (1956) 1 W.A.L.R. 128, 130. Cf. Adjeibi Kojo v. Bonsie, supra, where a contrary view was taken by the Privy Council.

Pledge of Movables

Pledges of the old style, which have been discussed so far, are practically obsolete and are scarcely created today in respect of land. Today it is not the land as such but the farm on it that is pledged. Hence a new form of pledge has been evolved to serve this purpose. This will be discussed in the next section.

It is necessary to mention briefly here, however, that the old style pledge is still used in the pledging of movables. In spite of the limitations in the Pawnbrokers Ordinance,[1] movables or chattels are still pledged. That enactment places pledges on a commercial basis by providing that any person who takes goods or chattels from another person by way of security for the repayment of a sum not exceeding £50 is a pawnbroker.[2] As the pawnbroker is required by the statute to fulfil some conditions as to registration and keeping of books,[3] it seeks in effect to eliminate the customary pledging of chattels to an occasional lender of money.

It is a fact, confirmed by field research, however, that in spite of the statute, movables are still pledged today in the old way among the Ewe under the statutory limit but without the statutory formality. When movables are so pledged, the

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1. Cap. 189 of the Laws of the Gold Coast, 1951 Edition.
2. Sections 2 and 3 of the Pawnbrokers Ordinance, Cap. 189.
3. Sections 8 and 16 of the Pawnbrokers Ordinance, Cap. 189.

incidents are precisely the same as for the old style pledging of land as described above. The pledgor delivers the pledged article, such as a ring, a necklace, bangles, or an expensive kente cloth, to the pledgee and receives in return an advance of a sum of money. The pledgee keeps the pledged article, and is entitled to use it without accounting, until the sum advanced is repaid. Possession is thus essential to such a pledge of chattels. Like the old style pledge of land, a pledge of chattels is also redeemable at any time the sum due is tendered. As the pledgee of chattels is not generally expected to improve the property as one would develop or cultivate undeveloped land, there is no requirement as to notice before redeeming a pledged chattel.

Modern Pledges

Pledges of the old style, that is to hold property for use in lieu of interest until the principal debt is discharged, are now obsolete as far as land is concerned. Existing pledges made generations ago may still be redeemed today; but no new pledges of this type are created now relating to land. Today the old style pledge is created in Eweland only in relation to movables or chattels.

The reason why old style pledges have disappeared is that land as such, that is undeveloped land, is no longer pledged.

The modern pledge is a pledge of only the farmer's interest in the farm, that is agble or bofo, and not of the interest in the land itself or anyigba. As already explained, Ewe law distinguishes between the land itself and the things on it. Therefore, a pledge of a farm does not in the law extend to the land itself. Hence, while the old style pledge is known as anyigba dede megbe or anyigba dede awoba, the modern pledge is known as agble dede megbe or agble dede awoba, which means "the pledging of a farm". As the distinction leaves title to the land itself unaffected, the individual farmer has the capacity to pledge his interest in his farm on family land without the consent of his family. The family's consent is dispensed with in any case because in the modern pledge the pledged property pays off the debt and the property automatically reverts to the pledgor.

The simplicity of the modern pledge is that it is a self-liquidating pledge in which the proceeds of the farm are utilised to extinguish the debt due. For this reason the pledged farm cannot conceivably remain indefinitely in the hands of the pledgee as is the case with old style pledges.

This is the important point of difference between the old style pledges and modern pledges. The old style pledge means that the pledgee uses the property in lieu of interest on the loan and is, therefore, not accountable. In modern pledges,

however, there is accountability and the property is not held by the pledgee to be used in lieu of interest. In modern pledges interest is charged on the loan in practically every case; but, to circumvent the usury laws, the loan is described, even in any document evidencing the transaction, as an interest-free loan. The rate of interest, according to information, is 50 per cent, sometimes as high as 100 per cent. The principal and the interest thereon, are then added together and described as one interest-free loan which is repayable from the proceeds of the pledged farm. To illustrate it with actual figures, if the loan is £200 at a 50 per cent interest, the transaction is described as an interest-free loan of £300. It is usually difficult to dispute with parole evidence the description of the modern transaction as recorded, because practically all modern pledges are reduced into writing and signed or thumb-printed by the parties and attested by witnesses. This works hardship in many cases. It is suggested that, in appropriate cases, the courts should go outside the written agreement and admit parole evidence in order to ascertain the true terms of the agreement.

There are two types of modern pledges. In one case the debt is regarded as extinguished after a fixed term of years and the farm is then returned to the pledgor. In the other type the farm is held by the pledgee only until the net proceeds pay off the sum due. We may examine the incidents of both types.

A pledge for a fixed term of years is indeed a calculated gamble. In return for a loan the debtor pledges his farm to the creditor-pledgee by placing the said pledgee in possession for a fixed number of years. Obviously this kind of arrangement can only be established regarding farms with permanent cash crops like cocoa and coffee. The term of years is, therefore, usually determined with respect to the crop seasons and not necessarily to the calendar year. There is no accountability and the pledgee is entitled to all the proceeds of the pledged farm over the agreed years, in satisfaction of the principal loan and the (unexpressed) interest. If he gets a good harvest and the market price is good, he may make a considerable profit. On the other hand, if there is a poor harvest or the price falls, it is a loss against which he cannot be indemnified by the pledgor. For at the end of the fixed term the pledgor regains possession and the debt is deemed to be automatically extinguished. A pledge for a fixed term of years, unless expressly stated otherwise, is redeemable at any time by the pledgor tendering the whole of the original debt. The pledgor in such a case is not credited with the profits accruing to the pledgee for that part of the term that he had been in possession. Thus if for a loan expressed to be £200 the term fixed is 6 years but the pledgor decides to redeem the property after 4 years, he must tender the whole of the original £200.

When a farm is pledged over a fixed term of years, the pledgee also takes over the actual management of the farm. The pledgee becomes responsible for clearing the weeds and harvesting the crops. A prudent pledgee manages the farm well to ensure a maximum yield, at least until the closing years of the term. Quite often, however, such management by a pledgee leads to the deterioration in the condition of the farm. For the pledgee takes only a short-term view of the maintenance and development of the farm. At times there is an actual neglect of the farm. Even without actually neglecting the farm a pledgee will, for instance, resist the cutting out of diseased cocoa trees, since this may mean a loss to him in the produce over the remaining years of the term. Pledging in this manner, therefore, often leads not only to the deterioration of the farm but also to a decline in annual yield of crops.

The other type of modern pledge is where the proceeds of the farm are directly utilised to pay off the principal debt and the (usually unexpressed) interest. The pledgee is placed in possession of the farm. In this case, however, like the mortgagee of the common law, he is strictly accountable for his earnings while in possession. The basis of the arrangement is that the pledgee agrees to be repaid in dribblets by re-imbursing himself every crop season with the net proceeds of the farm. As soon as the amount due has been repaid in this manner, the transaction lapses and the farm is immediately returnable to the

pledgor. Any receipts in excess of the debt due are payable to the pledgor. There is, therefore, a strict accountability in a pledge of this nature. The reckoning, however, is on net proceeds only. The pledgor, although not in possession, remains responsible for maintaining the farm, including weeding it and harvesting the crops for the pledgee. If the pledgor cannot do these himself, a labourer is hired at his expense and the cost deducted from the gross earnings. In spite of these liabilities on the pledgor to maintain the farm, he is not legally in possession. If the debtor remains in possession then, in Ewe law, the transaction is not regarded as a pledge but only as a loan transaction, in which the creditor simply expects to be paid out of the proceeds of the farm. At times there is a variation in the arrangement whereby not all the net proceeds go to the pledgee, so that the pledgor is allowed a small fraction of the proceeds annually for his own use. A pledge of this nature is redeemable at any time. Redemption is obtained by tendering the balance due at any time after deducting the actual receipts of the pledgee. Until then the pledgee is entitled to be, and as a rule is, in possession of the property, on the basis of accountability. It is stated by Allott that among the Akan the pledgee does not normally go into occupation in the case of a self-liquidating pledge, though he admits his right to be in possession.[1] In this respect the Akan practice varies from

1. A.N. Allott, The Akan Law of Property, 1954, pp.405-406.

the Ewe; for among the Northern Ewe the pledgee normally goes into possession and sometimes even replaces the pledgor's farm labourers with his own.

CHAPTER XII

TENANCIES

Gratuitous Tenancies

There are two possible types of customary law tenancies. One is the type of tenancy granted on the condition that the tenant makes a payment of some sort for the use of the land. The other type is where the tenant is allowed a free occupation and use of the land to which he is not otherwise entitled. This latter type is what is described here as a gratuitous tenancy, because it involves no payment either in cash or in kind. It may also be described as a licence.

Gratuitous tenancies are usually granted to relatives and friends of the family by allowing them a free use of the land; but they may also be granted to any other person. It is then said that the land is given to the grantee "to eat on" or du nu le edzi. It is apt to be confused with an outright gift because of the absence of the obligation on the tenant to pay any form of rent, particularly if the tenancy subsists over a

considerable time. It is, however, not a gift and the paramount title to the land is not transferred. Therefore, the grantee, unless specially permitted to do so, cannot fell or sell palm trees, odum, mahogany or other valuable timber naturally growing on the land. For the right to these vests in the holder of the paramount title to the land or anyigbato. Similarly the rights over minerals and treasure trove in the soil remain in the holder of the paramount title.

A gratuitous tenancy may be determined if the tenant tries to set up an adverse title to the land.[1] As its basis is usually blood relationship or friendship, it may also be determined for ingratitude, disobedience and bad behaviour towards the grantor or for committing waste. The right and grounds for determining a gratuitous tenancy extend to the successors of the grantor and grantee. Hence a gratuitous tenancy granted several generations ago may be determined today if a bad relationship develops between those who have succeeded the original parties.

There are two species of gratuitous tenancies and their consequences differ. They are those granted (a) for the cultivation of foodstuffs, and (b) for the cultivation of permanent cash crops.

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1. As, indeed, it was determined in Adai v. Daku, (1905) Ren. 348, 418, when the grantee raised an adverse claim of title.

Gratuitous tenancy for foodstuffs: A gratuitous tenancy for the cultivation of foodstuffs is limited to the cultivation of cassava, cocoyam, yam, plantain, maize and other foodstuffs; but there is no restriction on the kind of foodstuffs which may be cultivated. However, cocoa, coffee and other permanent cash crops like palm trees may not be cultivated on land granted for the growing of only foodstuffs.

As foodstuffs are harvested within a year or so, the tenancy ends with the harvest, unless renewed. The tenant enjoys a security of tenure and his tenancy cannot be determined while his crops are on the land. His interest in the crops is alienable inter vivos and he may dispose of them post mortem. The gratuitous tenant, however, does not by virtue of his tenancy acquire a right to re-occupy the fallow land or afuu. The right of re-occupation remains in the individual member of the family who, but for the tenancy, would have been entitled to use the land. However, within a reasonable time of the determination of the tenancy, the former gratuitous tenant may enter upon the land to collect remaining foodstuffs.

Because a gratuitous tenancy for foodstuffs terminates at the harvest, it may be granted by an individual member of the family over family land in his occupation. The consent of the anyigbato or the family holding the paramount title is not in this case necessary for the validity of the tenancy; but the head of that family must be informed. If the gratuitous tenancy is to be on a continuous basis, then the authorisation of the

family is required, and publicity is necessary because of the possibility of the grantee or his successors setting up an adverse claim of title in the future.

Gratuitous tenancy for cash crops: A gratuitous tenancy may be granted for the cultivation of permanent cash crops like cocoa, coffee or palm trees. In that case foodstuffs may also be cultivated along with the permanent cash crops.

The grant of a gratuitous tenancy for the cultivation of such permanent cash crops resembles a gift because the land becomes permanently tied to the grantee, since the grantee's interest in the farm is both inheritable and alienable. For this reason it is only the family, that is the head of the family acting on the authority of the family, who can grant such a tenancy. In spite of the authorisation by the family, such a tenancy is not an outright gift transferring the paramount title to the land. The grantor family always retains the paramount title to the land. There is thus a horizontal stratification of interests. The family as anyigbato or holder of the paramount interest, reserves the right of ultimate control, including the right to sell, since a sale of land in Ewe law has the only effect of alienating the paramount title. The family also retains the right to minerals and trees growing naturally on the land. The family's interest, however, is encumbered by the co-existing interest it has created in favour of the tenant, which is the right of user.

A gratuitous tenancy for permanent crops may be determined when the crops die out and the farm cannot be said to be existing as such. Unless this happens the gratuitous tenancy cannot be determined because otherwise the grantee's labour would be lost. There is thus a security of tenure for as long as the cash crops are on the land. That is why the family must authorise such a transaction affecting family land in order to be valid.

Tenancies for Consideration

A tenancy for consideration is one in which the occupation and use of another's land is allowed in the customary law, on condition that part of the proceeds shall be paid to the landlord. The rent, it should be noted, is not reserved in terms of a monetary payment but as part of the proceeds of the land. Among the Ewe the normal arrangement is that the physical area of the farm itself, that is agble or bofo, is divided into equal halves between the farmer and the anyigbato or the holder of the paramount title to the land. It is known as dibimadibi. In Akofi v. Wiresi,[1] Coussey, P., in the West African Court of Appeal, described the essential features of such a tenancy thus:

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1. (1957) 2 W.A.L.R. 257.

> It is a common form of tenure throughout the country for a landowner who has unoccupied virgin or forest land, which he or his people are unable to cultivate, to grant the same to a stranger to work on it in return for a fixed share of the crops realised from the land. 1

It seems that this type of tenancy is an innovation introduced to the Ewe from the Akan areas. For the tenancy is known among the Ewe as dibimadibi, a corruption of the Twi expression dibi na mennibi which means "eat some and let me also eat some". Its development, however, has not followed exactly the Akan pattern among the Ewe. Among the Akan there are two types of tenancy for consideration, viz. abusa and abunu. The abusa tenancy is created when an uncultivated or virgin land is granted to another person, who then cultivates it under the agreement that the proceeds are to be shared in the ratio of 2 to 1 between the grantee and the grantor.[2] The abunu, however, is an agreement under which an old farm is taken over to be managed by another person, or where the landlord or anyigbato financially or materially assists another person to cultivate a farm on his land, so that in either case the proceeds of the farm are shared equally between the farmer and the landlord.3

The abunu type of tenancy does not seem to exist among the Ewe. Field research did not disclose any abunu type of tenancy among the Ewe. Where an existing farm is placed under the

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1. Akofi v. Wiresi, (1957) 2 W.A.L.R. 257, 259.
2. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.81.
3. Ibid.

management of another person among the Ewe, it is strictly in the nature of a hiring of labour and the person taking charge of the farm is known as a labourer or agbledzikpola or bofodzikpola. As such farms are usually cocoa or coffee farms, the labourer is remunerated at the rate of a fixed sum of money per load of the crops sold, the remuneration being known as kotoku nu dede. The rate varies according to the official buying price of the produce, but is uniform throughout the chiefdom every crop season. Thus, for clearing the weeds twice in the year and harvesting the crops, the labourer was paid about six shillings per load of cocoa when a load of 60-lbs., was officially purchased for £3. If the labourer enters into the agreement too late, so that he clears the weeds only once before the harvesting, or only harvests the crops, the rate of remuneration is reduced pro rata but usually by negotiation. On the termination of the contract the rights of the labourer end there, because this is not a tenancy but just the hiring of labour.

From the description, therefore, it seems that the tenancy for consideration or dibimadibi among the Ewe has as its near-equivalent the abusa tenancy among the Akan. A dibimadibi tenancy is created among the Ewe if virgin land is given to a stranger for cultivation so that the farm may be shared. The normal arrangement among the Ewe is that the physical area of the farm or agble or bofo is shared in two equal halves, though at times it is agreed that the farmer shall have two-thirds.

Among the Ewe the ratio in which the farm may be shared is negotiable. In all cases, however, it is the area covered by the farm which is physically shared, each party thereafter being entitled to only the yield from his own portion of the farm.

The Ewe system differs in some material respects from the Akan system. It borrows part of the features of both the abusa and the abunu of the Akan. Like the Akan abusa, the Ewe dibimadibi is a cultivation of virgin land without any assistance from the anyigbato or the holder of the paramount title to the land. In the division of the farm, however, the Ewe dibimadibi somewhat resembles the abunu of the Akan because the area of the farm is usually divided into equal halves, just as the proceeds of the farm in the abunu tenancy of the Akan are usually shared equally between the farmer and the landlord. On the other hand, the Ewe dibimadibi differs from both the abusa and abunu because the dibimadibi implies a division of the physical area of the farm itself and not merely the produce. Perhaps it is because the Ewe tenancy is a hybrid of the two Akan systems and is thus sui generis that it is not known as either abusa or abunu, hence the name dibimadibi. One gets the impression that among the Akan the abusa tenancy is of a fixed pattern whereby one-third share of the proceeds goes to the landlord and the farmer takes two-thirds.[1] Among the Ewe the

1. See e.g. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.81 and J.B. Danquah, op.cit., p.220. This is also the basis of the reasoning in Akofi v. Wiresi, (1957) 2 W.A.L.R. 257. But see also A.N. Allott, The Akan Law of Property Unpublished Ph.D. thesis, Univ. of London, 1954, p.480, where he says the ratio may be varied by agreement, and p.484 where he says in note 51 that in Bekwai and Ajumako the division is into halves.

ratio is negotiable; but where it is not specifically negotiated it is implied that a division in equal halves is intended.

One major difference between the Ewe dibimadibi and the Akan tenancies is in the nature of what is shared. The Ewe divide the farm itself, that is the physical area of the farm, so that each party reaps the fruits of his portion of the farm. They thus become two separate farms in effect. This sort of arrangement has been rejected as inapplicable to the Akan tenancies. In the Kwahu case of Sasu v. Asomani,[1] for instance, a case of abusa tenancy, the suggestion that the physical area of the farm itself, rather than the proceeds, should be shared was rejected by the Court. In that case Quarshie-Idun, J., said:

> I agree with the judgment of the Native Court that 'abusa' does not imply a right in an owner of the land to divide a farm cultivated by another person into three and himself collect the proceeds of the third share. 'Abusa' implies that the owner of the land is entitled to be paid a third share of the proceeds accruing from the whole farm cultivated by another. 2

Quite clearly this is different from the Ewe dibimadibi tenancy. The difference also explains why the same ratio is not applied in the division of the farm and the sharing of the proceeds among

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1. Sasu v. Asomani, Unreported, Land Court, 11th June, 1949. Reproduced in N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.171.

2. Ibid., at p.172. This decision is, however, doubtful. For it is stated by Allott that in some Akan areas, Bekwai and Ajumako for instance, there is sometimes a physical division of the farm itself and not merely the yield. See A.N. Allott, The Akan Law of Property, 1954, p.484.

the Ewe and the Akan respectively. In the Akan system the farmer remains on the whole farm and is responsible for clearing it of weeds and for harvesting all the crops. Among the Ewe, once the farm is divided the landlord or anyigbato becomes responsible for clearing his own portion and harvesting the crops there. The farmer's responsibility ceases over the landlord's portion as soon as the division of the farm has taken place. It means that the Ewe dibimadibi tenant does less work than the Akan abusa or abunu tenant. If the Ewe landlord wishes the dibimadibi tenant to manage his half of the farm for him, this is a fresh contract subject to the usual terms of remuneration for the agbledzikpola or a labourer as already discussed.[1] The total earnings of a dibimadibi tenant re-employed in this way, when added to the proceeds of his own half of the farm, may amount to something in the neighbourhood of the 2 to 1 ratio in his favour over the proceeds of the entire farm, which is the usual remuneration of his Akan counterpart on the abusa tenancy.

Even though the farm is physically divided among the Ewe, the tenant farmer takes the interest in only the farm and does not acquire the paramount title to the land itself. The arrangement does not involve alienation of title to the land, though it creates in the tenant the right to cultivate the

1. See pp. 585-586 supra.

land and enjoy the proceeds therefrom. Therefore, the tenant may not sell timber or fell or sell palm trees naturally growing on the land, and he has no interest in any minerals in the soil. Nevertheless, because the land becomes permanently tied to the grantee, the dibimadibi tenancy for permanent cash crops is not valid but void unless created on the authority of the anyigbato or the family holding the paramount title to the land.

The dibimadibi tenancy of the Ewe is both inheritable and alienable under the same terms as the original grantee had. As regards succession the landlord has no choice but to accept that person who, according to the personal law of the grantee, is entitled to succeed to his interests in property.[1]

Two different situations, however, arise with respect to alienation inter vivos. While the young trees are still being tended and the farm has not yet been physically divided, the tenant cannot alienate his interest without the consent of the landlord. Danquah puts it rather mildly when he says:

> A tenant on the abusa system has no right to alienate the property held, but he may transfer his own share to a third person, with due notice to the landlord. 2

Among the Ewe "due notice" is not enough. The consent of the landlord or anyigbato is necessary. The landlord can reject a

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1. The same is said of the Akan abusa tenancy. See, e.g. J.B. Danquah, Akan Laws and Customs, 1928, p.220.

2. J.B. Danquah, op.cit., p.220.

prospective alienee inter vivos if, in the opinion of the landlord, he is not a suitable person. For this is a personal contract in which the personality of the grantee is vital, since a lazy or careless transferee may neglect or fail to maintain the young farm properly.

If, on the other hand, the farm has been divided between the dibimadibi tenant and the landlord, then the tenant is unfettered in the alienation of his interest in his half of the farm. The tenant may in that case alienate his interest in his part of the farm by sale or gift, and he may pledge it, without the landlord's consent. For in that case the so-called tenant no longer performs any services for the landlord or anyigbato.

Ollennu suggests that the interests of the Akan abusa tenant may be attached in execution of a judgment debt.[1] It is submitted that he is right and that the interests of the Ewe dibimadibi tenant may be similarly attached. If the Ewe dibimadibi farm has already been divided, then the purchaser succeeds to the tenant's interest in the farm, though he does not thereby acquire any title to the land or anyigba itself. If the Ewe dibimadibi farm has not yet been divided, a purchaser of the tenant's interest in execution takes it subject to all the obligations under the tenancy to maintain the farm.

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.86-87.

Like all tenancies, the Ewe dibimadibi tenant forfeits the tenancy if he denies the title of his grantor. Before the division of the farm the tenancy may be terminated if the tenant fails to develop and maintain the farm reasonably well; but after the division the neglect by the tenant of his own portion of the farm cannot be a ground for terminating the tenancy. If the farm dies out completely, which is very highly improbable, the land reverts to the landlord unencumbered. Except in the above cases, the dibimadibi tenant anjoys a security of tenure and the tenancy cannot be terminated.

The Ewe dibimadibi tenancy may be granted, like the gratuitous tenancy, for either foodstuffs or permanent cash crops. These need a brief treatment.

For foodstuffs: This is a type of tenancy granted exclusively for the cultivation of only foodstuffs. It lasts only until the foodstuffs are harvested, which is about a year, unless renewed. The grantee has no automatic right to re-occupy the fallow land or afuu after the harvest, though he is entitled to enter upon the land thereafter to collect any foodstuffs remaining there. The individual member of the family may, therefore, grant such a tenancy on family land in his occupation, with the head of the family informed. But, again, if the tenancy for foodstuffs is to be on a continuous basis from year to year, then the authority of the family is necessary and there must be due publicity in order to forestall any adverse claim to title by the tenant or his successors in future.

In particular a dibimadibi tenancy for the cultivation of foodstuffs implies that the physical area of the farm itself is to be divided. The landlord may wish to have the foodstuffs solely for domestic consumption while the tenant may wish to sell his produce. By partitioning the farm itself each party is at liberty to do as he pleases with the crops on his portion of the farm. For if only the produce may be shared as held in Sasu v. Asomani,[1] then it may compel both parties to consent to the sale of all the produce.

For Permanent Cash Crops: An Ewe dibimadibi tenancy may be created for the cultivation of permanent cash crops like cocoa, coffee or palm trees. In fact this is by far the most common type of the dibimadibi tenancy. The particular kind of crops is specified in each case, and a tenancy granted for, say, cocoa cannot be converted by the tenant for the cultivation of another crop. However, while the cocoa or coffee trees are still young, the farmer may inter-plant foodstuffs for which he is not accountable to the landlord. Similarly, after the division of the farm, the tenant may cultivate foodstuffs in between the cash crops on his portion of the farm for his own use.

As the cultivation of permanent cash crops involves a permanent occupation of the land, a dibimadibi tenancy relating

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1. Supra.

to family land is not valid unless authorised by the family. An individual person holding the paramount title to a self-acquired land may, however, grant such a tenancy without the authority of his family.

CHAPTER XIII

SUCCESSION TO PROPERTY

Different Types of Succession Distinguished

The term "succession" in law refers to the disposal of the rights and duties of a person, or some aspects of them, in favour of a subsequent holder. It is thus the process by which in law the subsequent holder is treated as if the right or interest of his predecessor had passed to him.

We may distinguish two types of succession: succession inter vivos and succession post mortem. There is a succession inter vivos where the rights or duties of a previous holder pass to a subsequent holder in the life-time of the previous holder, whether voluntarily or involuntarily. There is a succession inter vivos when the holder of an interest in property alienates the same by gift or sale. Another example is when an office holder, such as a chief, is replaced by another incumbent voluntarily on his abdication or involuntarily

on his deposition. Similarly, there may be succession inter vivos to interests in property when the property of an insolvent is sold in bankruptcy proceedings or when execution is levied on the property of a debtor and the goods are sold. The present work is not concerned with succession inter vivos.

Succession is post mortem if the rights or duties devolve on the new holder as a result of the death of the previous holder. In certain cases, notably succession to an office, the predecessor may not be able to determine who should be his successor, as legal qualifications and non-legal preference for individual candidates may be the determinants. In the case of a post mortem succession to an interest in property, however, the predecessor may by his will determine who shall succeed him. Failing a testamentary disposition, the interest may devolve in accordance with an order of preference usually fixed by law or determined by certain organs of society such as the family among the Ewe and the statutory court in most modern societies. Here, again, we are not concerned with succession consequent upon a will because a will, as we shall show later, is unknown to Ewe law. We are, therefore, concerned only with succession post mortem upon intestacy.

Succession, whether inter vivos or post mortem, may have two denotations. It may mean succession to inter-personal rights or succession to interests in property. Succession to inter-personal rights may refer to accession to a position or

an office, ranging from political ones like a king or chief to religious ones like a bishop or a fetish priest. A common type of such succession in Ghana, and particularly among the Ewe, is accession to political office, such as that of a chief or a linguist. Another common type of succession is the assumption of the office of head of family. Succession to a chief and other political functionaries among the Ewe has already been discussed,[1] and so has succession to a head of family.[2] We may, therefore, briefly discuss positional succession to an ordinary individual before we proceed to consider succession to rights in property. Usually succession to such a position implies the assumption of the responsibilities of a guardian, a "father" or "mother", or the administrator of an estate. Such positional succession does not imply succession to rights in property and the two should be distinguished.

An adult person among the Ewe, especially if he or she has children, occupies the position of a father or a mother to his or her children. On his or her death, therefore, some other person succeeds to the position of father or mother which the deceased occupied in his lifetime. This positional successor is known as tefenola or a "substitute". Thus a positional successor to a father is known as to tefenola or "father-substitute" and that of a mother is no tefenola or "mother-

1. See pp. 71-74 supra.

2. See pp. 207-209 supra.

substitute". That is why it is said that an Ewe man is never without a father or a mother. However old he or she may be, on the death of his parents, another close relative will step into the shoes of his deceased parents.

When a father dies, that father's brother, another male relative or one of the deceased's own children, succeeds him as "father" or to tefenola to his children. Such succession to the position is scarcely ever sinecure because the successor actually stands in loco parentis to the children, discharging the responsibilities of a father, especially if the children are still young. The responsibilities of such a successor include the maintenance of the children and responsibility for their education and general upbringing. As a "father" the successor or to tefenola also administers the estate of the deceased in the interim until it is distributed to successors to the property rights, and the estate may remain in his hands for quite some time if the children of the deceased are young. But, however long the tefenola or positional successor may administer such property, he has no beneficial interest in it in that capacity. He is not even entitled as of right to reside in the house of the deceased, though he may do so if it is absolutely necessary for the efficient discharge of his functions. Those who are entitled to the beneficial enjoyment, the successors to the property, are usually the children and it

is to them that the positional successor or tefenola must ultimately deliver the property in proportions determined at a formal meeting of the family. What has just been outlined for a father also applies mutatis mutandis to succession to a mother.

As a rule there is only one tefenola or successor to the position of a deceased person in this sense. Succession to this position is according to a fixed formula, but the family always reserves the right to appoint a different person if the circumstances so require. If a man dies his eldest brother normally succeeds him as "father" or to tefenola and it runs through that generation completely before descending on the next. Similarly a sister may be the successor to a woman or no tefenola. The eldest child, if an adult, may become the positional successor to his or her parent. In that case there is a titular parent for that child also. If, however, a grandfather or grandmother is living, he or she has priority over everybody else in becoming the "father" or "mother" to the grandchildren. Although this is the normal pattern, a junior person may be appointed if the senior one declines or if, because of a strained personal relationship with the deceased or the children, he is unsuitable. From what has been said of the tefenola or positional successor, it follows that normally a childless person cannot have a successor in this sense; but a childless person who had succeeded another person

as "father" or "mother" may in turn have such a successor.

The other type of succession is succession to property rights. Inter vivos succession to property rights will not be discussed here, because that may be properly considered under sale, gift and other kinds of alienation. We are presently concerned with post mortem succession to rights in property on intestacy. We may, therefore, describe a successor as a person who, by the rules of the devolution of rights in property, is entitled to the beneficial enjoyment of property left by a deceased person in his own right. The successor to property rights is known as domenyila or nudula, that is "he who eats his things". The successor or domenyila may also assume the other rights and obligations for and against the estate of the deceased; but this need not necessarily be so. As a rule the children succeed to their father's interests in property among the Ewe. All the children are joint successors or domenyilawo and, therefore, there is not usually a single successor. In a similar manner there are usually several automatic successors to a woman's interests in property.

We may contrast the position thus. On the death of a person there is one type of successor who steps into his or her shoes as "father" or "mother" to his children. This type of successor is known as tefenola or a "substitute". There is usually only a single tefenola or positional successor in this sense and such a successor does not succeed to any interest in

the property of the deceased, unless he or she is also entitled to succeed to the property under a different legal right. For example, an adult child may succeed his father as "father" to the rest of the children while, as a child himself, he may be one of the successors to his interests in property. With the exception of such cases when one person is a successor in both senses, the general rule is that the successor to interpersonal rights is not the same as the successor to property rights among the Ewe. Indeed, as will appear later, there are usually more than one successor to interests in property but always one successor to the position of the deceased.

Some conclusions follow from this. Where a chief or head of family is survived by children, there are three types of successors to him on his death. The person who succeeds him as a chief or head of family would be different from his positional successor as "father" to his children. The successors to his interest in property or domenyilawo may be yet different persons. A person without children and holding no other office may only have successors in respect of his self-acquired property but no positional successors, unless he was in loco parentis to another deceased person's children.

The General Principle of Succession

Post mortem succession to rights in intestate property among the Northern Ewe-speaking people of Ghana is based upon the patrilineal principle. To say that succession to interests in property is patrilineal is, however, only an indication of a general principle governing the *post mortem* devolution of rights in property. It means that in principle the right to succeed *post mortem* to the interest in property, other than by virtue of a testamentary disposition, generally depends on relationship being traced through the male line from the proposed successor to the previous holder of the interest. This is, however, only a general principle, distinguishable from matrilineal succession which confines the right to succession to blood relations traced through the female line. Neither "patrilineal succession" nor "matrilineal succession" by itself imports any clear and distinct rules for deciding which particular individuals are entitled to succeed to the rights. For in either case the right may devolve within the general principle but in accordance with different rules conferring the right on different persons. Each system of succession, though classified as "patrilineal" or "matrilineal", therefore, requires a closer examination in relation to specific communities in order to ascertain the applicable rules.

As regards matrilineal succession, the basic principle, as we have just stated, is that the person succeeding to a right in intestate property does so by virtue of his relationship traced through his mother and in the female line to the previous holder of the right in the said property. As several, or even many, persons may stand in this relationship to the intestate with varying degrees of remoteness, the identification of this general principle may not provide the answer in any particular circumstance to the question of which individual or group of persons may succeed to the property. For matrilineal succession can simply mean that a child succeeds to his own mother's interest in property, thus strictly meaning maternal succession. Matrilineal succession may also mean that a man is succeeded in his property rights by his sister's children, which we may describe as avuncular succession. Examples of this are the Central Bantu peoples of Yao and Cewa, among whom matrilineal succession means that a man's heirs are his sister's children.[1] In other cases, notably the Akan of Ghana, the rule stated by some authorities is that nephews are entitled to succeed but are postponed to the mother and brothers of the deceased.[2] In all these cases the right to succeed may be

1. See, e.g. A.R. Radcliffe-Brown & D. Forde, African Systems of Kinship and Marriage, O.U.P., London, 1960, pp.232-233.

2. R.S. Rattray, Ashanti, Clarendon Press, Oxford, 1923, p.40; J.B. Danquah, Akan Laws and Customs, Routledge, London, 1928, pp. 182-183; N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp.98-99.

affected by sex and age. Furthermore, there is the judicial opinion that matrilineal succession in Ghana means succession by the matrilineal family of the deceased, being persons descended from the same womb, such that the said family may appoint one or more of its members to manage the property with a right of beneficial enjoyment.[1] According to this proposition of the Ghanaian judicial customary law, no individual person has a right of automatic succession, the right of appointment being vested in the family to be exercised by way of preferment.

Patrilineal succession has no more certain meaning. Its basic principle is that the right to succeed to interests in property is derived from the relationship traced through one's father. Without more, this might be taken to imply that all the children, both male and female, succeed to the interests in the property of their father. In most cases, however, it means that only the male children are entitled to succeed. Even in cases where the right to succeed to property is limited to male children, their individual entitlements may raise problems. In some cases, such as among the Kikuyu of Kenya, all the male children are corporately entitled to succeed and the property is shared among them on the basis that an elder gets slightly more than a younger brother. Among other tribes, of which the

1. Amarfio v. Ayorkor, (1954) 14 W.A.C.A. 554; Larkai v. Amorkor, (1933) 1 W.A.C.A. 323.

Haya of Tanzania are an example, the principle of filioprimogeniture applies, so that the eldest male child alone succeeds to all the property.[1] Among the Tswana the principle of filioprimogeniture is pressed so far that, even if the eldest male child should die, his rights devolve by the principle of representation on his own first son who is the grandson of the intestate. According to Schapera:

> .... If the principal heir is dead, his eldest son will succeed to his rights, taking precedence over his father's younger brothers. 2

Patrilineal succession may also mean that the right to succeed to property is enjoyed not through one's father directly but through one's father's brother. Of the old Buganda patrilineal system of succession Haydon says:

> Prior to the reign of Kabaka Muteesa I the pattern of succession was for a man to succeed to the estate of his paternal uncle, a woman to succeed to the estate of her paternal aunt. 3

The Buganda law has now been changed by the Kabaka so that it prefers a son and a grandson to the brother of the deceased. So many are the variants of even patrilineal succession that it is necessary to spell out more detailed rules in each case.

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1. H. Cory and M.M. Hartnall, Customary Law of the Haya Tribe, International African Institute, London, 1945, pp. 1-2.
2. I. Schapera, A Handbook of Tswana Law and Custom, International African Institute, London, 1955, p.231.
3. E.S. Haydon, Law and Justice in Buganda, Butterworths, London, 1960, p.214.

As already stated the Ewe are a patrilineal community. As a general rule the patrilineal system among the Ewe implies patri-descent and patri-succession. The Ewe system of patri-descent has already been discussed as regards membership of the family.[1] The rule here is that membership of the family is in principle traced through the male line of descent, that is through one's father. As it is the families which form the sub-divisions, and the sub-divisions are the components of the divisions constituting the chiefdom, the principle of patri-descent determines a person's citizenship of a particular chiefdom. Of this there is hardly any doubt throughout all Eweland.

The principle of patri-succession determines the right of succession not only to rights in property but also succession to hereditary offices, such as that of a chief or a linguist. Under this principle eligibility for hereditary offices depends on membership of the patrilineal family on the basis of patri-descent. This is the general rule among the Northern Ewe and presumably among the other Ewe. The only known exception is the case of succession to the office of Paramount Chief or Awoamefia of the Anlo Ewe, to which certain matrilineal descendants are also eligible. This exception, allowing matri-succession to be mixed with patri-succession with respect to the single office of Awoamefia, has been confused with patri-succession to interests in property. As a result it is sometimes stated

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1. See pp. 106-107 supra.

erroneously that the rule applicable among the Anlo Ewe is matrilineal succession to property.

The reason for the exception which allows a unique mixture of patri-succession and matri-succession to the Paramount Stool of Anlo is historical. The Anlo tradition is that the Awoamefia left his ancestral stool, the symbol of office, in Notsie during the Ewe exodus from that walled city. When he wanted to retrieve the stool none of his own children was prepared to risk his life for the purpose. A son of Togbui Sri's sister, however, volunteered to undertake the hazardous task of returning to Notsie, whence they had fled from an autocratic and cruel ruler, to recover it.[1] On successfully accomplishing this feat which brought back the sacred stool, the Awoamefia decreed the maternal descendants to be also entitled to succeed to the office of paramount chief. It is, therefore, only a rare exception, dating from that historical incident and limited to the office of Awoamefia. It does not affect succession to other Anlo stools, let alone rights in property generally among the Anlo Ewe.

The general rule among the Ewe as we have stated, is that succession to interests in property is patrilineal. As regards ancestral or family property it means that the inherent right to the occupation and use of such property is in principle derived from membership of the family through one's father. Concerning self-acquired property the Ewe rule of patrilineal

1. D.K. Fiawoo, op.cit., p.34. On the Ewe exodus from Notsie, see pp. 30-31 supra.

succession means that children as of right succeed to their father's rights in property. The mixture of patri-succession and matri-succession in respect of the single office of Awoamefia of Anlo Ewe has, however, misled some writers to suggest that succession to rights in property among some Ewe communities, notably the Anlo Ewe, is matrilineal. For example, Manoukian, although agreeing that succession is patrilineal in most Ewe societies, yet adds that:

> In other sub-tribes, for example, Anlo and Glidyi, individual property is transmitted matrilineally, a man's heir being his sister's son. 1

Presumably Manoukian relied on Ward,[2] the latter reproducing the view of Westermann.[3] It was not possible to ascertain the law of succession among the Glidzi Ewe in the Republic of Togo. It should be pointed out, however, that the primary source of this information, that is Westermann himself, accepts the basic proposition of patrilineal succession among the Ewe and explains that the idea of matrilineal succession was introduced to the Glidzi Ewe through contact with the Akan of the Gold Coast (Ghana).[4] It is also stated by Westerman that immovable property among the Glidzi Ewe is inheritable automatically by the children of a deceased man, or, failing them, the brothers of the deceased.[5] It seems, therefore, that Westermann's

1. M. Manoukian, The Ewe-Speaking People of Togoland and the Gold Coast, I.A.I., London, 1952, p.24.
2. B.E. Ward, The Social Organisation of the Ewe-speaking People, Unpublished M.A. thesis, Univ. of London, 1949, p.93.
3. D. Westermann, Die Glidyi-Ewe in Togo, Berlin, 1935, p.264.
4. Ibid.
5. Ibid.

statement of matrilineal succession refers only to movable property even among the people of Glidzi.

As far as the Anlo Ewe and the Northern Ewe of Ghana are concerned, it is not correct to say that property is inherited matrilineally. The rule is patrilineal succession, implying the right of children to succeed to their father's estate. On the occasions when this question was referred to the traditional authorities of the Anlo Ewe, the answers indisputably indicate the principle of patrilineal succession. In In re E.N. Tamakloe[1] the question of succession among the Anlo Ewe was referred to the Paramount Tribunal of Anlo for an opinion on the law. The opinion of the Tribunal, dated 21st March, 1945, was that:

> One important point which must not be forgotten is that the senior boy or girl never automatically succeeds to the estate; an election ... must be done strictly in accordance with the rules of Native Custom, and in most cases the choice goes to the senior surviving son of the deceased when not proved to be a delinquent ... When the eldest surviving son is disqualified for any reason from succeeding, the choice is given to one of his fit younger brothers.

This view is often quoted but only to support the proposition that succession is not automatic. Looking at the words of the Anlo Tribunal, however, it is quite clear that it had only children of the deceased in mind. That is why it says that failing the eldest son the next son in seniority should assume the position. Whatever interpretation may be placed on the

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1. In re Tamakloe, Unreported, Suit No. 78/44, High Court, Accra.

declaration, its basis is patrilineal succession with the right of succession in the children of the deceased. In any case the Tribunal, to remove any doubt, made absolutely clear the patrilineal nature of succession among the Anlo Ewe when in the same opinion it said that:

> According to Anlo customary laws children are the heirs and successors to their father's real properties, i.e. farms, lands and houses, whilst nephews or nieces inherit the movable properties, i.e. personal effects.

This is not a mixed system of succession. As a general rule among the Ewe, the personal effects of a deceased person, whether a man or a woman, are distributed among relatives of both the paternal and maternal side. Only the expensive or valuable items are retained intact. Perhaps that explains why the Anlo Tribunal mentions the succession to "personal effects" by matrilineal relatives to emphasise that they are entitled to partake of the distribution of movables. The opinion of the Anlo Tribunal, however, leaves no doubt about the system of succession. It makes it clear that rights in what may really be referred to as property, that is farms, lands, houses and the like, are succeeded to by the children of the deceased.

Again in Attipoe v. Shoucaire,[1] a case arising from In re Tamakloe just mentioned, the Paramount Tribunal of Anlo had no difficulty in making a declaration that the eldest son of the

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1. Attipoe v. Shoucaire, Unreported, Land Court, Accra, 4th May, 1948.

deceased was "successor" to his father. This declaration, although its effect was whittled down by the Land Court, again emphasises the patrilineal system of succession among the Ewe. The Land Court constituted by Coussey, J., surprisingly held that a declaration that the eldest son was his father's successor amounted only to a declaration that the eldest child was among the group of persons from whom a successor could be appointed. Certainly that was not what the Native Tribunal meant. However, assuming for the moment that the Land Court was right, then both the Native Tribunal and the Land Court accept that succession among the Anlo Ewe is patrilineal. For it is only in a patrilineal system of succession that a son of the deceased can be held to be the successor or even a possible successor to his father.

In another case, Khoury v. Tamakloe,[1] after considering the expert evidence of Fia Sri II, Paramount Chief of Anlo, Smith, J., said:

> The Fia is equally emphatic that succession is not a matter of right, but of appointment by a family meeting, and he goes on to say that the selection of a successor should be governed by seniority and that the eldest son should not be passed over in favour of a younger unless the former were considered unfit.

The substance of the exposition of the law by the Awoamefia of Anlo is that the system of succession among the Anlo Ewe is patrilineal, and that this among the Ewe implies a right of

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1. Khoury v. Tamakloe, Unreported, Suit No. 11/1948, Land Court, Accra, 4th January, 1950.

succession in the children of the deceased. That is why the rights of the male children are emphasised by the Awoamofia.

It is submitted that the law to be extracted from the above cases is that the principle of succession among the Anlo Ewe, as among the Northern Ewe of Ghana, is patrilineal succession to property. This is the law in all the chiefdoms of Northern Eweland. It is expressed in the maxim Ewe medua nyroe nu o: to nu Ewe dua , that is "The Ewe do not succeed to property on the mother side: they succeed on the father side".

Succession to rights in property may relate to two types of property. One is ancestral property, normally referred to as family property. The other is the self-acquired property of an individual person. In both cases the principle is patrilineal succession. We are not presently concerned with family property, as entitlement to such property has already been discussed. It may, however, be reiterated that the main type of family property among the Northern Ewe is the family land. Entitlement to such property, as already explained, is by right of membership of the patrilineal family or dzotinu. The patrilineal basis of the right to such ancestral property is indisputable. In Nunekpeku v. Amelefe[1] the trial South Anlo Local Court "A", it is submitted, was right when in its own judgment it held that the defendant could not establish an inherent right of occupation and user of family land through

1. (1961) G.L.R. 301. This case has been discussed at some length in pp. 108-113 supra.

a maternal connection with the family. The reversal of that judgment on appeal by Prempeh, J., it is respectfully submitted, was wrong because it ran counter to the generally accepted rules of Ewe law of patrilineal succession. Such issues only infrequently arise before the courts because they are such familiar rules of law that one would describe them as trite learning. When the issue was raised in Agblevoe v. Dankradi,[1] a case from Abutia, the decision of the Native Court of Appeal was of the same effect as that of the trial South Anlo Local Court in Nunekpeku v. Ametefe, which was unfortunately reversed by the High Court. The Asogli Native Appeal Court, Ho, in Agblevoe v. Dankradi, held:

> It has also been agreed in evidence on record that the Defendant-Respondent maternally belongs to the Plaintiff's family which, in accordance with the native customary law among the Ewe speaking people, gives no absolute right to the Respondent over the disputed land. 2

It is hoped that the higher courts will accept this proposition as the basic law of entitlement to ancestral or family property among the Ewe. This is succession to the individual's dependent interest in family property. In addition there is also succession to interests in self-acquired property under the same rules.

As far as Ewe law is concerned every person is presumed to die intestate; for Ewe law does not recognise any form of testamentary disposition. The law of intestate succession,

1. Agblevoe v. Dankradi, Unreported, Asogli Native Appeal Court, Ho, 4th September, 1952, at p.17 of Civil Appeal Record Book.
2. Agblevoe v. Dankradi, ibid., at p.20 of Civil Appeal Record Book.

therefore, applies to all the property belonging to the deceased as self-acquired at the time of death, except for testamentary dispositions validly made by him under the received law or a statute.[1] If, however, he was survived by a spouse or an issue of a marriage under the Marriage Ordinance,[2] or was himself an issue of such a marriage, then only one-third of the intestate estate is affected by these customary law rules of intestate succession, the other two-thirds falling for distribution under the relevant rules of English law. Similarly if the deceased was a party to a marriage under the Marriage of Mohammedans Ordinance[3] and that marriage was duly registered, succession to the estate is subject to the provisions of the relevant school of Mohammedan law.

Interim Administration on Intestacy

As already noted, except in cases where a statute provides otherwise, every Ewe man and woman is presumed to have died intestate. This is particularly so because the nuncupative will which is recognised among some other Ghanaian communities is not of the same effect among the Ewe. On the occurrence of death, therefore, the first act with respect to the deceased's estate is

1. i.e. the common law, the Wills Act, 1837 (7 Will. 4 & 1 Vict. c.26) and the Wills (Amendment) Act, 1852 (15 & 16 Vict. c. 51).
2. Cap. 127.
3. Cap. 129.

to make provision for an interim administration pending the determination of the entitlements of his successors or domenyilawo, also known as nudulawo.

The first step in the interim administration of the intestate estate among the Ewe is the appointment of a positional successor or tefenola to the deceased in his personal capacity. Such a successor or tefenola, as we have already explained, is not the same as the successor to rights in the property or domenyila. The positional successor or tefenola only steps into the shoes of the deceased in the personal capacity of "father" or "mother" to the children of the deceased, but with that goes the responsibility for the interim administration of the estate of the deceased. He is appointed or approved by the whole family or dzotinu at a formal meeting. The choice, however, is usually automatic because the family is in principle bound by established rules. If none of the children is of a mature age, the father of the deceased or one of the deceased's brothers or some other close male relative in the patrilineal family is appointed tefenola or positional successor. The childrens' grandfather or paternal uncle then becomes "father" or to tefenola to them. If some of the male children of the deceased are of a mature age, which here means more than the mere attainment of majority, one of them is appointed to succeed his father as "father" to the rest of his brothers and sisters.

Usually but not invariably the child appointed as such a successor is the eldest male child of the deceased. Where a child is appointed a positional successor or tefenola, there is in addition a titular "father" or a classificatory father to whom the children may refer matters of disagreement.

The same principle applies to the succession to a woman. Owing to the generally inferior position of women a male child, especially if he is older, may become the positional successor to his mother but with the effective administration of the movable property in the hands of the senior daughter. If none of her children is mature enough to assume the position, an appointment is made by the deceased woman's own patrilineal family from that family and the appointee, usually a sister of the deceased, becomes "mother" to her children.

The role of the tefenola or positional successor, as far as the estate is concerned, is that of an interim administrator. In Makata v. Ahorli[1] the West African Court of Appeal, after referring to a Government Report on succession among the Ewe, defined the role of such a successor thus:

> In the case of family property the eldest surviving brother acts as administrator and divides the property among the children of the deceased. 2

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1. (1956) 1 W.A.L.R. 169.

2. Makata v. Ahorli, (1956) 1 W.A.L.R. 169, 172.

From the context it is to be presumed that by "family property" the Court meant not ancestral family property but the self-acquired property of a deceased member of the family; for it has been the opinion of the courts that self-acquired property becomes family property on death intestate. The statement is not strictly accurate because the division of the property among the children is done by the entire family or dzotinu and not by the tefenola or positional successor alone. However, it is substantially accurate in underlining the role of the positional successor as that of an interim administrator of the estate.

A positional successor or tefenola is not by virtue of his office the head of family in Ewe law, even if we regard the children of the deceased as an immediate family as stated in Yawoga v. Yawoga.[1] As stated in the above passage from Makata v. Ahorli the tefenola or positional successor is usually a brother of the deceased. He is, therefore, not a member of the so-called immediate family originating from the deceased and hence cannot be its head. The legal position is not any different if, instead of the deceased's brother, one of the deceased's own children becomes the positional successor. In any case, as earlier submitted, the so-called immediate family does not exist in Ewe law to which a head of family may be appointed.

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1. (1958) 3 W.A.L.R. 309.

The positional successor or tefenola is practically in the position of an administrator ad colligendum bona defuncti. He takes possession of all the estate and collects the assets of the deceased. Debts due to the estate are payable to him. Until the property is handed over to the heirs all debts and liabilities against the estate are enforceable against the tefenola, but are met out of the estate. If the liabilities exceed the assets of the estate, the tefenola is entitled to call on the domenyilawo or heirs or, failing them, the whole family or dzotinu, to contribute to the discharge of the obligations. As, however, the tefenola is usually a brother or a child of the deceased, he would normally meet the obligations out of his own resources unless they are obviously too onerous.

Assuming that the assets exceed the liabilities, the tefenola administers them for the benefit of the domenyilawo or heirs. Out of the estate, for instance, he meets the obligations of the maintenance, education and up-bringing of the children and other dependants of the deceased. He is entitled to re-imburse himself out of the estate for his expenses, but he is not, in the capacity of tefenola, a beneficiary of the estate. Therefore, on handing over the property to the domenyilawo or successors to the property, he is accountable in respect of his period of administration on the same principle as an administrator in English law.[1]

1. Tamakloe v. Attipoe, Unreported, Civil Appeal No. 38/1952, West African Court of Appeal, 22nd June, 1953. Referred to and quoted in Ennin v. Prah, (1959) G.L.R. 44, 47-48.

The period of interim administration is not fixed and is determined by the circumstances of each case. Normally it lasts until such time as the successors to the property are old enough to manage the property by themselves. This means that where some of the children are adults at the time of the death of their father the period of interim administration may be very brief. Sometimes interim administration is terminated, or the tefenola is changed, if the domenyilawo, usually the children, have reason to believe that the tefenola is neglecting them or is using the property for his own benefit. Only the family can change the tefenola or terminate the period of administration. The formal termination of the interim administration is, therefore, decided by a full meeting of the family or dzotinu when the property is handed over to the successors to the rights in the property or domenyilawo. At that stage the tefenola becomes functus officio as far as the estate is concerned; but, unless earlier removed for good cause, he continues in the other position for life as a "parent" to the children of the deceased.

Distribution of Chattels and other Movables

It is not all the property of the deceased which goes to his successors or domenyilawo. Chattels and other personal effects are distributed among relatives, mainly in the patrilineal family but also including a number of beneficiaries who are maternal relations of the deceased.

Of a man's belongings the articles which fall for such general distribution include cloths and other clothing, sandals, chairs, knives, plates, cups, hoes, cutlasses and other items of small value. In the case of a woman the distributable items include clothes and other clothing, headkerchiefs, sandals, native chairs or nyonu kpukpo, plates, pots and cooking utensils, less valuable beads and ear-rings. So far as both males and females are concerned, only a few of the items enumerated above, and the less valuable among them, are distributed in this general manner. The bulk of them are reserved for the domenyilawo or successors to the rights in property. Certain items of property are in any case undistributable. Thus a man's gun, as a rule, goes to his eldest son; a man's tools of trade go to his eldest son, unless another child had been taught his trade when the latter is entitled to them; and, as a rule, a woman's axe and the big head-pan, whether made of wood (agbonu) or enamel (nutsotsogbe), go to the eldest daughter. Land, other immovable property and valuable movable property are not distributed in this general way because they devolve as of right on the domenyilawo.

The articles given to beneficiaries under the general distribution become their property absolutely and are held by them as purchaser and they can dispose of them as they please. They are not thereafter recoverable. As a matter of fact, however, such articles are usually preserved as a memorial to

the deceased unless they are fungible.

The actual occasion for the distribution of the personal effects of a deceased person is a formal meeting of the family. It is known as numekaka or numekafe, that is "searching the estate". In addition to the principal members of the deceased's patrilineal family, some members of his mother's family and other relatives are also invited to the meeting. It is presided over by the head of the patrilineal family. At this meeting the tefenola or positional successor first makes a public declaration of the properties in his possession. All other persons holding any property in favour of the estate disclose the nature and extent of such property. Even the children and brothers and sisters of the deceased are bound to make a full disclosure. There is a belief that any concealment will lead to the death of the guilty person because the spirit of the deceased will pursue the secret beneficiary.

As far as practicable all the personal effects of the deceased are assembled before the gathering. The boxes are opened in the presence of all and the contents are noted. Any money "found in the box" is disclosed, and this includes both physical cash discovered in the box and money held elsewhere in favour of the estate. It is only after such an inventory is taken of all the property of the deceased that it is decided which items should be retained undistributed for the domenyilawo.

Before the general distribution of chattels some two persons are entitled to choose some items for themselves. One of

them is the amedie or amedila, literally "the person responsible for the burial"; the other is the tsidzoedola or "the boiler of the hot water". The positions of these two individuals may be briefly explained. In Ewe society every individual has two other persons, one male and the other female, who stand to him or her in the position of tovi (pl. toviwo) or "father's child". The toviwo are as a rule chosen from different families in the same sub-division or saame. None of them can, therefore, in fact be a child of one's father. In some areas such as Aveme, therefore, they are known as tofo tovi or "father's child in public", so as to distinguish them from the actual father's child who is also known as tovi. Especially on some ritual occasions touching the individual the toviwo have vital functions to perform. The male tovi, on the death of the person to whom he stands in that position, is regarded as officially responsible for the interment of the corpse. He inter alia offers ritual prayers by way of libation before the body can be placed in the coffin for burial, and in theory it is he who thereafter performs the burial. He is, therefore, known as amedie or amedila, that is "the person responsible for the burial".[1] The female tovi has the special responsibility of providing the hot water, or tsidzoe, with which the corpse is bathed before it is laid in state prior to the burial. The female tovi is, therefore, known as tsidzoedola, or "the boiler of the hot water".

1. He is, however, not a sexton.

The general rule is that the male tovi, now known as amedie or amedila, formally opens the boxes of the deceased at the family gathering or numekafe. He then chooses one item and places his foot on it. The process is known as afo dodo nu dzi or "stepping on a thing". The normal item taken in this way by the amedie is, in the case of a deceased male, one of the cloths of the deceased, taking care not to choose one of the best. In addition the male tovi or amedie formally takes possession of the gun of the deceased. As a rule, however, he is bound to release the gun to the person legally entitled to it, who is usually the eldest son of the deceased, on a formal demand made by the latter with drinks or aha. In Abutia and a few areas different rules are stated but informants disagree. In those areas it is stated that, in addition to what he "stepped on", the amedie or male tovi is put to the choice of either a gun or a wife of the deceased. The general opinion in those areas is that if the amedie chooses the gun then he would have to release it thereafter to the entitled person; but if he chooses a wife then he would become married to her. A contrary opinion urged by other informants is that, as if he chooses a wife she would become permanently married to him, the amedie cannot be compelled to release the gun if he chooses that as an alternative to a wife. It was not possible to ascertain precisely this local variation as informants disagreed.

In the case of a deceased female the male tovi or amedie does not have much of a choice. The rule in that case is that the amedie chooses one item, usually a female cover-cloth which is only big enough for wrapping around his loins.

In all cases the female tovi, now tsidzoedola, takes the pot or ze in which hot water was boiled for bathing the corpse as well as the seat or kpukpo on which the body was placed when bathed. In addition, if the deceased was a man, the tsidzoedola gets nothing else except one other item chosen for her at the discretion of the gathering. If the deceased was a woman, however, the female tovi or tsidzoedola is additionally entitled to take one set of cloth or do tata deka, the deceased's stool, axe and the big head-pan used in going to farm, which is known as nutsotsogbe if it is an imported enamel pan or agbonu if carved out of wood. However, like a man's gun, the female tovi also releases the axe (or fia) and the big head-pan (known as nutsotsogbe or agbonu) to the eldest daughter of the deceased or other entitled female member of the deceased's family. The articles are released on payment to the female tovi or tsidzoedola of a nominal sum like 3d., which is known as "buying the head" or ta fefle.

After the amedie and tsidzoedola have taken their entitlements the gathering, by consensus, distributes the chattels to the relatives. Those items which are not distributed are then entrusted to the positional successor or tefenola until another

meeting to share them among the heirs or domenyilawo. If the children or the domenyilawo are of a mature age to manage the property, then this meeting or numekafe is also conveniently the occasion to share among them the portions of the estate to which they are entitled. For the extent of the estate is generally ascertained at this meeting. In most cases, however, the sharing of the estate among the domenyilawo is postponed for some time. The maxim is wometsoa nu dzodzo dea vidze si o, or "we do not place a hot thing in the hands of a small child". Metaphorically the purpose of the postponement is to allow for a cooling-off period. The reason for it is that the postponement allows for a reasonable intervention of time, thus affording an opportunity for claims against the estate to be raised by even tardy creditors. This makes possible a fair ascertainment of the net assets before the estate is shared to the domenyilawo or successors to the property.

The Individual's Right to Succeed to Property

The general rule of Ewe law is that the family or dzotinu as such does not succeed to any interest in the self-acquired property of a deceased member of the family. Succession is by right, as it were, by the proximate next-of-kin traced patrilineally. There are thus specific persons in each circumstance who have the right to succeed to property either individually or as a group. As a general proposition the children, as the nearest next-of-kin, succeed to their father's interests in property as of right. Failing the children, the father of the

deceased, the deceased's brothers and sisters, or the deceased's brother's children would, in that order of priority, be entitled to succeed to the interest in the self-acquired property as domenyilawo. In the case of a deceased woman her children, since they belong to a different family, have only a life interest in her self-acquired property. After the death of all the children, or if the woman had no children, her interest in the property is succeeded to by the deceased woman's father, brothers and sisters, or brothers' children, the peculiarly feminine articles being given to the female members. The circle of domenyilawo or persons entitled to succeed to property widens as there is default through death or inability of the proximate next-of-kin to succeed to the property. Since on the default of the immediate group of entitled successors or domenyilawo the right devolves on the next group, ultimately capable of embracing every member of the family or dzotinu, every member of the patrilineal family or dzotinu has a spes successionis in the self-acquired property of every other member. However, it is the law among the Ewe that the family as a corporate entity does not in any circumstances succeed to any rights in the self-acquired property of an individual. The right to succeed to interests in property is determined in accordance with a fixed formula which is variable only in very compelling circumstances by the family.

The propositions stated above are contradicted by judicial authority and the legal literature. The judicial customary law is that, upon the death intestate of any person, his self-acquired property becomes family property and that it is the family, and not an individual, who succeeds to interests in the property. On the strength of the authorities, Ollennu says:

> the correct statement of the law is that upon a person's death intestate, his self-acquired property vests in his ancestral family, which includes the immediate, the head and elders of the whole family. 1

Subsequently he stated more categorically that:

> the first principle of the customary law of succession applicable to all tribes in Ghana is that upon a person's death intestate - male or female - his or her self-acquired property becomes family property. 2

And he adds that

> ... it is the family which inherits and not an individual. 3

Agreeing with him is Bentsi-Enchill who also says:

> ... the fundamental rule on which all are agreed /is/ that upon the death intestate of a person his self-acquired property becomes family property, 4

and

> The basic rule everywhere throughout Ghana is that upon the death intestate of a person, his or her self-acquired property becomes family property. This is so whether the family be patrilineal or matrilineal. 5

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1. N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, pp.153-154.
2. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.70.
3. Ibid., at p.85. Also stated at pp. 123, 171 et passim.
4. K. Bentsi-Enchill, Ghana Land Law, 1964, p.126.
5. Ibid., p.134.

These are sweeping generalisations in which I do not concur. The learned authors, however, are supported by decided cases in the superior courts. In Amarfio v. Ayorkor,[1] for instance, it was held by the West African Court of Appeal that on the death of Ayiku, a Ga, his interests in self-acquired property vested in his family. Similarly in Larkai v. Amorkor[2] the same Court stated that the self-acquired property of the intestate Ahuru Larkai became family property. It is not necessary to review all the cases in which this proposition has so often been stated that it has now become notorious.[3] It is pertinent to point out, however, that none of the cases enunciating the rule of succession to property by the family has come from the Northern Ewe area. The applicability of the rule as regards succession to property among the Ewe cannot, therefore, be presumed.

Before proceeding to examine the Ewe cases on the point, however, we may draw attention to the lack of agreement among the advocates of the alleged rule that it is the family as such which succeeds to the self-acquired property of a deceased Ghanaian. The areas of disagreement are on the vital question

1. (1954) 14 W.A.C.A. 554.
2. (1933) 1 W.A.C.A. 323.
3. e.g. Ennin v. Prah, (1959) G.L.R. 44; In re Eburahim, (1958) 3 W.A.L.R. 317; Carboo v. Carboo, (1961) G.L.R. 83 (a Ningo case); Kwakye v. Tuba, (1961) G.L.R. 720; and Krakue v. Krabah, Unreported, Supreme Court of Ghana, Accra, 24th June, 1963.

of what constitutes the family for the purposes of such succession, as well as how the family as an entity acquires such property rights. Is it the entire family, corresponding to the dzotinu among the Northern Ewe, or the so-called immediate family, which succeeds? Ollennu is a great exponent of that school of thought which holds that the group which succeeds to an intestate estate is the "wider family". He says:

> ... it is the entire family, and not a branch of it - not the immediate family, which succeeds. 1

In support of this view is Amarfio v. Ayorkor[2] where it was held by the West African Court of Appeal that the self-acquired property of the deceased Ayiku did not devolve on the so-called immediate family originating from the deceased but on the wider Adaku-Mansah family. Then there is the Ghana Supreme Court case of Krakue v. Krabah[3] in which the majority judgment is that the family which succeeds is the wider family. In Kwakye v. Tuba[4] when a preliminary objection was taken to the right of the head of the wider family to sue in respect of an intestate estate, the right to sue was rejected on the sufficient ground that a successor had been appointed who was the proper person to sue. However, Ollennu, J., said:

> ... upon the death of a person intestate ... his self-acquired property becomes property of his whole family, the immediate and extended, together.

1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.123.
2. (1954) 14 W.A.C.A. 554.
3. Krakue v. Krabah, Unreported, Supreme Court, Accra, 24th June, 1963.
4. Kwakye v. Tuba, Unreported, High Court, Accra, 20th September 1961. Different from but preliminary to Kwakye v. Tuba, (1961) G.L.R. 720.

There is thus judicial opinion in support of the view that the family which succeeds to an intestate estate of its deceased member is the wider family.

There is, however, no dearth of judicial authority for the other view, that the family which succeeds to an intestate estate is the so-called immediate family. Cases like Ennin v. Prah[1] and In re Eburahim[2] readily come to mind. In the earlier of the two cases, In re Eburahim, Adumua-Bossman, J., said:

> Too often when mention is made of the family of a person, attention is focussed on the wider family to which he belonged rather than his own immediate or small family, i.e. the group of persons entitled by custom to inherit from him ... In our particular case, as the deceased and the parties are ... of the Fanti tribal group, one of the groups whose system of inheritance or succession is matrilineal, the group of persons entitled by custom to the beneficial enjoyment of his estate consists of all the persons emanating or tracing from the same womb as the deceased. 3

The learned Judge proceeded to say that it is only upon the failure of this immediate family that members of the wider family are considered. Later in Ennin v. Prah the same Judge dismissed the contention that the concurrence of the wider family was necessary for the valid alienation of property left intestate by a deceased person and said:

> The late Kofi Nkum's properties could not devolve upon, and become vested in, the wider Twidan family of which he was a member in his lifetime. They devolved upon, and became vested in, his immediate family group. This consisted of all who were descended matrilineally from the same womb as himself - his surviving brothers (if any), his surviving sisters (if any), and the surviving children of his sisters, dead or alive. 4

1. (1959) G.L.R. 44.
2. (1958) 3 W.A.L.R. 317.
3. In re Eburahim, (1958) 3 W.A.L.R. 317, 321.
4. Ennin v. Prah, (1959) G.L.R. 44, 46.

He continued:

> The Head and principal members of the wider Twidan family had no interest whatever in the properties left by the deceased Kofi Nkum. Their concurrence was not in any way necessary to alienation by the successor and/or Head of the deceased's immediate family group, tracing from his mother. 1

It is pointed out by Ollennu that the judgment in Ennin v. Prah was set aside by a consent judgment when that case went on a further appeal to the Supreme Court. A consent judgment, however, is one in which the contestants agree to a settlement without insisting on a judicial pronouncement of their respective legal rights. It could be, and often is, a compromise of claims. A consent judgment in the circumstances, therefore, while nullifying the order of the High Court, does not necessarily affect the proposition of law on which it was based.

However, Ollennu contends further that, in any case, both In re Eburahim and Ennin v. Prah were decided per incuriam because the attention of the learned Judge was not directed to the contrary but binding decisions of the West African Court of Appeal in Ghamson v. Wobill[2] and Amarfio v. Ayorkor.[3] Perhaps it is not enough judicial notice even if it is pointed out that the Judge in both cases, that is Adumua-Bossman, J., had been Counsel for the successful appellants in Ghamson v. Wobill and

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1. Ennin v. Prah, (1959) G.L.R. 44, 47. See also Arthur v. Ayensu, (1957) 2 W.A.L.R. 357, where the decision is to the same effect.
2. (1947) 12 W.A.C.A. 181.
3. (1954) 14 W.A.C.A. 554.

knew of the decision therein. The important point, however, is that in Ghamson v. Wobill the argument in the West African Court of Appeal turned largely on the question of whether the Efutu lex loci rei sitae or the Fanti lex domicilii of the intestate and the parties should govern succession to, and therefore the capacity to alienate, title to immovable property situate in Winneba. Having decided that the choice of law rules in the English conflict of laws did not apply even by analogy, and that Fanti law, therefore, applied, the question of the composition of the competent family was not specifically considered by the West African Court of Appeal. The authority of that decision, it is submitted, is not therefore free from doubt.

The other objection by Ollennu, a strong one, is that the attention of Adumua-Bossman, J., was not drawn to the Ga case of Amarfio v. Ayorkor which, as a decision of the West African Court of Appeal, was binding on the learned Judge that the successor is the wider family. The equally strong answer to that, however, is that the learned Judge was fortified in his opinion of the law by other judgments of the same West African Court of Appeal, such as Larkai v. Amorkor[1] and Tamakloe v. Attipoe.[2] In both these cases, which were specifically considered by Adumua-Bossman, J., in Ennin v. Prah, the West

1. (1933) 1 W.A.C.A. 323.

2. Tamakloe v. Attipoe, Unreported, West African Court of Appeal, Civil Appeal No. 38/52, 22nd June, 1953.

African Court of Appeal decided in favour of succession by the immediate family. In Larkai v. Amorkor the West African Court of Appeal specifically considered the question and expressly decided that the self-acquired property of an intestate devolved on the immediate rather than the wider family. The West African Court of Appeal, per Deane, C.J., said:

> Now the plaintiff has claimed this land as being the head of the Larkai family. Ahuru it is true was called Ahuru Larkai and it seems was a member of the Larkai family, but individually owned property of his would, on his death intestate, become the family property, not of the Larkai family, but of his own family ... Although Ahuru's family is probably a sub-branch of the Larkai family, it is clear that the Larkai family has a much wider ambit and includes a far greater number of individuals than Ahuru's family could ever do ... In my opinion, therefore, it is certain that the plaintiff cannot succeed in this case as the head of the Larkai family since the Larkai family as such have no interest in this land which is not their family property but the property of the family of Ahuru 1

When a judge is faced with contradictory judgments of the same superior Court, he decides which to follow. In any case it is submitted that, regardless of the authority of the decisions in In re Eburahim and Ennin v. Prah, the decision of the West African Court of Appeal in Larkai v. Amorkor stands in its own right as authority in favour of the proposition that it is the immediate family which succeeds to the intestate estate of its members. There are, therefore, authorities in support of succession both by the immediate family and by the wider family.

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1. Larkai v. Amorkor, (1933) 1 W.A.C.A. 323, 330.

The apparent contradiction may perhaps be resolved on at least two grounds. The first is that both In re Eburahim and Ennin v. Prah are Akan (Fanti) cases and in Akan law different interests in intestate property devolve on the family itself as well as the sections of it which are described as immediate families. This explains the emphasis placed by the Court on the interest of the so-called immediate family in the Akan cases. The second explanation follows from the first that, while In re Eburahim and Ennin v. Prah are Akan cases, Amarfio v. Ayorkor, on which Ollennu would like to rely, is a Ga case. The Ga law not being necessarily the same as Akan law, or Ewe law for that matter, the Court deciding an Akan case is not bound to follow a decision involving the Ga law of succession.

Apart from Tamakloe v. Attipoe, none of the authorities examined so far relates to succession to property among the patrilineal Ewe. There is a notable change from the expression "family" to the term "children" when we examine the rules of succession among the Ewe as illustrated by the decided cases. There is no Ewe case in which the right of the family to succeed to the property of a deceased person has been canvassed. All the Ewe cases are based on the assumption that children succeed to their father's interests in property, and the question which has been before the courts is whether, of the entitled children, one or the other had been duly authorised to enter into succession. It is submitted, therefore, that the law among the Ewe is

that children succeed to the interest in their father's self-acquired property as of right as next-of-kin. Failing children, other persons in proximity to the intestate as next-of-kin are entitled to succeed to interests in the property.

Taking the Ewe cases chronologically, the first is In re E.N. Tamakloe.[1] When in that case a reference was made to the Paramount Tribunal of Anlo State on the law of succession, its report, dated 21st March, 1945, said:

> According to Anlo customary laws children are the heirs and successors to the father's real properties ...

Although the Tribunal did state that

> One important point which must not be forgotten is that the senior boy or girl never automatically succeeds to the estate,

yet it went on to emphasise that

> When the eldest surviving son is disqualified for any reason from succeeding, the choice is given to one of his fit younger brothers.

It is clear, therefore, that the Paramount Tribunal of Anlo limits the right of succession to property to children and not to the so-called immediate family, let alone the wider family. In the second case of Attipoe v. Shoucaire[2] the same Paramount Tribunal of Anlo had no inhibitions in making the declaration that the second defendant, as the eldest son of the late E.N. Tamakloe, was the successor. By an inexplicable twisting of

1. In re E.N. Tamakloe, Unreported Suit No. 78/44, High Court, Accra.
2. Attipoe v. Shoucaire, Unreported, Land Court, Accra, 4th May, 1948.

the unequivocal language of the Native Tribunal's declaration, the Land Court held that the said declaration amounted to nothing more than a declaration that the said defendant was one of those entitled to succeed his father. However, the interpretation placed on the declaration by the Land Court does not affect the central issue of the declaration, which is the recognition of the children's right to succeed to their father's interests in property.

In another case, Khoury v. Tamakloe,[1] the law of the Anlo Ewe as stated by the Paramount Chief, Fia Sri II, Awoamefia of Anlo, was accepted by Smith, J., and expressed by him thus:

> In the second place the Fia is equally emphatic that succession is not a matter of right, but of appointment by a family meeting, and he goes on to say that the selection of a successor should be governed by seniority and that the eldest son should not be passed over in favour of a younger unless the former were considered unfit.

In this case also, therefore, the right of the children to succeed to their father's property is basically accepted, so that the only question is one of priority inter se.

Finally in Tamakloe v. Attipoe[2] the right to succeed to interests in property was recognised by the West African Court of Appeal as vested in the children of the deceased and the head of the family was held accountable to the children on releasing

1. Khoury v. Tamakloe, Unreported, Land Court, Accra, 4th January, 1950.
2. Tamakloe v. Attipoe, Unreported, Civil Appeal No. 38/1952, West African Court of Appeal, 22nd June, 1953; referred to in Ennin v. Prah, (1959) G.L.R. 44, 48.

the property to them. In that case Coussey, J., said:

> I can see no difference in principle in their liability to account both by English law and by the customary law, once it is appreciated that the 1st and 2nd Defendants have no beneficial interest in the estate of the deceased, and that their function, as Heads of the larger family is advisory and protective, i.e. to watch the interests of the children, and if necessary to convene meetings in matters affecting the deceased's estate. 1

All these cases from the Anlo Ewe area illustrate not only the law of the Anlo Ewe but also that of the Northern Ewe that, on a man's death, it is his children who succeed to his interests in property as of right. Without expressly stating it, it was the same principle that was applied in Yawoga v. Yawoga,[2] a case from the Ho District of Northern Eweland. In that case the first defendant and his sister, Afua Yawoga, were the only children of their father, Yawoga. The Land Court held that the first defendant and his sister could together alienate title to a self-acquired farm inherited from their father, without a reference to the wider family or dzotinu. It was said by Ollennu, J., :

> Succession in the tribe to which the plaintiff and the first defendant belong is patrilineal. And it is admitted that upon the death of the said Yawoga, his family, who became entitled to the property, consisted of his children and their descendants. 3

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1. Tamakloe v. Attipoe, supra. Quoted in Ennin v. Prah, (1959) G.L.R. 44, 48.
2. (1958) 3 W.A.L.R. 309.
3. Yawoga v. Yawoga, (1958) 3 W.A.L.R. 309, 310.

The learned Judge, in spite of the erroneous reference to the group as a "family", was correct in identifying the persons entitled to succeed to interests in the property. They are the children of the deceased and their descendants, excluding, of course, the descendants of the female children. In Yawoga v. Yawoga, therefore, if the first defendant did not have any issue, then the only two persons entitled to succeed to the self-acquired property of the deceased would have been the children of the deceased, that is the first defendant and his sister. By whatever name they may be called, it is the same persons, that is the children, who, as we have submitted, are the legally entitled persons to succeed to the interests in the property of their father and this is the decision in Yawoga v. Yawoga.

In Ahoklui v. Ahoklui[1], a case from Ghi, Ollennu, J., was even more explicit in stating that children are the successors to their father's interests in property among the Ewe. In the course of his judgment in that case the learned Judge said:

> The parties being Ewes, the custom of succession is that children succeed to their father's estate. It is only during minority of children who inherit property that a paternal uncle is made to take charge and control of the property until the children come of age. 2

1. Ahoklui v. Ahoklui, Unreported, Land Court, Accra, 1st June, 1959. Reproduced in N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.212.
2. Ahoklui v. Ahoklui, supra. Reproduced in N.A. Ollennu, Principles of Customary Land Law in Ghana, 1962, p.212, at p.214.

It is submitted that the rule in Yawoga v. Yawoga, as elaborated in Ahoklui v. Ahoklui, expresses the correct law of succession among the Northern Ewe.

Bentsi-Enchill also, though insisting on succession by the so-called immediate family, comes to identify the successors in the patrilineal societies as being the children of the deceased. He says:

> It can be stated with confidence that the self-acquired property of a person dying intestate in a patrilineal community devolves not on the whole patrilineage, but on his immediate family - both as to title and as to rights of beneficial enjoyment. But what persons comprise this immediate family? ... The group which is generally regarded as being beneficially entitled to the self-acquired property of a deceased intestate is the class of persons called his or her children, though the deceased's brothers and sisters are often considered entitled to some share of this property. 1

As compared with matrilineal communities, Bentsi-Enchill's treatment of patrilineal succession is noticeably brief and he approached it with some diffidence. Furthermore, he does not seem to have considered the decision in Yawoga v. Yawoga or the dictum in Ahoklui v. Ahoklui in this context. He could otherwise have been more precise by stating the law simply that the entitled successors to property are the children of the deceased. As for the brothers and sisters of the deceased, they only have a potential substitutionary claim to succeed, what is usually referred to as a spes successionis, and their right to succeed can be recognised only after that of the children and of the father of the deceased.

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1. K. Bentsi-Enchill, op.cit., p.158.

When Manoukian considered the question of succession among the Ewe, because of the information given of matrilineal succession in some Ewe areas, she said that the rules differ. However, she was able to say that

> In certain sub-tribes, including Ho, individual property is transmitted patrilineally: a man's heir is his son. 1

The Ho area mentioned by Manoukian is within Northern Eweland, and it is submitted that this is the rule in all these areas. Westermann also agrees that among the Ewe a man's property is inherited by his children, but points out that the variation allowing maternal relations to inherit some chattels in Glidzi and a few areas is an importation of Akan ideas.[2] Writing about the patrilineal Adangbe, Pogucki makes the observation that "Succession is patrilineal and automatic".[3] He could have said that of the Ewe.

In spite of his own decisions recognising the right of the children to succeed to the interests in the property of their father in Yawoga v. Yawoga,[4] and Ahoklui v. Ahoklui,[5] Ollennu, J., rejected the same submission when it was made to him in the Ningo (Ga-Adangbe) case of Carboo v. Carboo.[6] This was a case

1. M. Manoukian, op.cit., p.24.
2. D. Westermann, Die Glidyi-Ewe in Togo, Berlin, 1935, p.264.
3. R.J.H. Pogucki, op.cit., vol. II, Land Tenure in Adangbe Law, p.39.
4. Supra.
5. Supra.
6. (1961) G.L.R. 83.

not of succession to interests in property but of a grant of letters of administration. The administrator at the general law performs a function analogous to that of a positional successor or tefenola at customary law, to manage the estate without necessarily succeeding to any beneficial interest in the property. There is, therefore, nothing inconsistent with the customary law of succession in placing the administration of the estate, as the learned Judge did, in the hands of the brother of the deceased, who had succeeded to the position of "father" or to tefenola to the children. In Ewe law the brother of the deceased is a proper person to take charge of the estate but the children cannot be postponed to him as successor to the property or domenyila. The decision itself, therefore, conforms to Ewe law. The learned Judge in Carboo v. Carboo, however, seems to have treated the positional successor (or tefenola) and the successor to property rights (or domenyila) as being the same. He, therefore, went beyond the specific issue of administration which was before him and said:

> It was submitted on behalf of the defendant that upon a Ningo man's death intestate his children inherit, and his property automatically vests in his children as upon a devise; and it is only when all the children are minors that some relative must be appointed to take charge of the property. I must say at once that this submission is a misconception, and is against all the fundamental principles of our customary law of succession. 1

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1. Carboo v. Carboo, (1961) G.L.R. 83, 85.

Immediately after this he stated further that:

> The most elementary principle of our customary law of succession is that upon a man's death intestate, his self-acquired property, real and personal, vests automatically in his family. That family may be the patrilineal family, or the matrilineal family, depending upon the tribe to which the deceased belonged. 1

The learned Judge did not state the constitution of the family in which the property in this case vests on intestacy. That family, however, is the patrilineal family because the Ningo people are patrilineal. As regards the definition of the inheriting patrilineal family, therefore, we may turn to the decision of the same Judge in Yawoga v. Yawoga.[2] According to Yawoga v. Yawoga the "family" which succeeds to property consists of the children of the deceased, together with their issue, if any. Is that not the same as the submission on behalf of the defendant and which the learned Judge rejected in Carboo v. Carboo? It is possible that the dictum of the learned Judge was given per incuriam because he did not direct his mind to Yawoga v. Yawoga which concerns another patrilineal community. He also did not consider his own dictum in Ahoklui v. Ahoklui.[3] Similarly his attention was not drawn to the unreported decision of the West African Court of Appeal in Tamakloe v. Attipoe,[4] which is quoted with approval in Ennin v. Prah,[5] that children succeed to the interests of their father

1. Carboo v. Carboo, (1961) G.L.R. 83, 85.
2. Ibid.
3. Supra.
4. Supra.
5. (1959) G.L.R. 44, 48.

and that those who may manage the estate on their behalf may not have any beneficial interest in it. Another explanation may be that the Ningo rules of succession to property differ from those of the Ewe, though both are patrilineal. If so, then Carboo v. Carboo must be confined to the Ningo community because the decision in Yawoga v. Yawoga and the dictum in Ahoklui v. Ahoklui represent the correct statement of the Ewe law of succession. For it is not, as the learned Judge states in Carboo v. Carboo, a fundamental principle of the customary law of all Ghanaian communities, and certainly not of the Ewe, that it is the family which succeeds to a man's interests in property on intestacy.

The right to succeed to property without appointment by the family is recognised by implication by Ollennu, J., in Summey v. Yohuno.[1] While discussing the conditions essential to the validity of a nuncupative will at customary law in Summey v. Yohuno, one of the three conditions stated by Ollennu, J., is that

> (2) the member of the family who would have succeeded the person making the will, had the latter died intestate, must be among the witnesses in whose presence the declaration is made. 2

It is submitted that this means that even in a man's lifetime the successor to his interest in property is known. Otherwise

1. (1960) G.L.R. 68.
2. Summey v. Yohuno (1960) G.L.R. 68, 71.

how could he be present, realising that a successor, unless he has an automatic right, cannot be appointed until after the death of the intestate? If a different person was present but was not the prospective successor the nuncupative will would, according to that case, be invalid. For it was after a general statement insisting on the presence of other witnesses that the learned Judge made the special point emphasising that it was fatal if the prospective successor was not present, thus making him the one indispensable person. It is submitted that this implies an automatic right of succession to interests in property.

Furthermore Ollennu expressly recognises the automatic right in certain persons to succeed to property. For instance he recognises such a right in the father in a patrilineal society and in the mother in the matrilineal.[1] However, after admitting the right of children and others to succeed, he says, "all these rules we have discussed are rules of practice, not rules of law".2 The question immediately arises as to what is a "rule of law" as distinguished from a "rule of practice" in customary law. Apparently the "rule of law" in customary

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1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.90. This, however, is not wholly correct because, as will be explained later, in most of Northern Ewe areas the children have priority over the father of the deceased. See pp.676 & 682 infra.

2. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp. 103, 176.

law is one judicially determined and the "rule of practice" is the customary law actually practised and observed by the people. This dichotomy is resulting in decisions by the courts which have startled communities to which they apply. Customary law, however, ceases to be customary law unless it is a rule hallowed by long usage, acceptance and observance by the community. For these attributes, however, there is being substituted the judicial fiat. It is suggested that it is essential to achieve a fusion and halt the growing cleavage illustrated by the dichotomy between judicial customary law and the practised customary law.

Reverting to the substantive question of succession, it will be seen that the Ewe are not the only community granting the children of a deceased person the automatic right to succeed to their father's estate. In spite of the strong words of Ollennu, J., to the contrary in Carboo v. Carboo,[1] it has been stated by Pogucki, as we have seen, that among the Adangbe "succession is patrilineal and automatic", children succeeding.[2]

In the Nigerian case of Adesayo v. Taiwo,[3] when relations claimed the property of the deceased as against the children of the deceased, the claim was rejected and Jibowu, Ag. F.C.J., said:

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1. (1961) G.L.R. 83.
2. R.J.H. Pogucki, op.cit., Vol. II, Land Tenure in Adangbe Customary Law, p.39. The same is true also of the Guang.
3. (1956) 1 F.S.C. 84.

> It is quite clear ... that real properties of a deceased person who had children surviving go to his children, and not to his uncles, aunts and cousins. There can, therefore, be no doubt that neither the plaintiffs nor the persons through whom they claim blood relationship ... could inherit or take a share of his real property which, by native law and custom, belongs to children and descendants of the deceased. 1

The concluding words are identical with those used by Ollennu, J., in describing the right of succession of Ewe children in Yawoga v. Yawoga.[2] It represents Ewe law.

In his little book published in 1924, Ajisafe's statement of Yoruba law of succession on this point is that:

> Immovable property is inherited by the children and from the children to children's children, and so on in perpetuity. 3

The rule among the Yoruba as stated by Coker is that:

> Among the Yorubas inheritance is generally through the father, and there is authority for the proposition that generally on the death of a father intestate, his property devolves on his children as family property. 4

What Ajisafe and Coker say of the Yoruba could as well have been written about the Ewe. For among the Ewe, the rule, we must repeat, is that children succeed to the property of their deceased father as of right.

Examples of the right of automatic succession to interests in property are found in other parts of Africa. We have already

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1. Adesayo v. Taiwo, (1956) 1 F.S.C. 84, 85.
2. (1958) 3 W.A.L.R. 309, 310.
3. A.K. Ajisafe, The Laws and Customs of the Yoruba People, Routledge, London, 1924, p.8.
4. G.B.A. Coker, Family Property Among the Yorubas, 1966, p.44.

noted that among the Haya of Tanzania the right of succession to property is automatic on the basis of filioprimogeniture.[1] In Buganda in Uganda the rule is that "a child of the blood should inherit", this being both patrilineal and automatic.[2] Among the Tswana there is a right of automatic patrilineal succession to interests in property on the basis of filio-primogeniture, which is pressed so far that even if the eldest son of the deceased is himself dead, the eldest son of the dead child succeeds to his rights, taking precedence over his father's younger brothers.[3] The right of automatic succession to property, therefore, seems to be often found as a feature of patrilineal succession and is not a peculiarity of the Ewe.

Children as Successors

The general proposition is that among the Ewe the children of a deceased person succeed to his interests in property as of right as the proximate next-of-kin. This proposition is also supported by the principle deducible from Yawoga v. Yawoga.[4]

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1. H. Cory and M.M. Hartnoll, Customary Law of the Haya Tribe, International African Institute, London, 1945, pp. 1-2.
2. E.S. Haydon, op.cit., p.214.
3. I. Schapera, A Handbook of Tswana Law and Custom, International African Institute, London, 1955, p.231.
4. (1958) 3 W.A.L.R. 309.

The way Ollennu, J., expressed it in Ahoklui v. Ahoklui, as we have seen, is that among the Ewe "the custom of succession is that children succeed to their father's estate".[1] In interviews during field research it was represented to me that the family or dzotinu has authority to supersede a child for very compelling reasons. However, so rare are such cases that throughout my field research no present or past instance could be cited to me when the surviving children of sound mind and body had been denied the right to succeed to the interest in their father's intestate property. It is suggested, therefore, that among the Ewe the so-called authority in the family to by-pass a child in the succession to his deceased father's intestate estate is largely theoretical.

However, although the children have an indefeasible right to succeed to their father's property, there is no automatic right of priority inter se, nor is there an automatic right of entitlement to specific portions of the estate. The share of each child in the estate is a matter for the determination of the family or dzotinu. The only exception is that, if there is only one child and he is a male child, then his right to succeed to the entire estate is automatic as he cannot be postponed to other relations and there is nobody entitled to share with him. It is the same automatic entitlement if the deceased was childless but is survived by only one brother.

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1. Ahoklui v. Ahoklui, supra.

This aspect of the devolution of intestate estate among the Ewe has not been well appreciated. The failure to appreciate it is largely responsible for the misleading statements that ewen among the Ewe succession to property by an individual is not automatic and that it is the family which succeeds. We must understand "automatic" here in two senses of collective entitlement and personal share. Succession by children, or failing them the other next-of-kin, is automatic in the sense of collective entitlement. All the children of the deceased are jointly entitled to all the inheritable estate, and if there is only one child who is male he is automatically entitled to all personally.

In the sense of personal shares in the estate, however, there are no automatic entitlements. It seems that the old rule was that the eldest male child took all the property and was then under an obligation to maintain the rest of the children out of the estate.[1] The principle of filioprimogeniture, however, has not survived the evolution of society and the introduction of a complex economy. Today it is still preferred to entrust the estate to the eldest male child on behalf of himself and the other children until the property is shared,

1. cf. the principle of filioprimogeniture among the Haya of Tanzania in H. Cory and M.M. Hartnoll, op.cit., pp. 1-2, and among the Tswana in I. Schapera, op.cit., pp.230-231.

or if sharing is not contemplated. The eldest child, however, has no legal right of priority today as against the other children, and the elders have the right to exercise their own discretion in selecting which of the children shall take charge of the estate. While age is an important consideration, personal qualities may result in the selection of a younger child for the position.

It is against this background that one should understand the opinion of the Paramount Tribunal of Anlo in the cases that had been referred to it. It is respectfully submitted that as a result of a failure to grasp this point, the statements of Ewe law have been misunderstood and misapplied by the judges of the higher courts, as by Ollennu both in his works[1] and in his judicial capacity.[2] Bentsi-Enchill and other authorities have also not escaped the same error.[3] It is true that the cases in which they have been misapplied are not Ewe cases; but all the same they are instances of the misapplication of the principle in the Ewe cases.

The declaration by the Paramount Tribunal of Anlo in In re E.N. Tamakloe[4] is treated by Ollennu as supporting the

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1. e.g. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp.87-90.

2. e.g. Kwakye v. Tuba, (1961) G.L.R. 720; Carboo v. Carboo, (1961) G.L.R. 83; Okoe v. Ankrah, (1961) G.L.R. 109; and Krakue v. Krabah, Unreported, Supreme Court of Ghana, Accra, 24th June, 1963.

3. e.g. K. Bentsi-Enchill, op.cit., pp.126, 134, 157.

4. In re E.N. Tamakloe, Unreported, Suit No. 78/44, High Court, Accra.

proposition that succession to intestate property is not as of right among the Ewe and that the family has an unfettered choice in appointing a successor.[1] It is respectfully submitted that Ollennu missed the full import of the declaration of Anlo customary law of succession. It is further submitted that the said declaration does not go beyond the children of the deceased and that it means no more than that the family decides the order of priority as among the children. The relevant portion of the declaration by the Paramount Tribunal of Anlo may be quoted again. It runs thus:

> One important point which must not be forgotten is that the senior boy or girl never automatically succeeds to the estate; an election by the deceased's maternal and paternal relatives must be done strictly in accordance with the rules of native custom, and in most cases the choice goes to the senior son of the deceased, when not proved to be a delinquent, i.e. a drunkard, spend-thrift, litigious person, or general waster. When the eldest surviving son is disqualified for any reason from succeeding, the choice is given to one of his fit younger brothers. 2

The Tribunal was at pains to emphasise that if the eldest child was unsuitable the choice should go to "one of his fit younger brothers" and not just another member of the family. It is a right vested in the children and not in the entire family. The Tribunal was only stating the guidelines as regards the respective claims of the children inter se. It is, therefore, a misapprehension to rely on this declaration for the wide

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1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp.87-88.

2. In re Tamakloe, supra.

proposition that it is the family which succeeds to the estate of an intestate member.

In the same way the effect of the expert evidence given by Togbui Sri II, Awoamefia of Anlo, on the law of succession among the Anlo Ewe has been misunderstood. According to Smith, J.,

> In the second place the Fia is equally emphatic that succession is not a matter of right, but of appointment by a family meeting, and he goes on to say that the selection of a successor should be governed by seniority and that the eldest son should not be passed over in favour of a younger unless the former were considered unfit. 1

Contrary to how this evidence has been construed, it is not to the effect that it is the family which succeeds to the estate. What Togbui Sri meant here was that, while it is the children who inherit, the management of the undivided estate is not as of right handed over to the eldest son on the simple principle of filioprimogeniture. Although the principle of seniores priores is respected, the family has the discretion to choose a younger child in preference to his elders if the circumstances so warrant it. It is respectfully submitted that, if so construed, Togbui Sri was right and that this also represents the law among the Northern Ewe.

The statements of the Ewe law of succession in In re Tamakloe, Attipoe v. Shoucaire, Khoury v. Tamakloe, Yawoga v. Yawoga and Tamakloe v. Attipoe are all to the effect that

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1. Khoury v. Tamakloe, supra.

children succeed to their father's intestate estate as of right but that their respective entitlements are subject to the determination of the family. For that reason the court went so far as to state in Tamakloe v. Attipoe[1] that, on handing over the property to the children, the head of the wider family is accountable, a decision which is otherwise inexplicable in view of the consistent rule of judicial customary law that a head of family is unaccountable.

The automatic right to succeed to property is perhaps not an Ewe peculiarity. In the Fanti case of Poh v. Konamba,[2] it was stated by Bossman, J., that:

> ... the right given to the family to elect or approve a person entitled to succeed cannot be exercised capriciously and contrary to customary law. A person who, by virtue of his relationship to the deceased, is entitled to succeed, cannot be passed over by the family unless he has disqualified himself ... [3]

Being "entitled to succeed" is hardly different from the general right of succession which we have been discussing. Similarly, as we have already seen, in Summey v. Yohuno,[4] Ollennu, J., emphasised that "the member of the family who would have succeeded" on intestacy must be present when a customary law will or samansiw is made, else it would be invalid. This means that the successor is known even in the

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1. Supra.
2. (1957) 3 W.A.L.R. 74.
3. Poh v. Konamba, (1957) 3 W.A.L.R. 74, 81. Emphasis supplied.
4. Summey v. Yohuno, (1960) G.L.R. 68, 71.

lifetime of the person to whose interest he would succeed. The application of the dicta in Poh v. Konamba and Summey v. Yohuno to the Ewe circumstance means that those "entitled to succeed" are the children of the deceased.

The automatic right of succession is also stated by Sarbah for the matrilineal Fanti, among whom the entitled successors are the "real successor" (i.e. uterine brothers and sisters and issue of the sisters).[1] The others, whom Sarbah calls "ordinary successors" and "extraordinary successors", are simply other members of the family with only a spes successionis. The terminology of Sarbah has been criticised, but the substance of his proposition has not been effectively assailed.[2] Of the matrilineal Akan generally Danquah says the mother has the right to succeed to her child's intestate estate and says of her:

> There is none to supersede her claim to succeed her son. If the mother steps in, in case of any controversy, it is to be realised that she does so de jure. 3

It is doubtful whether Danquah's exposition is wholly correct. What Danquah says of the Akan mother, however, can also be said of the Ewe child because he has the legal right to succeed his father, especially if he is the sole child. Therefore, without

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1. J.M. Sarbah, op.cit., pp. 101-105.

2. e.g. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp. 84, 153-154 and K. Bentsi-Enchill, op.cit., pp. 127-132.

3. J.B. Danquah, op.cit., p.183.

concurring in his entire judgment, we agree with Akuffo-Addo, J.S.C., as he then was, in his dissenting judgment in Krakue v. Krabah[1], when he said:

> A family cannot by manipulating the appointment of a successor shift the legal basis of inheritance... Since family rights are always enjoyed in lineal groups, the successor appointed ... must come from the group entitled to the inheritance. Thus there is a limit on the exercise of the rights of the family in this respect.

The "group entitled to the inheritance" among the Ewe consists of the children of the deceased man if he is survived by issue. We repeat, therefore, that among the Ewe the persons entitled as successors to property or domenyilawo are the children of the deceased. The family as such does not succeed. Hence, although it is the family which decides on the shares etc which each child is entitled, the family is limited in this function to choosing from among the children. The effect is that, if a man is survived by only one child, his right to succeed to the entire estate is automatic and the family becomes functus officio in the selection of a successor or domenyila and in the distribution of the estate.

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1. Krakue v. Krabah, Unreported, Supreme Court, Accra, 24th June, 1963.

Distribution of the Estate Among Successors

As already stated, the children, as the proximate next-of-kin, are entitled as of right to succeed to their father's interests in property on intestacy. If the deceased is not survived by any child, other persons as next-of-kin are entitled to succeed to the estate, depending on proximity to the deceased in the pedigree. In either event, as we have seen, there is no automatic right to specifiable portions of the estate. The actual distribution or sharing of the deceased's property among the entitled persons or domenyilawo is a function of the patrilineal family or dzotinu.

The body which determines what particular items of the intestate property an entitled person may succeed to is the family or dzotinu. It has already been explained that among the Northern Ewe there is no immediate family as distinguished from the wider family. However, for the avoidance of doubt, we may say that the family or dzotinu here is equivalent to the wider family in the scheme of those jurists who recognise the existence of immediate families.

Among those who maintain that there are immediate families as opposed to wider families, there is no unanimity of opinion as to which body is competent to appoint successors to property (i.e. domenyilawo) or share the intestate estate among them. The view of one school, including Bentsi-Enchill,[1] is that it

1. K. Bentsi-Enchill, op.cit., p.141.

is the immediate family which has the beneficial interest in the property and which, therefore, has the right to deal with the property. There are cases supporting this view, such as Arthur v. Ayensu,[1] In re Eburahim,[2] and Ennin v. Prah.[3] There appears, however, to be a confusion of two aspects of the matter. The persons entitled to succeed to the property, who are described by this school of thought as the immediate family, are confused with the body competent to appoint beneficiaries from that group or share the property among them.

The other school, of which Ollennu is an exponent,[4] holds the view that the appointment of successors is the responsibility of what is described as the wider family. Cases relied upon for this proposition include Amarfio v. Ayorkor[5] and Krakue v. Krabah.[6] As far as the Ewe are concerned, this latter view is correct that the appointment of successors (domenyilawo) or distribution of the estate is a responsibility of the wider family. Among the Ewe it is not necessary that the body appointing successors or sharing the estate among them should be the same as the group of persons entitled to the property.

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1. (1957) 2 W.A.L.R. 357.
2. (1958) 3 W.A.L.R. 317.
3. (1959) G.L.R. 44.
4. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp. 124-125.
5. (1954) 14 W.A.C.A. 554.
6. Krakue v. Krabah, Unreported, Supreme Court, Accra, 24th June, 1963.

An illustration of the Ewe position may be made by reference to a decided case. In Yawoga v. Yawoga[1] it was agreed that the successors were the children of the deceased Yawoga and their descendants. In that case the only children of the deceased were the first defendant and his sister. Children of a woman are excluded in the patrilineal Ewe system. Therefore, if the first defendant himself did not have any issue, then the only successors would have been the first defendant and his sister. In the scheme of those who contend that there are immediate families, these two persons would constitute the so-called immediate family. Indeed that is how they were regarded and described by Ollennu, J., in the instant case. If we follow those who contend that the successor is appointed, or the estate is distributed, by only the immediate family, we would have to say that the first defendant and his sister constituted the competent body. It is respectfully submitted that that is not Ewe law. In every case it is the entire family or dzotinu which makes the appointment or distribution of the estate. The family assesses the personal merits as well as the circumstances of those who are the successors, and decides how the estate is to be distributed. The constitution of the family meeting for this purpose is the same as when any important deliberation takes place, such as to decide on the sale of family land. It means that the head of

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1. (1958) 3 W.A.L.R. 309.

the family and the principal elders must be present. Furthermore, other relations may and often are invited.

In agreeing with Ollennu that it is the "wider" family which determines the shares of the successors, we do not agree with him, however, that the said family is the successor or that the family is not limited in its choice. As to the first point, the competence of the dzotinu or family to determine the shares of the successors, or to entrust the property to one successor, is not the same as saying that the family as an entity is entitled to the property. The Probate Court performs similar functions in relation to both testate and intestate estates, but that Court itself is not a beneficiary. The role of the family in this respect may be considered as somewhat analogous to that of the Court in adjudicating upon the entitlements of successors.

As regards the choice of successors and the determination of their shares, the family is not unfettered in the exercise of its discretion. We agree with Akuffo-Addo, J.S.C., in Krakue v. Krabah that:

> ... since family rights are always enjoyed in lineal groups the successors appointed ... must come from the group entitled to the inheritance. Thus there is a limit on the exercise of the rights of the family in this respect. 1

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1. Krakue v. Krabah, supra.

This was the only condition on which the learned Judge was prepared to concede the right of the "wider family" to make the appointment of successors. Although the impression is given by Ollennu that the family is unfettered in its choice of successors, he corrects that impression by stating the proviso that, if an entitled person with a prior right is passed over arbitrarily or capriciously he can obtain a remedy by invoking the court's intervention.[1]

It is submitted, therefore, that there must be a qualification to the sweeping proposition stated in the head-note to the decision of the West African Court of Appeal in Makata v. Ahorli that

> There are no rigid rules of intestate succession in Gold Coast native custom, but the elders of a family of which a deceased was a member may appoint a successor at their discretion. 2

Because of the above head-note, Makata v. Ahorli is often cited as authority for the proposition that the family may choose as successor, in the sense of domenyila, whomsoever it pleases. It is respectfully submitted that this is a misunderstanding of the decision in that case. The head-note is misleading. The West African Court of Appeal did not say that the question of a successor is at the absolute discretion of the family.

1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.88.

2. Makata v. Ahorli, (1956) 1 W.A.L.R. 169. Field similarly says of the Ga that "There are no rigid laws of inheritance as a European understands codified law"; M.J. Field, Social Organisation of the Ga People, 1940, p.43. This is inapplicable to Ewe. The Ewe have no "codified" law, but the law of succession is certain.

In the first place the deceased in Makata v. Ahorli was not survived by any issue. The case, therefore, is no authority for the view that even children may be postponed to other relations at the discretion of the family. Secondly, the appointment of a nephew to succeed to the property in this case, instead of a brother on the failure of children, is but an exception which proves the general rule. The nephew had not only laboured with his uncle in the farms left intestate; in the light of the particular facts of the case he was also requested to shoulder part of the funeral expenses of his uncle, a duty which would not ordinarily have devolved on him as he was not a member of the deceased uncle's patrilineal family. These were the facts and circumstances which justified a departure from the normal rule. It was an exceptional case which must be treated as such. It does not by itself establish a wider rule of an unfettered discretion in the family. Exceptions of this type are rare but they exist in perhaps every legal system. In English law, for instance, a spouse who would have been entitled to his wife's estate on intestacy would not be permitted to take the property if he was implicated in the death of his wife. Similarly in Ewe law an otherwise entitled person may not be permitted to succeed if the special circumstances make it undesirable that he should. It is not that "there is no codified or rigid law of inheritance" as the dictum in Makata v. Ahorli suggests.[1] The law indeed is not

1. Makata v. Ahorli, (1956) 1 W.A.L.R. 169, 172.

codified but it is explicit and certain among the Ewe. The Ewe law, however, is not applied mechanically. Hence the particular circumstances of the case may defeat the right otherwise vesting in a prospective successor or domenyila in Ewe law. Such circumstances may arise where the prospective successor was not on speaking terms with the deceased, where the deceased had been neglected either in health or in illness in a manner repulsive to Ewe notions, or where the entitled successor had been cruel to the deceased. Similarly a distant relative's special relationship with the deceased, as in the case of the nephew and his uncle in Makata v. Ahorli, may justify the conferment of a right of enjoyment of the intestate estate on that relative. The discretion of the family, therefore, is not an absolute one among the Ewe. Like judicial discretion, the discretion of the Ewe family in the matter of succession to property is exerciseable only in conformity with certain generally accepted rules which are stated hereunder.

These rules are stated with specific reference to children because in Ewe law children are the normal successors to property as of right.[1] Where the deceased is not survived by any issue the same rules apply with equal force but mutatis mutandis to other successors or domenyilawo, such as the brothers and sisters of the deceased.

1. The principle in cases like Makata v. Ahorli, (1956) 1 W.A.L.R. 169, 172; Yawoga v. Yawoga, supra; In re Tamakloe, supra; Khoury v. Tamakloe, supra, and Ahoklui v. Ahoklui, supra.

The first rule of Ewe law of succession is that, where the deceased is survived by only one issue, that child succeeds to all his interests in property automatically as of right. A sole female child, however, succeeds to the interest in the estate but only for her own lifetime. After her death the interest in the property becomes inheritable as if the original holder had died intestate and without issue. The reason is that the female child's own children are normally not members of her patrilineal family through which the right of succession is traced; even if such grandchildren are born into the same patrilineal family they would not count as the proximate next-of-kin traced unilineally through their own father. Another general rule is that if the intestate had no issue but predeceased his own father, the father automatically succeeds to all the estate absolutely as of right, in the same manner as a sole male child. The other rules which follow are subject to the above exceptions.

Where there are two or more children entitled to succeed, none of them can claim any specified portion of the estate. None of them can, by the right of succession alone, claim a particular house or farm until it is allotted to him by a full meeting of the patrilineal family. No single one of the children, not even the eldest, nor any group of them, can alienate the interest in any portion of the estate. The right to succeed is not of itself enough to confer title until a specific allocation or distribution has been made by the family.

In the distribution of property among the children of an intestate, the old rule was that a child whose mother was not formally married to the deceased father was not entitled to any share. Such a child was known as asikevi, ahasivi or gbomevi, that is "a child not born in wedlock". The asikevi, ahasivi or gbomevi was not illegitimate if his paternity was duly acknowledged by or on behalf of the father. For that reason he was fully entitled to the occupation and use of family property, such as land, vested in the father's family and he was fully eligible for succession to hereditary offices reserved for the members of that family.' It was only in respect of the self-acquired property of the deceased father that he incurred a disability to succeed. This is similar to the disentitlement of a child procreated by a man in adulterous relations during the subsistence of a marriage under the Marriage Ordinance[1] who, though otherwise fully legitimate by the Ghanaian lex domicilii, cannot partake of the portion of the intestate estate which, under Section 48 of that Ordinance, devolves according to the relevant rules of English law.[2] The explanation for the Ewe law disinheriting the asikevi, whose mother was unmarried to the deceased, seems to be that it is presumed that his mother might not have assisted the deceased in building up the estate.

1. Cap. 127.

2. Coleman v. Shang, (1959) G.L.R. 390; Bamgbosie v. Daniel, (1952) 14 W.A.C.A. 115.

The old rule, however, has now virtually disappeared in most chiefdoms. The general rule today is that the marriage of the child's mother to the father is irrelevant in conferring the right of succession on the child. The terms asikevi, ahasivi and gbomevi are, therefore, merely terms of social distinction today without implying any property disqualification. The vital and decisive criterion today is whether the child has been duly acknowledged, whether in the lifetime of the deceased or posthumously, as a child of the deceased. If paternity is thus established, the marital status of the mother is an irrelevant consideration as regards succession to property. The marital status of the mother is thus only a matter of evidentiary value in raising a rebuttable presumption of paternity. In the Nigerian (Yoruba) case of Savage v. MacFoy the contention that the right of succession vested in only the children of married mothers was rejected and the Court held that for the purposes of intestate succession to property it made no difference whether the children were born in wedlock or not.[1] It is submitted that this decision conforms to the general view of modern Ewe law.

There are, however, a few exceptions of chiefdoms where the old rule has persisted in some form, so that the child of an unmarried mother is held to be not fully entitled to succeed to the interest in his father's intestate estate. It is, however, not a total disinheritance. The severest rule is found in

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1. Savage v. MacFoy, (1909) Ren. 504.

Wusuta where it is stated that the child born in wedlock is entitled to a greater share of the property than that whose mother was unmarried to his father, even if the latter is senior in age. In Abutia it is simply stated that, as against a child whose mother was never married to his father, the child of a married mother, even if younger in age, is regarded as senior. The result is that on the principle of seniores priores, he may be adjudged to be entitled to a greater share of the property, and he is first considered for taking care of the estate on behalf of the rest of the children if no division is contemplated. In Peki it is regarded only as a matter of prejudice where the child's mother was unmarried; but it may have the practical effect of a more favourable allottment of property to that child whose mother was married to the deceased.

The old rule, especially when the estate was not divided among the children, was that the principle of filioprimogeniture applied. Its implication was in the first place to eliminate female children in favour of the male ones, even if younger in age. As among the male children the principle involved several elements. The children of unmarried women were regarded as junior to all those born of married mothers. Then as between the children of married mothers the status of the wives determined seniority. The Ewe have various forms of marriage such as asiga or full ceremonial marriage, the asivi or marriage

consequent upon betrothal.[1] If the mothers were all of the same status in the sense that they had all gone through the same form of marriage with the deceased husband, then seniority inter se was determined by their respective dates of marriage to the deceased. The eldest male child of the most senior wife, as determined on the foregoing basis, was the senior child according to the Ewe principle of filioprimogeniture. If none of the children was of a mother married to their father, then the senior male child was the eldest in age. The application of the Ewe principle of filioprimogeniture, as can be seen, did not make the choice necessarily fall on the eldest child in terms of age alone.

When the principle of filioprimogeniture had its full sway, the estate was entrusted to the senior child who administered it for and on behalf of himself and the other children. This may be described as a joint entitlement. It is the collapse of this principle under the pressure of a developing society and the introduction of a complex cash economy that has led to the regrettable practice today of dividing the estate among the children of the deceased. It is the collapse of the principle of filioprimogeniture that the Paramount Tribunal of Anlo wanted to emphasise when it said in its declaration in In re Tamakloe that:

1. Cf. the children of the Ga "six cloth" marriage: Solomon v. Botchway, (1943) 9 W.A.C.A. 127 and Amarfio v. Ayorkor, (1954) 14 W.A.C.A. 554.

> One important point which must not be forgotten is that the senior boy or girl never automatically succeeds to the estate; an election ... must be done. 1

The effect of the declaration is that today the eldest child, merely because of his seniority, cannot arrogate to himself the right to exclusive succession or the right to manage or deal with the estate without the sanction of the family. The strong words of the declaration are, however, watered down by the Paramount Chief of Anlo when, according to Smith, J., in Khoury v. Tamakloe[2] the Fia said that

> the selection of a successor should be governed by seniority and that the eldest son should not be passed over in favour of a younger unless the former were considered unfit.

Even in the olden days the senior child could be superseded in favour of a younger one if the senior was unsuitable, and this is still the case today. In that case it is said Foli zu Dzeha or "Foli turns Dzeha". Among the Northern Ewe the first male child, even if not addressed by that name, is known as Foli, the second is Dzeha, the third is Mensa, and the fourth is Anani, and so on. Similarly the first female child is Agoe, the second is Gboo, the third is Mansa and the fourth is Anani. Therefore, by saying Foli zu Dzeha or "Foli turns Dzeha" it is meant that the senior child is relegated to the position of a junior.

Today the estate is, as a rule, divided among the children.

1. In re E.N. Tamakloe, supra.
2. Supra.

The principle of filioprimogeniture, therefore, scarcely applies in its old form. If all the children are of the same mother the estate is shared per capita among all the children of the deceased. If they are children of more than one mother, the property is divided on a per matres basis, that is according to the number of mothers; then there usually follows a further sub-division among each set of children. Where the property is divided per capita among children of the same mother, the principle of seniores priores only means that a senior child gets a little more than the next junior one in a diminishing order according to age. Where the property is divided per matres, only the senior child of each mother counts for the purposes of the division and he receives the share on behalf of himself and his brothers and sisters, pending a possible further sub-division per capita. In all cases the descendants of a deceased male child are considered as together entitled to the share of their deceased parent on a per stirpes basis.

The position among the Ewe today, regrettable as it may be, is that the estate left intestate by a deceased person is, as a rule, divided among all the children. Ollennu, however, says

> Real property left by a deceased member of the family is ... retained intact and undivided to avoid partitioning which eventually brings about the sale of the property and its loss to the family. Such real property is retained as family property. 1

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1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.127.

Unfortunately this is not true of Ewe society today. The general rule, on the contrary, is to divide the property among all the successors or domenyilawo. As Bentsi-Enchill has observed:

> The tendency to hold landed property together as family property is perhaps stronger in matrilineages than in patrilineages. 1

The practice of dividing the estate among the successors is so common today among the Ewe that it is always expected. There is, therefore, hardly any property held together today by Ewe successors or domenyilawo as group property. Sometimes farms are physically divided. If there are two or more farms, the distributing family decides which of the successors shall inherit a particular farm. Houses are not usually shared by rooms. Usually the whole house is given to one of the successors as against other property of comparable value to others. If the house is not so allocated, then any rents or proceeds accruing from the property are shared among the successors.

As already stated, the self-acquired property of an individual does not become family property among the Ewe, though members of the family have severally a spes successionis in such property. Now the division of the property among the successors practically defeats the likelihood of the property ever becoming family property. The result is that there is no addition to family property today among the Ewe, so that family property properly so called consists principally of the ancestral lands.

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1. K. Bentsi-Enchill, op.cit., p.170.

No thanks-offering is provided when property is allotted to a successor. Ollennu says that acceptance of property on appointment as successor is evidenced by the presentation of a drink or aseda to the family for his preferment.[1] This customary procedure does not apply among the Ewe. Perhaps one explanation is that among the Ewe succession to rights in property on intestacy is a general legal right and not just a "preferment" as Ollennu describes it. The role of the family among the Ewe is merely to act as an arbiter among persons who have a common right in the property. If drink were to be offered on the basis of thanks for preferment, then there would normally be several "drinks" or thanks-offerings because the Ewe usually have several successors taking shares in the same estate. In the Ewe society ceremonies and formal occasions of this type are always marked by the pouring of libation with drinks or aha. This is usually provided by only the eldest child or successor. It is not, however, in the nature of akpedanu, the equivalent of aseda or thanks-offering among the Akan. It is simply for libation.

The last basic rule was that women were not entitled to succeed to rights in property except a few chattels. The maxim is nyonu gble de mebiana o, that is "palm fruits in the farm of a woman can never ripen". As a result women were not considered in the distribution of property on intestacy. Today the rule is

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1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.107.

not observed with the same rigidity; but it is still the general principle that male successors are preferred to female ones. Even if there are older sisters they are postponed to a younger brother. As between brothers and sisters, immovable property is normally allotted to the male children. Furthermore the bulk of the property goes to the male child even if he is younger than the female children. A problem arises in connection with the application of this principle in the case of a plurality of wives, if one of the wives has only female children. The general rule today is that such female children are entitled to the property on an equal footing with the male children on a per matres basis.[1] Similarly a man survived by only daughters may have his property inherited by such female children.

Generally a woman succeeding to rights in property on intestacy is regarded as taking a life interest only, so that the interest in the property cannot devolve on her own children as it does in the case of male successors. A female successor to property cannot, therefore, alienate the interest in the inherited property inter vivos, nor does she possess any testamentary capacity with respect to the property. It means that on the death of such a female successor the interest in the property falls once more to be inherited as an intestate estate of the original holder. In Kpedze and Ho, however, it is stated that the rule is that a woman who is entitled to succeed, and

1. But see Fietsu v. Fietsu, Unreported, Suit No. 51/51, Atando Native Court, Hohoe, 17th August, 1951, discussed infra, pp. 677-679 , where it is held by implication that female children are not entitled.

does succeed, takes the property absolutely as a male successor, so that on her death the interest in the property devolves on her own children and the lineal descendants of her body unless she disposes of it. In that case the property is known as mama nu or "grandmother's thing". On the extinction of the lineal descendants of the female successor in such a case, the interest in the property reverts to the female successor's patrilineal family to be succeeded to by those with the spes successionis in that family.

All the above propositions are subject to the general consideration that, as a rule, a deceased person's estate is inherited by a person of his or her sex. The sex distinction, however, does not cover such items as immovable property and cash. It does mean, however, that peculiarly feminine articles go to female successors in the proximate group, and men members succeed to the interest in property usable by only men.

Table of Succession: Deceased Male

Though subject to variation by the family in exceptional cases, the table of succession to intestate property is determined by a fixed formula. The right to succeed to property on intestacy is, as it were, as that of next-of-kin. On the failure of a prospective successor, therefore, the next set of persons in proximity to the deceased in the pedigree traced patrilineally become entitled to succeed. By the application of the formula it is possible to know in advance who possess the

right of succession to a particular individual's interests in property on intestacy.

For the purpose of determining who are his successors, the marital status of a deceased man is an irrelevant consideration. Even if the deceased is survived by a wife, the wife does not in that capacity have a right of succession. The right of succession to intestate property is legally enjoyable only by the members of the patrilineal family and a wife is not in Ewe law absorbed into her husband's family by reason of marriage. That the deceased is survived by a wife and children to be maintained out of the estate may, however, influence the family in the appointment of a tefenola for the interim administration of the estate, as well as in deciding which of the legally entitled persons shall enjoy the property.

The first general rule is that, if a deceased male is survived by children, the children are his next-of-kin and are entitled to succeed to his interests in property as of right on intestacy. If there are no children but children's children, such descendants have the right to succeed, priority being determined among them in the descending order of the pedigree. This was the principle also accepted in Yawoga v. Yawoga,[1] when the Land Court held that in Ewe law a man's successors are his children and the descendants of those children. The same proposition was also stated by Ollennu, J., in Ahoklui v. Ahoklui.[2]

1. (1958) 3 W.A.L.R. 309.
2. Supra.

As already explained, it is now irrelevant for this purpose that the mother of any of the children was not lawfully married to the deceased father. It is a necessary but sufficient requirement that the child's paternity is acknowledged by or on behalf of the deceased father. Male children are preferred to daughters in the succession to the property of a man, even if such sons are younger.[1] As a general rule a female child succeeding to an interest in her father's property takes only a life interest in it.

If there are no children or descendants of children, the actual father of the deceased, if still living, is the successor to the property or domenyila. Ollennu seems to suggest that in any event the father of the deceased has priority over children of the deceased in succession to the estate of the deceased.[2] The impression one gets, however, is that Ollennu is referring to the tefenola as a successor only for the limited purpose of the interim administration of the estate; for he says that the father is the successor "until the family meet and make a formal appointment".[3] If Ollennu means the successor in the sense of an interim administrator of the estate, then we would agree with him because, until the children of the deceased are of a mature age, their grandfather may manage the property on their behalf.

1. See pp.677 - 679 infra, Fietsu v. Fietsu, Unreported, Suit 51/51, Atando Native Court, Hohoe, 7th August, 1951.
2. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp. 90-91.
3. Ibid.

If, however, by successor Ollennu means the successor to an interest in property or domenyila then his proposition is at variance with the general Ewe law. The general rule among the Northern Ewe is that, as between the children of the deceased and the father of the deceased (i.e. grandfather of the children), the children have a prior right to succeed to the property. Only in Kpedze is it stated that the father of the deceased has priority over the deceased's children in succeeding to the intestate estate.

If the deceased is not survived by any child or descendants and the deceased's own father had pre-deceased him, then the next set of persons entitled to succeed to the interest in the property are the brothers and sisters of the deceased. Two rules are applied here. The first is that as a general proposition a brother is preferred to a sister. Accordingly even a younger brother is preferred to a sister of an older age. The second rule is that, if there are children of different mothers, those of the whole blood and their descendants in the male line must be exhausted before those of the paternal half blood are allowed to succeed to the property. The conflict of these two rules is not always easy to resolve, especially if the childless deceased has only sisters of the whole blood and half-brothers, without any brother of the whole blood. The sisters of the whole blood, quite rightly it is submitted, contend that, being of the whole blood, they have priority over half brothers. As sisters in such a case can only take a life interest in the property,

the property would eventually devolve on the brothers of the half blood. The rule, however, is that half-brothers, because they are male, have priority over even sisters of the whole blood. In Fietsu v. Fietsu[1] the plaintiff was a half-sister to the defendant, being born of the same father but of different mothers. They were both pre-deceased by the plaintiff's only brother of the whole blood, Augustine Komla Fietsu, who died intestate and childless. The deceased Augustine left two farms, one of which was self-acquired and the other was inherited from their father. The defendant claimed the inherited farm. The plaintiff sister, however, contended that, as the only sibling of the whole blood to the deceased, she was entitled to the farm inherited from their father because the property of their father had been divided on a per matres basis into two parts, as their father had two wives. The property, she contended, was therefore held by the deceased Augustine on behalf of all the children of their mother, of which she was the only surviving one. She claimed, therefore, to succeed to the interest in the farm on the original per matres basis. As regards the self-acquired farm of the deceased, the defendant conceded that the sister of the whole blood could succeed to the interest in that. An arbitration held on the matter decided that the plaintiff sister was entitled to succeed not only to the self-acquired farm of her deceased brother of the whole blood, but also to that farm

1. Fietsu v. Fietsu, Unreported, Suit No. 51/51, Atando Native Court, Hohoe, 7th August, 1951.

which on a per matres basis her brother of the whole blood had previously inherited from their father; for, as the deceased brother had succeeded to the interest in their father's farm on a per matres basis, he held it on behalf of all her mother's children. Being dissatisfied with the decision of the arbitrators, the defendant went into possession of the disputed farm and drove away the labourers of his half-sister. The half-sister, therefore, sued. It was held by the Atando Native Court, Hohoe, that the plaintiff, as a woman, could not, as against a half-brother, succeed to the interest in the property, not even the self-acquired property of her brother of the whole blood. The Atando Native Court said:

> The arbitrators were quite wrong according to our Gbi native customary laws by transferring or giving the deceased's cocoa farms to the Plaintiff, being a woman. According to our Gbi native customary laws, although the Defendant and the late Augustine Fietsu were of one father but of different mothers, yet he the Defendant is the right person to inherit Augustine Fietsu and not rather the Plaintiff. The Defendant was rather generous to Plaintiff to leave out to Plaintiff the cocoa farm the late Augustine Fietsu made (i.e. his self-acquired property); for according to our Gbi native customary laws, these two cocoa farms belong to the Defendant and not to the Plaintiff. 1

The proposition on which this decision is founded is that, in the succession to the interest in property held by a deceased man, a male successor is preferred to a female. That is why, even though the self-acquired farm of the deceased was not in dispute, the Native Court volunteered its opinion that the

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1. Fietsu v. Fietsu, supra.

interest in even that devolved on the defendant half-brother as against the sister of the whole blood. There is a further implication from the decision. The defendant half-brother was held entitled to take the property held by the deceased on a per matres basis even though a female child of the other wife was still alive. The implication then is that if the plaintiff sister were the only child of her mother, there would have been no division per matres because as a woman she could not succeed to her father's interest in property. It is doubtful whether this decision will be followed that far in other chiefdoms, because in many areas it is now considered that female children can take a life interest in the intestate estates of their deceased fathers.

There is another aspect of Fietsu v. Fietsu which is worth noting. The arbitrators who made the award in the first instance consisted mainly of the head and the principal elders of the family. The Native Court, however, held that Ewe law of succession was fixed and that the family could not bend the rules even to solve such a difficult claim. In other words, the Native Court held that succession to rights in property is automatic as a matter of law and is not subject to any modification at the discretion of the family. This is generally correct and is contrary to the dictum in Makata v. Ahorli[1] that there are no fixed rules of succession in customary law and that the family exercises its discretion in appointing a successor.

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1. (1956) 1 W.A.L.R. 169.

It is suggested by Ollennu that brothers and sisters have priority over children in succeeding to the intestate property of a deceased man.[1] Ollennu does not cite any authority for this proposition. His proposition, however, contradicts his own dictum in Ahoklui v. Ahoklui,[2] and his decision in Yawoga v. Yawoga, when he held that among the Ewe a man's successors are his children.[3] In any case it is submitted that as a general proposition it is not true of Ewe law that children are superseded by brothers and sisters in the succession to the intestate estate of a man. Field research shows that in practically all Ewe chiefdoms children have priority over their father's brothers in succeeding to the interests in their father's property. Even children's children have priority over brothers. The only area where it is stated that brothers (but not sisters) of the deceased have priority over the children of the deceased in succeeding to property is Aveme, but it is qualified that the children can insist on immediate succession.

In a typical case before her, Annie Jiagge, J., an Ewe Judge, accepted the expert evidence of the customary law of succession to intestate property in Kpeve in the Northern Ewe area, as both parties agreed that the law was correctly stated. The learned Judge, therefore, stated the law thus:

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1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.99. It seems that this is the Ga rule known to Ollennu because the same proposition is stated for the Ga in M.J. Field, Social Organisation of the Ga People, Crown Agents, 1950, p.45.
2. Quoted at p.638 supra.
3. Yawoga v. Yawoga, (1958) 3 W.A.L.R. 309.

> Among the Kpeves, succession to real and personal properties is patrilineal. Children - sons and daughters - inherit their fathers as of right, but the daughters have only a life interest in the property descending to them from their father. 1

This, it is submitted, was correctly decided.

If there are no brothers of the whole blood living, children of the brothers (but not of the sisters) of the whole blood of the deceased succeed to rights in the intestate property. Failing them there come for consideration the paternal half-brothers and children of the paternal half-brothers of the deceased. Failing all these we move one step up to the brothers of the father of the deceased, that is paternal uncles. Descendants of the brothers of the father of the deceased then come next. On their failure we move further up to the grandfather and the brothers of the grandfather and their own descendants. The right is thus traced upwards along the genealogical tree until a successor or domenyila is found. There is, therefore, no notion of bona vacantia which can ultimately vest in the family, the stool or the community as ultimus heres. A successor is bound to be found by tracing further upwards.

The scheme we have outlined above presumes descent traced only patrilineally. Descendants of female members are not counted. Women are also as far as possible excluded from succession to interests in intestate property other than

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1. Golo v. Doh, Unreported, High Court, Ho, 12th November, 1965. Digested in (1965) Current Cases, paragraph 214.

essentially feminine articles, as shown by Fietsu v. Fietsu.[1] Particularly as the circle of possible successors widens further away from the deceased, the claims of women members of the family to succeed definitely fade away and they are no longer considered for succession.

In the light of the rules discussed above, we may set out in order of priority the table of succession to a man's intestate property thus:

1. Children of the deceased, sons generally preferred to daughters, and daughters normally for a life interest only.
2. Patrilineal descendants of children of the deceased.
3. Father of the deceased.
4. Brothers of the whole blood.
5. Possibly sisters of the whole blood, and normally for a life interest only.
6. Descendants of brothers of the whole blood.
7. Brothers of the half blood.
8. Possibly sisters of the half blood, normally for a life interest only.
9. Descendants of brothers of the half blood.
10. Father's brothers of the whole blood.
11. Descendants of father's brothers of the whole blood.
12. Father's brothers of the half blood.
13. Descendants of father's brothers of the half blood.
14. Grandfather.

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1. Supra.

15. Grandfather's brothers of the whole blood.

16. Descendants of grandfather's brothers of the whole blood.

17. Grandfather's brothers of the half blood.

18. Descendants of grandfather's brothers of the half blood.

19. Great grandfather.

20. Great grandfather's brothers of the whole blood.

21. Descendants of great grandfather's brothers of the whole blood.

22. Great grandfather's brothers of the half blood.

23. Descendants of great grandfather's brothers of the half blood.

24. Great great grandfather, his brothers and their descendants.

It is in practice hardly necessary to go as far as the descendants of the great great grandfather to find a successor. If it should be necessary to go beyond them, the successors are traced further upwards as indicated by the pattern of the table, always preferring brothers of the whole blood and their descendants. In all cases where descendants are entitled to succeed to the property, the members of the older generation are first exhausted before the next generation is considered. As between descendants of the same generation there is a preference for males over females.

Table of Succession: Deceased Female

It is far more difficult to spell out the rules governing succession to interests in the property left intestate by a woman than that left by a man. Several principles are in conflict. There is the general recognition that in principle children should benefit from property left by their deceased parents. While these children often include males, and males are normally preferred to females in the succession to rights in property, property left by a deceased woman may be of a peculiarly feminine nature. Furthermore, in the patrilineal Ewe society the children of a woman do not belong to her family but to that of their father. Against this background must be applied the all-pervasive rule that in the matter of succession or domenyinyi the property must be retained within the patrilineal family of the deceased, whether a man or a woman. Unilineal descent within the patrilineal family, however, ends with a woman. There is, therefore, a reversion to those severally having a spes succesionis within the patrilineal family at any time that a female succeeds to the property rights. This is less common with succession to a man's property because in that case the inherited interest is transmissible to the successor's heirs.

As with a man, the marital status of a woman is itself irrelevant to the right of succession to her intestate estate.

The explanation is that, even when married, a woman retains the original membership of her own family and does not acquire that of her husband, for the purposes of succession to interests in property. A married woman's debts and other liabilities fall on members of her own patrilineal family and not on her husband or members of her husband's family, even in her own lifetime. Similarly the husband or the husband's family members cannot succeed to interests in the property of the married woman. Indeed in many areas it is taboo for a widower to use the property of his deceased wife, and to violate the taboo is believed to be visited with an incurable illness leading to unavoidable death. All the personal belongings of a deceased wife are, therefore, taken out of the matrimonial home and often even the kitchen is broken down, lest the husband break the taboo by entering it.

There is no uniformity in the rules governing domenyinyi or succession to property left intestate by a woman who is survived by children. The difference may be the result of the interplay of the various principles which determine the right of succession among the Ewe. In some places, notably Abutia, Kpedze and Kpeve, the rule is that the children of a deceased woman are those entitled to succeed to her interests in property on intestacy. Children here include both male and female children. If there are male children, however, the male children

succeed to the property on their own behalf and on behalf of their sisters. The reason for the preference of men even here is that, by making a man a successor or domenyila, the property is retained within the husband's family or dzotinu to be enjoyed by the lineal descendants of the woman in the male line.[1] Such property originating from a grandmother is also known as mama nu or "grandmother's thing". Property inherited by a child from his mother in these areas, therefore, remains permanently in the patrilineal family of the woman's children and not in the woman's own family. If the woman had only female children, the interest in the inherited property is succeeded to by their own children, and so on until a male child is born, when he and his patrilineal descendants form the permanent line of successors or domenyilawo. In either event there is always a reversion in members of the deceased woman's own patrilineal family and the members of that family succeed to the rights in the property on the extinction of the descendants of the body of the woman. In all cases, although male persons are said to succeed to the property legally, the actual possession and beneficial use of the property, especially feminine articles, are in the hands of the female members, such as daughters and sisters.

1. See, e.g. the Kpeve case of Golo v. Doh, Unreported, High Court, Ho, 12th November, 1965. Digested in (1965) Current Cases, paragraph 214. Discussed in pp.690-691 infra.

The rules in Abutia, Kpedze and Kpeve sacrifice at least two principles of the general Ewe law of succession or domenyinyi. By allowing the children to succeed to their mother's property permanently, the general principle of patrilineal succession is not strictly adhered to. The result is that one child, while succeeding to his father's property under the principle of patrilineal succession, may at the same time also succeed to his mother's property under a special rule. There is thus created a double right of succession. The second principle sacrificed is that which demands that the property, unless disposed of, shall remain in the patrilineal family of the original acquirer. Under the Abutia, Kpedze and Kpeve rules the self-acquired property of a deceased woman, if survived by children, is not retained in her own family but in her husband's family, though not inheritable by the husband himself.

In most Ewe areas the Abutia, Kpedze and Kpeve rules are unacceptable, inasmuch as their application means that the members of the deceased woman's patrilineal family are deprived of the right to succeed to the woman's self-acquired intestate property. At the same time it is realised that it would be unjust to deny the children the benefit of their mother's property in favour of her patrilineal family. The rule adopted in most other areas, therefore, represents a via media. Hence in the majority of the Ewe areas, the rule is that children,

both male and female, succeed to their mother's interests in intestate property but only for the joint lives of the children.[1] After the death of the last child the interests in the property devolve as if the original female holder had died childless, that is to be succeeded to by members of the original holder's patrilineal family. As can be deduced from the nature of the rule, only immovable property like land, farms and houses can survive the joint lives of the children to devolve eventually on members of their mother's family. Movable property, especially personal effects, by their nature, hardly endure for so long in a form that would make their return to the deceased woman's family worthwhile.

It is for this reason that a few areas, such as Gbi and Kpando, have also devised another variant of the rule. In those chiefdoms the children surviving a deceased woman succeed absolutely and as of right to her interests in movable property, including personal effects, the only possible exceptions being items like very precious and expensive jewellery and beads. The interests in exceptionally precious and expensive items like valuable jewellery, as well as immovable property like land, houses and farms are, however, succeeded to by the members of the deceased woman's patrilineal family as if she had died childless. In most, but certainly not all, cases the

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1. See, e.g. the Dodome-Tsikor case of Kpakpla v. Deble, Unreported, High Court, Ho, 7th May, 1965, digested in (1965) Current Cases, paragraph 171 and discussed at pp. 690-691 infra. Also the Ziavi case of Dake v. Dogbe, Unreported, Native Tribunal of Ziavi, Ziavi, 6th July, 1946, discussed at pp. 689-690 infra.

children are in fact allowed in these areas to use even the expensive jewellery and immovable property of their deceased mother during their own lifetime, provided they do not raise any adverse claims against the title of the legal successor to the property. This ensures that jewellery, beads and immovable property, being of durable character, remain in the deceased woman's patrilineal family.

The basis of the rule in most of these Ewe areas is that, as the interests in the immovable property revert to the deceased woman's patrilineal family, future generations of descendants of that woman cannot succeed to any interest in such property. An example of the application of this rule is found in the case of Dake v. Dogbe,[1] a case from Ziavi. In that case the plaintiff claimed the paramount title to the land in dispute "by right of succession". In his statement the plaintiff stated that the paramount title to the land was originally held by his father's great grandmother called Gboo. From his great grandmother, however, he traced title through the male descendants to himself. The Native Tribunal of Ziavi held that the plaintiff must fail in his claim, because any interest in property held by a woman reverts to her own family after the life interest of her children, and that a descendant of the son of a woman cannot, therefore, claim to succeed to the interest in such property. The Native Tribunal said:

1. Dake v. Dogbe, Unreported, Native Tribunal of Ziavi, Ziavi, 6th July, 1946, at p.44 of the Civil Record Book.

> The Plaintiff adduced in his statement that the land in dispute belongs to his great grandmother. If these stories are true it is unfair; for amongst the Ewe speaking people the third or second generation cannot inherit any property maternally. 1

Against this may be cited the judgment of Annie Jiagge, J., in Golo v. Doh[2] where she stated the law in Kpeve thus:

> Where self-acquired property descends to the daughter from her mother, the daughter's children may inherit ... The self-acquired properties of a woman belong to her children, male and female alike ... On the death of a woman her family appoints one of her children to look after all her properties for herself and on behalf of all her brothers and sisters ... On the death of a female child her issue step into their mother's place and enjoy her portion of the proceeds of the estate. The grandchildren of a woman may inherit property descending from their grandmother provided that the property was self-acquired by the said grandmother. 3

The decision in Dake v. Dogbe, a Ziavi case, is thus opposed to that in the Kpeve case of Golo v. Doh. It is, however, submitted that both are right. The explanation is that the rules differ in the various chiefdoms. Thus the same Judge who decided Golo v. Doh applied the contrary principle, that is the Ziavi principle, in another case, Kpakpla v. Deble,[4] a case from Dodome-Tsikor. In Kpakpla v. Deble, Annie Jiagge, J., stated the rules of succession to the property of a woman thus:

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1. Ibid.
2. Golo v. Doh, Unreported, High Court, Ho, 12th November, 1965. Digested in (1965) Current Cases, paragraph 214.
3. Ibid.
4. Kpakpla v. Deble, Unreported, High Court, Ho, 7th May, 1965. Digested in (1965) Current Cases, paragraph 171.

> Where a woman dies she is succeeded by her father, or in his absence, the person who succeeded the father or stands in his stead. The self-acquired property of a deceased woman goes to her children. On the death of the last of the children the property reverts to the mother's family. Grandchildren do not normally inherit their grandmother's property. Every child belongs to his father's clan. A grandchild may inherit his grandmother only if he belongs to the same clan as the grandmother and both descend from the same ancestor. 1

We may say, therefore, that in each case the relevant rules of the particular community must be ascertained in order to determine who are the successors to the property of a deceased woman survived by children.

If a woman dies childless she is succeeded, as a rule, by her father and not by her mother. The principle here is that the property must remain in the patrilineal family of the deceased child and the mother belongs to a different family. Another reason is that, as a member of a different family, neither the mother nor the members of her family are responsible for the debts and liabilities of the daughter, whether during her lifetime or after her death; hence the mother cannot succeed to her daughter's interests in property.[2] That is why the father must succeed to his childless daughter's interest in property in any case of intestacy. If it is the case of an older woman, the property may include farms, houses

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1. Ibid.

2. Though a child may succeed to the interest in the property of his or her mother, even if only for life.

or other immovable property, and in such a case the father may directly enjoy the property. In the case of a young girl, however, her property would consist principally of personal effects. As most of these may be feminine articles, the mother may be the person in actual beneficial enjoyment though she is not the domenyila or successor to the property. In addition, in most chiefdoms the mother is entitled to one set of cloth (that is avo or do tata) and a few chattels which are given to her in her own right at the numekafe when the deceased's personal belongings are distributed among the relations.

In the absence of a child or a father, the general rule is that the domenyilawo or group of persons entitled to succeed to the property of a deceased woman comprises the brothers and sisters of the woman. In the few areas where grandchildren are entitled to succeed, such maternal grandchildren may have priority over brothers and sisters of the deceased. Subject to this exception in favour of grandchildren, we may state the general rule that, failing a child and a father, the rule of succession to intestate property is essentially the same for both a man and a woman. The table already given for the succession to interests in the property of a deceased male, therefore, applies also to the property of a deceased female who dies without a child or a father. There is, however, the qualification that in all cases the essentially feminine articles are given to female members of the group of successors

or domenyilawo or they are used for life by their female children.

A woman is entitled to farm the family land of her own family. Like any farmer she has the prior right to re-occupy the afuu or land left fallow by her. In the case of a deceased male farmer this prior right of re-occupation devolves on his own children.[1] In the case of a deceased female farmer, however, as the right to the afuu or fallow land is enjoyable only by members of the family holding the paramount title to the land, her children, being members of a different family, cannot succeed to the prior right of re-occupation. Hence it is the father, or failing him the brothers and possibly the sisters, on whom the right devolves of re-occupying the afuu or fallow land left by a deceased woman on her family land. A fallow land being a part of the deceased woman's husband's family lands is not covered by this rule and is re-occupiable by the otherwise entitled member of the husband's family.

The rules discussed above apply with equal force even today, in spite of modern developments in property holding by women. Thus property acquired today by a woman, including bank accounts, shares and negotiable instruments, are all subject to these rules of succession unless otherwise provided by a statute or the common law.

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1. See pp. 323-324 supra.

Rights and Responsibilities of Successors

It has already been explained that the tefenola or positional successor is not also in that capacity the domenyila or successor to the interest in property of a deceased person.[1] A tefenola stands in the shoes of the deceased in the personal position of "father" or "mother" as the case may be, and may in that capacity administer the estate of the deceased until the successor or successors assume control. Normally there is only one tefenola or successor in this sense but several domenyilawo or successors to property. As we have seen, however, the eldest son or a brother who is the tefenola may at the same time be a domenyila. In that case he has a dual capacity; but except in such cases the positional successor is different from the successor to the deceased's interests in property.

A domenyila or successor to property is not by virtue of the succession the head of the family among the Ewe. The failure to appreciate the distinction between a tefenola (positional successor) and domenyila (successor to property) is largely responsible for the erroneous supposition that a successor to property is, by virtue of such succession, also the head of family. The confusion of the position of the domenyila or successor to property with that of a head of family is often evident in the judicial customary law. In

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1. See pp. 597-599 supra.

Kwakye v. Tuba,[1] Ollennu, J., said:

> Learned Counsel failed to appreciate that the term 'head of family' and 'successor' are terms which mean one and the same thing, and are interchangeable and that the only time that they are used together as having separate denotations is where it is necessary to distinguish the head of an immediate family of a deceased from the head of a wider family of which the immediate family of the deceased is a branch. It is a distinction without a difference.

To say the least, this is a very doubtful proposition even as applied to other Ghanaian communities. In any case, however much this dictum may be applicable to other communities, it does not represent Ewe law. In the first place we have already submitted that the Ewe do not have an immediate as distinguished from a wider family. There being no immediate family, it follows that the successor to any property cannot be head of any immediate family originating from the deceased person to whose interest he succeeds. However, assuming but not accepting that the Ewe have immediate families, it would still not be the case that the successor to property is head of an immediate family simply by virtue of the succession. The Ewe positional successor or tefenola cannot be head of the so-called immediate family because he becomes functus officio as soon as the domenyilawo or successors to the property assume control of the estate. His role then remains only that of "father" or

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1. Kwakye v. Tuba, Unreported, High Court, Accra, 20th September, 1961. Different from Kwakye v. Tuba, (1961) G.L.R. 720. This view is also stated by Ollennu in his Principles of Customary Land Law in Ghana, 1962, p.151.

"mother" to the children of the deceased. As regards the domenyilawo or successors to interests in property, they are not heads of families either. If there is only one surviving child he becomes the sole domenyila or successor to the property. If, as held in Yawoga v. Yawoga,[1] the so-called immediate family of the Ewe consists of children of the deceased and their patrilineal descendants, then a sole child without descendants would be the only constituent of the immediate family. In that case the sole child would be the only member of the so-called immediate family, the only principal member of it, and its head of family! It is respectfully submitted that this is not Ewe law.

Let us, however, assume that the deceased, as often happens, is survived by several children. As we have already stated, the property in such a case is shared among all the children as domenyilawo. If they are all children of the same mother it is divided per capita, otherwise the division is on a per matres basis. There are, therefore, usually several persons who together succeed to the interest in the property. Which of these several successors is then head of the so-called immediate family? Can there be several joint heads of family? Certainly such a scheme of several joint heads of one family would render the position of head of family meaningless. It is also for the same reason that, even if the estate is kept undivided, the

1. (1958) 3 W.A.L.R. 309.

person in charge of it is not ipso facto head of the so-called family. The property arrangement would not make such an administrator of the property a head of family. For the headship of a family does not end with only the administration of property. It also involves overall responsibility for the welfare of members, their solidarity as a kinship unit, and their general conduct and other problems.

The absurdity of the proposition is seen even in Makata v. Ahorli.[1] In that case a nephew, that is a sister's son, was allowed to succeed to the interests in the property of the deceased. It could be argued on the strength of the dictum in Kwakye v. Tuba[2] that the nephew thus became head of the family originating from his maternal uncle. It is respectfully submitted that this would be palpably wrong. It would be tantamount to appointing as head of family a person who is not a member of that family. Among the Ewe a right of enjoyment of property may be conferred on a stranger in the light of any special relationship with the deceased, as was done in Makata v. Ahorli. The headship of the family, however, is limited to only members of that family. Among the patrilineal Ewe the nephew succeeding to property in Makata v. Ahorli was not a member of the deceased's family, whether the wider or the narrow. There can be no question of his being a member of the

1. (1956) 1 W.A.L.R. 169.

2. Kwakye v. Tuba, Unreported, High Court, Accra, 20th September, 1961. Different from Kwakye v. Tuba (1961) G.L.R. 720.

"wider" family or dzotinu, as his connection with that unit was through his mother. What of the so-called immediate family originating from the deceased? Who are its members? According to Ollennu, J., the so-called immediate family among the patrilineal Ewe consists of the deceased's children and their descendants. For in Yawoga v. Yawoga he gives the answer thus:

> It is admitted that upon the death of the said Yawoga, his family, who became entitled to the property, consisted of his children and their descendants. 1

Now the nephew who succeeded to the interests in property in Makata v. Ahorli was neither a child of the deceased, nor a descendant of a child of the deceased. He was, therefore, not a member of the so-called immediate family. Similarly as a maternal nephew he was not a member of a "family" comprising the brothers and sisters of the deceased and their descendants; for descendants of females do not count for membership of the Ewe family. We cannot, therefore, regard the nephew as head of that family of which he was not a member, notwithstanding that certain property rights had been conferred on him by a special dispensation of the family.

A similar argument applies to a brother of the deceased. Though a member of the deceased's "wider" family or dzotinu, a brother is not a child of the deceased nor a descendant of such a child. He is, therefore, not a member of the deceased's so-called immediate family as defined in Yawoga v. Yawoga. Hence

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1. Yawoga v. Yawoga (1958) 3 W.A.L.R. 309, 310.

although a positional successor or tefenola to his deceased brother and managing the estate on behalf of the children of the deceased, he does not thereby become head of a family to which,, by definition, he does not belong. It is submitted, therefore, that among the Ewe a person does not become the head of family merely because of the succession to interests in property left intestate. Different considerations apply in the succession to the largely administrative position of head of family and the beneficial enjoyment of property as a domenyila or successor to property.

The domenyilawo or successors to the property are the proper persons to collect and receive the assets due to the estate. If the assets were previously known, a specified successor would have been empowered by the family to collect each particular asset. If not so specified, the eldest child or the positional successor of the deceased collects the assets on behalf of all the successors to the estate. In either case the successor to the property (domenyila) must make the demand as a matter of formality through the positional successor (tefenola), and the asset is receivable through the said tefenola. It should be understood, however, that until the successors to the property enter into possession it is the tefenola or positional successor of the deceased who collects the assets. It is partly for this reason that the property is usually not handed over to the heirs until some time after the death of the intestate.

Debts, liabilities and obligations against the estate are discharged by the successors to the estate. However, the claim must be laid formally against the tefenola or positional successor, usually a brother or the eldest son of the deceased. If the liabilities are known in good time, they are discharged out of the estate before the net amount is divided among the successors to the property. If they are enforced after the distribution of the estate, it is a liability of all the domenyilawo or successors to the property; but they contribute to an extent approximating to the ratio in which the property had been divided among them. It is because the eldest child shoulders a greater share of the liabilities that he is also entitled to a larger share in the distribution of the property. Because of possible subsequent claims against the estate, the customary law requires that creditors of the estate should introduce themselves to the family of the deceased as soon as practicable after burial. The obligations are then met directly out of the estate instead of seeking contributions later from the individual heirs. The procedure stated by Ollennu is that

> The customary law therefore requires that whilst the corpse of a deceased lies in state prior to burial all creditors of the deceased should appear and declare the debts due to them. 1

According to Ollennu the creditors must touch the bed on which the corpse is lying, in testimony of the truth of their claims.

1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.216.

This does not represent Ewe law. It would be regarded as a grave and unpardonable insult to the family if, at the critical moment when death has struck and tears are in their eyes, there should be such a public proclamation of the indebtedness of their deceased member. Among the Ewe the claim is made some reasonable time after burial when the creditor must introduce himself to the tefenola or positional successor with a small amount of palm wine or deha. It is a private affair without general publicity except among the members of the deceased's family and that of the creditor. The claim, however, must be made within a reasonable time, otherwise it may be repudiated; for Vigilantibus, non dormientibus, jura subveniunt is in this context also a principle of Ewe law.

A problem arises if the debts and liabilities exceed the assets of the estate. The solution profferred by Sarbah is that "the heir and his family" can absolve themselves of liability by giving the body of the deceased to "the public" or the "company of the deceased" for burial.[1] Presumably "company" refers to the asafu company of the Akan. Not only do asafu companies of the Akan or Fanti style not exist among the Ewe, but the type of solution suggested by Sarbah is unheard of among the Ewe. Even in the unlikely event of the excess liability of the deceased being determined within the short time between death and burial the next day, yet it would be grossly

1. J.M. Sarbah, op.cit., p.108.

offensive to Ewe notions, and it would constitute a permanent disgrace and embarrassment to the family, to abdicate its responsibility for the proper burial of the deceased member. However deep he may be in debt, the deceased will be given a burial by his own family.

The solution suggested by Danquah is substantially that applied by Ewe law. Danquah says:

> If the debt is greater than the gross value of the property, the successor would be justified in calling on the other members of the family to assist in paying debts which have become veritable family debts. 1

The Ewe, however, do not strictly regard the debts of a deceased person as "family debts", any more than they regard his intestate property as family property. The obligation is on the family to discharge the debts of its deceased member, but just as a facet of the general responsibility of the family for its members which exists even in their lifetime. For, even in the lifetime of the deceased, if he was seriously in debt his family was obliged to contribute to settle his liabilities. That is the reason why in the olden days any member of the family could be seized for another member's debts. It is the same corporate responsibility which binds the family in respect of debts or obligations against the estate of the deceased. However, the family is not directly liable. First the tefenola or positional successor is taxed with liability. Although he may not be a

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1. J.B. Danquah, Akan Laws and Customs, 1928, p.184.

successor to the estate, insofar as he now stands in loco parentis to the children or the successors to the estate, he would usually discharge the liability if he has the means. If the tefenola cannot, he calls on the successors to the estate or those who would have succeeded to the estate if it were solvent; for they are under a legal duty to meet the liability. When prospective successors to the estate are contributing, the elder contributes a little more than his next immediate junior, as he would have received more property if the estate were solvent. If the heirs cannot discharge the liabilities, the entire family, that is the dzotinu, are liable. This obligation, it must be emphasised, falls only on members of the family or dzotinu who are known as nu deka dulawo or "those who eat one thing"; for, however remote may be the relationship to the deceased, each of them would have a spes successionis in any property left by the deceased. That is why the family cannot, except for very compelling reasons, appoint just any person of their choice as successor to the estate. The right to succeed to property is matched with the correlative obligation to discharge the liabilities against the estate.

Today, however, it seems that liabilities in excess of the assets comprised in the insolvent estate cannot be enforced against either the successors or the family. For it has been decided that a successor to an estate is not liable to pay debts exceeding the assets which may have come into his hands.[1]

1. Quabinah v. Chibbrah, (1875) Ren. 22.

Furthermore, the Administration of Estates Act, 1961,[1] seems to limit the claims against the estate to the value of the estate. Under Section 1(2)(a) of that Act, in default of the appointment of an executor or an administrator, an intestate estate vests according to customary law. In Ewe law this means that title to the property devolves first on the tefenola or positional successor without a beneficial enjoyment and subsequently vests in the domenyilawo or successors to the property in the proportions determined by the family. Section 94(2) of the same Act, however, provides that:

> Where the estate of a deceased person is insolvent, his estate shall be administered as provided by law.

It is not clear what is meant here by "law". Perhaps "law" here means law other than the customary law because the section follows the express provision for the application of customary law; where customary law was specified. If "law" in this section of the Act means the common law as contrasted with the customary law, it means that the liability is limited to the value of the estate and that the creditors are paid according to the category of their respective debts. In this scheme, debts due to the state,[2] then judgment debts and debts due upon recognissance, take priority in that order. It is only after them that contract debts and other voluntary debts are payable.

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1. Act 63.

2. i.e. the central government.

Debts due against a deceased married woman are not a responsibility of the surviving husband. They are liabilities on the deceased wife's own estate and are met out of that estate or by her positional successor, the successors to her interests in property or members of her own patrilineal family as the case may be. As the husband does not succeed to any interest in his wife's property, so also is he not liable for her debts. Similarly a wife is not liable for the debts of her deceased husband. A husband who has the means would, however, pay the debts of his deceased wife and would be expected to do so. A woman, on the other hand, is not normally expected to pay her deceased husband's debts even if she can, as this would be misinterpreted as a failure by the man's family to discharge their obligations, a form of permanent insult.

The next issue is who performs the funeral or kunu of a deceased person. Among the Ewe this is a responsibility of the whole family or dzotinu, headed by the head of the family. It seems that this is generally the rule throughout Ghana.[1] The financial liability is shared by all members of the family and, among the Northern Ewe, they are not entitled to be re-imbursed out of the estate, unless the funeral involved some special expenses such as transporting the dead body from a distant place. Older members of the family contribute more than the junior ones.

1. See, e.g. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp.68-70 and K. Bentsi-Enchill, op.cit., pp.164-165.

It should not be understood, however, that there are no specific duties on some members of the family. In particular it is a responsibility of the male children, if any, to provide the coffin for their deceased father or mother. If there are no male children or if they are too young, the eldest brother of the deceased provides the coffin unless the father is alive when he does so. A husband, however, provides the coffin for the burial of his dead wife, but not vice versa. The male children slaughter sheep to the deceased in most areas, all the children of the same mother providing one sheep on a per matres basis. As a rule graves are dug free of charge by all able-bodied youth in the division, including those outside the family.

All members of the family contribute money ad hoc for each funeral in sums usually fixed according to age and proximity in relationship to the deceased. Sometimes the final funeral obsequies of several members of the family are combined in order to reduce expenses. A single contribution is thus made to cover all. This forms the central fund in the hands of the head of the family in respect of every funeral. This central fund goes towards defraying the general costs of entertaining relatives and mourners with food and a profuse supply of drinks. Mourners attending funerals also offer monetary donations as well as drinks and dishes of food for consumption during the funeral, thus reducing the expenses to members of the family. The bulk

of the funeral expenses, however, are the responsibility of the tefenola or positional successor and the successors to the property (domenyilawo). Unless the expenses are particularly heavy and the estate is rich, the tefenola or positional successor is not expected to recoup himself out of the estate or call upon the heirs or the family to refund his expenses.

The dependants of the deceased are entitled to be maintained out of the estate. These dependants usually include the children and the wives of the deceased. While the estate is in his hands the tefenola or positional successor is responsible for the maintenance of both the deceased's children and wives. This responsibility practically ceases when the positional successor hands over the property to the domenyilawo or heirs. However, as the tefenola is in loco parentis to the children, he remains technically responsible for the maintenance of the children and this responsibility is a real one where the estate inherited is not substantial. Because the children are, as a rule, the successors to the property of their father, it is not strictly accurate to say that the successors must maintain the deceased's children, which simply means that they must maintain themselves. It is, therefore, only when an elder son is both a successor and the person in charge of the undivided estate, jointly held, that we may say that he has a duty to maintain his other brothers and sisters. The children of a woman cannot legally claim maintenance out of their mother's estate because maintenance is a responsibility of their father.

A widow is entitled to maintenance out of her husband's estate while single and she is entitled to reside in the matrimonial home. Even if the estate is not enough the tefenola or positional successor still has a duty to maintain the widow out of his own resources. His duty does not cease on handing over the property to the heirs but it becomes less onerous because the heirs thereafter also become responsible for maintaining her. Where a man's estate is inherited by his own children the maintenance of his widows is not usually much of a problem; for the children, both as successors and as children of the widows, maintain their own mothers. There is, however, a problem if the inheriting children are not sons of the widow, in which case she may feel neglected by the children of a rival wife. There is no corresponding obligation on the successors of a deceased wife to maintain her surviving husband out of her estate.

The Successor's Interest in Inherited Property

The domenyila or person who succeeds to an interest in property in Ewe law takes absolutely as purchaser. If several domenyilawo take together in undivided shares they, as a group, hold the paramount title to the property, free from any interest in the family or dzotinu. This is possible because intestate property, as we have explained, does not become family property among the Ewe. The only exception is in the case of a

woman successor to property who takes for life only.

The above proposition of Ewe law is contradicted by the trend of legal opinion. It is the view of both Ollennu and Bentsi-Enchill that a successor to property on intestacy does not acquire the paramount title to the property, as in their view such property is perpetually clothed with the character of family property. Bentsi-Enchill says:

> a successor under customary law is neither the owner of the property of the deceased of which he is placed in charge, nor the exclusive possessor and enjoyer of the deceased's property. 1

Bentsi-Enchill, however, does not cite any authority for this proposition but relies on what he regards as a fundamental rule throughout Ghana that the self-acquired property of an intestate becomes family property on death. If it were true that an intestate estate in Ewe customary law became family property automatically, then the force of this deduction from it would be irresistible. For a single individual or some of them only, even as successors to property, cannot hold the absolute title in, or possess the legal capacity to dispose of, what belongs to the whole family. It is, however, not true that among the Ewe the intestate estate automatically becomes family property by the operation of law. Therefore, the deduction based on this assumption is also inapplicable to the Ewe.

The same view is stated by Ollennu thus:

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1. K. Bentsi-Enchill, op.cit., p.154.

> The interest which members of the family have in self-acquired property of an intestate member of the family is joint life interest of all of them, continuing as life interest for the survivor of them. The property cannot be disposed of by such life tenant or tenants either inter vivos or by testamentary disposition or otherwise as if it belongs to them by purchase. 1

Apart from his own decision in Mills v. Addy[2] to that effect, Ollennu also does not cite any direct authority for this proposition but relies basically on the principle that the self-acquired property of an intestate automatically becomes family property. Even if Mills v. Addy was rightly decided, it is a case from the matrilineal Ga community and it is submitted that it has no application among the patrilineal Ewe. To fortify his opinion, however, Ollennu cites the case of Husunukpe v. Dzegblor,[3] a case from the Anlo Ewe area. In that case a daughter, the sole surviving child of a deceased father, sought to sell land which was her father's self-acquired property. It was correctly held by the Land Court that, although the present beneficial interest in the land was vested in the said daughter as successor to her father's interest in the property, yet she was not capable of alienating that interest in the property without the consent of the family. It is argued by Ollennu that this is authority

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1. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.231.
2. (1958) 3 W.A.L.R. 357.
3. Husunukpe v. Dzegblor, Unreported, Land Court, Accra, 24th November, 1951.

for the view that a successor to property on intestacy has only a life interest in what he inherits. It is respectfully submitted that such a deduction is based on a misunderstanding of the basis of that decision.

To understand the decision in Husunukpe v. Dzegblor we must analyse the position of daughters as successors to intestate property. The old Ewe rule, still prevailing in some areas, was that a woman was incapable of inheriting property from her father. Although this rule has substantially changed in many places, it is still the rule in most Ewe areas that a daughter, however old she may be, must be postponed to a son, even a younger brother, in the succession to the interests in their father's estate. Therefore, even today, it is only when there are no sons that a daughter may succeed to the interests in her father's property, as did the sole daughter as the only surviving child of the deceased in Husunukpe v. Dzegblor.

What, then, is the interest of a daughter in such an inherited property? The general rule among the Ewe is that a daughter succeeding to her father's interest in property on intestacy is incapable of having an interest therein subsisting beyond her lifetime and that the interest so held by her in such property is not transmissible to her own children. In other words, as a general rule, a woman has only a life interest in any property to which she succeeds from her father. This is how it was put by Annie Jiagge, J., in the Kpeve case of

Golo v. Doh:

> Children - sons and daughters - inherit their fathers as of right, but the daughters have only a life interest in the property descending to them from their father. On the death of a daughter her father's property reverts to her father's family. A daughter cannot, therefore, make any absolute disposition of property inherited from her father. Her children do not inherit such property. 1

This, it is submitted, is the rationale of the decision in Husunukpe v. Dzegblor. It was the case of a daughter attempting to alienate title to property in which, because she was a daughter, she had only a life interest as a successor. If she were an inheriting son, the right to sell could not have been challenged among the Northern Ewe. It is submitted, therefore, that Husunukpe v. Dzegblor must be limited to its own facts as a narrow proposition that generally a female successor to an interest in intestate property is incapable of disposing of that interest. It does not support a wider proposition among the Ewe that every successor to property is incapable of alienating the interest to which he has succeeded.

Against Husunukpe v. Dzegblor may be contrasted Yawoga v. Yawoga.[2] In Yawoga v. Yawoga the first defendant and his sister were the only children of their father. Without the consent or even the knowledge of the head and other members of the family or dzotinu, the first defendant sold the farm he had inherited

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1. Golo v. Doh, Unreported, High Court, Ho, 12th November, 1965. Digested in (1965) Current Cases, paragraph 214.

2. (1958) 3 W.A.L.R. 309.

as his father's self-acquired property. It is true that he did inform his only sister but that was scarcely necessary. That she was informed could be explained on the ground of the special brotherly relationship, a relationship which would be a reason for the sister to expect to be informed even if the first defendant were selling his own self-acquired property. In any case, although we do not know for how much the farm was sold, the fact that the sister was given only a paltry sum of £2 out of the purchase price shows that the first defendant did not sell jointly with his sister. The first defendant, as the only son of the deceased, was entitled to sell and he did sell as holder of the paramount interest once he succeeded to the self-acquired property of his father. The other members of his family who severally had a spes successionis in the property did not protest because they could not have objected to the sale. Only the successor's own son challenged the validity of the sale but, as should be expected, he failed.

It is submitted, therefore, that among the Ewe a successor to property on intestacy takes the entire interest of his predecessor in title, unless she is a woman when she takes only a life interest in it. The successor to intestate property has in it the same full title which is conferred on the relations in respect of articles distributed among them at the numekafe, which articles become irrecoverable. As such holder of the absolute title, like a purchaser, the Ewe successor in turn

passes the interest in the property on to his own children and successors on intestacy. He can dispose of his interest in the property by testamentary disposition as well as by alienation inter vivos, as did the first defendant in Yawoga v. Yawoga. The property does not fall into the family pool on the death of the successor. For an Ewe successor to property or domenyila does not have only a life interest in the property he inherits. The spes successionis which other members of the family or dzotinu have in such property is not contingent on the death of the present successor to the interest in the property. The possibility of the other members of the family or dzotinu ever succeeding to the interest in the property can only arise in the event of the extinction of the patrilineal descendants of the original successor without previously disposing of the property effectively. It is because of this power of disposal and alienation that, except for the ancestral lands, there is hardly any family property properly so called among the Northern Ewe of Ghana. Apart from the ancestral lands, property among the Northern Ewe is individualised as far as title and the power of alienation are concerned, but it is largely communal in use inasmuch as members of the family are freely allowed as a rule to enjoy the property of their members.

If the inherited property is kept intact and undivided, it is still subject to the same power of disposal by the successors acting together. For it is still not family property

but the property of as many successors or domenyilawo as there are. No single one of them, however, can dispose of any portion unless that portion has been specifically allocated to him as successor.

The position of a tefenola or positional successor must be contrasted and not confused with that of a domenyila or successor to an interest in property in this respect. A tefenola, no matter for how long he administers the estate, lacks the capacity to alienate it because he has no beneficial interest in it, and the property is not transmissible to his own children or heirs.

Apart from female successors, special successors to interests in property may also lack the capacity to alienate title to the property in their hands. An example is the maternal nephew who succeeded to the property of his uncle in the patrilineal Ewe community in Makata v. Ahorli.[1] The nephew was not an ordinary successor to all the interests of his maternal uncle. He was only a life tenant as a result of a concession from the family in recognition of his special services to the deceased, which included making the farms with him and also paying a substantial part of the deceased's funeral expenses. Hence the West African Court of Appeal, though confirming the plaintiff nephew in possession because he had been placed in possession by the dispensation of the family, defined his

1. (1956) 1 W.A.L.R. 169.

interest thus:

> I would allow the appeal and restore the judgment of the Native Court but I would qualify the declaration of title claimed by the Plaintiff by the limitation that he is entitled to possession of the farms described during his lifetime only ... Upon his death the Plaintiff's sons or family will have no inherent right to inherit. It will be for the council of the family of Boshua to decide who next inherits the properties. 1

This is clearly only a limited interest. It was found necessary to define the interest of the nephew with such precision but for only one reason. Unless this limitation was placed on his interest, he could be presumed to have succeeded to the interests in the property in the normal way, which is as purchaser. For, why was the definition of his life interest necessary if, as is contended by some authorities, a successor to property takes the property only for life any way? It is submitted that in Makata v. Ahorli the West African Court of Appeal impliedly accepted it that an Ewe successor to property takes absolutely as purchaser or takes the highest interest held by his predecessor in title, whichever is greater. That is why that Court went to the trouble of defining the nephew's life interest, which is short of that of a normal domenyila or successor to property in Ewe law.

As an Ewe successor to property holds the absolute interest in it as purchaser, he is not accountable to anybody, not even to the family. We do not agree with Bentsi-Enchill, therefore, that a successor to property or domenyila is accountable.[2]

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1. Makata v. Ahorli, (1956) 1 W.A.L.R. 169, 174.

2. K. Bentsi-Enchill, op.cit., p.156.

A positional successor, on the other hand, is accountable not to the family as such but to the heirs,[1] though the family may go into account with him in order to determine the extent of the estate before distribution. A successor to the property who is managing it on behalf of himself and the other successors is also accountable to his colleagues but not to the family.

Since a successor to property on intestacy takes absolutely both as of right and as a result of the determination of his portion by the family, he cannot subsequently be dispossessed of the property. A special successor who is not entitled to succeed to the property as of right but is granted a special dispensation by the family, such as the nephew in Makata v. Ahorli, may, however, be removed if he deals with the property in a manner which may defeat the spes successionis of the proximate next-of-kin. Similarly a tefenola or positional successor can be removed from management of the property. We would say, therefore, that the only persons who can be removed or dispossessed are tefenolawo or positional successors in interim administration and beneficiaries enjoying only a life interest in the intestate property.

The Ewe Levirate

The levirate or "widow inheritance" has been known among the Ewe from time immemorial and is known as ahosi dede. However,

1. Tamakloe v. Attipoe, supra. Quoted in Ennin v. Prah, (1959) G.L.R. 44, 48.

whatever may have been the rule in the past, it is today not obligatory on the widow or ahosi to be remarried into the family of her deceased husband. As Manoukian puts it:

> The levirate is approved, though widows may refuse this marriage. 1

If the widow declines to be re-married into her former husband's family, she cannot be compelled to refund the marriage consideration or tanu. Conversely the family of the deceased husband is not obliged to find another husband for the widow, though they would try to do so.

When the family finds a new husband for the widow, he is hardly ever one of the deceased husband's heirs; for a man's heirs are usually his children, often the widow's own children, and, among the Ewe, the children cannot marry their own mother or their father's wives. Sometimes the choice is one of the brothers of the deceased; but generally this is frowned upon today as "too close". The usual practice today seems to be to choose a male member within the husband's family or dzotinu, who is not necessarily a brother of the deceased. It usually turns out, therefore, that the person who marries the widow under the system of levirate is neither the tefenola or positional successor (who is usually a brother) nor one of the heirs (who, as a rule, are the children). In some areas, notably Abutia, the widow may be married by the amedie, also known as the male tovi, if he chooses the widow as alternative to the gun of the

1. M. Manoukian, op.cit., p.25.

deceased.[1] In that case the widow is re-married outside the family or dzotinu of the deceased but within the same sub-division or saame, for the male tovi is as a rule chosen from a different family within the same sub-division.

The Ewe system of "widow inheritance" certainly differs from that of the other communities of Ghana. As regards the Ashanti, it has been stated by Rattray that the successor to the interests in property inherits the wives of the deceased in the same way that he inherits the man's other property.[2] This view is also urged by Ollennu who says

> According to custom if there is only one widow the family formally declare her to be a wife of the successor ... 3

The other wives, according to Ollennu, are distributed. The same view is also shared by Field[4] and Bentsi-Enchill.[5]

It seems that none of the above writers had considered the patrilineal Ewe law of succession to property vis-a-vis "widow inheritance". Among the Ewe, as we have already explained, there are usually several successors to the interests in a man's property. Which of these successors will the family "formally declare" to be married to the widow? Furthermore, as a rule, a man's successors are his children in the Ewe society, and the

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1. See pp. 623 supra.
2. R.S. Rattray, Ashanti, Clarendon Press, Oxford, 1923, pp. 29, 78-79.
3. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.226.
4. M.J. Field, Akim Kotoku, Crown Agents, London, 1948, p.115.
5. K. Bentsi-Enchill, op.cit., p.152.

children cannot marry their own mother and the other wives of their deceased father. The position of a positional successor, as standing in loco parentis to the children, is also often occupied by one of the deceased's own children, usually the eldest son. The Ewe arrangement, therefore, is to choose another man from the same family, formerly usually, but now rarely, the deceased's brother, as the new husband.

On the obligation of the successor to marry the deceased's widow, and of the widow's obligation to accept the successor as her new husband, Field, writing about the Akim Kotoku of the Eastern Region of Ghana, says:

> If the man who inherits the widows does not want them as wives, he may publicly release them - just as a man may dismiss a wife who has not been unfaithful - by giving them 'road money'. In such a case he is usually made to give them portions of the farms that they have helped his uncle or brother to make. The children of such wives are still his responsibility ....
>
> If the widow herself objects to becoming the wife of her husband's successor, she is not forced to it, but while she remains dependent on him she must perform a wife's secondary duties, such as cooking and working on the farm. If she wishes to leave him altogether and go to another town or marry some other man, she can do so only on terms on which any marriage is dissolved by the wife, that is, her people must return marriage fees paid by her husband. 1

These propositions are accepted by Ollennu who says

> The customary law as set out by Field ... is in substance the same as the law which obtains in all the different tribes throughout Ghana. 2

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1. M.J. Field, Akim Kotoku, Crown Agents, London, 1948, p.115.
2. N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, p.226.

The same propositions are also stated by Ollennu, J., in Quartey v. Martey.[1] With great respect, it is submitted that Field's account of the law of widow inheritance in Akim Kotoku is not of general application in all Ghanaian communities and certainly not in that form among the Ewe. Neither is Quartey v. Martey good law among the Ewe in this respect. It is not true among the Ewe that the widow has the only two alternatives open to her of either marrying the successor to her husband's property or refunding the marriage consideration or tanu. Similarly the successor to property is also not constrained to make a choice between taking the widow to wife or divorcing her with a lump sum compensation as "road money" or modoga. The fallacy underlying these propositions is the assumption that in all cases the successors to interest in property possess the legal capacity to take the widows to wife. This fallacy explodes in the application of the propositions to the Northern Ewe, when it is realised that the successors to a man's interests in property are usually his own children who cannot marry their own mother and other wives of their father.

The second assumption with which we cannot agree is that the marriage is still subsisting even after the death of the husband. To establish this Ollennu repeats the oft-stated view that an African marriage is not simply a union of individuals

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1. Quartey v. Martey, (1959) G.L.R. 377, 381.

but of their families. There is no doubt that an African marriage does deeply involve the two families who thereby become related by affinity. Like the matches often arranged between royal families in Europe and elsewhere, the African families are always involved, at times over-involved, in forging out marital unions, and, when formed, are concerned with their maintenance and stability. However, to over-emphasise this aspect, as is often done, at the expense of the personal love and personal relationship of African couples, is a misconception of the legal as well as the social implications of an African marriage of today. An African marriage, or at least an Ewe marriage, does not mean that the two families of the original spouses are permanently "married" to each other. Hence, among the Ewe, at any rate, the present view is that the death of either of the spouses automatically dissolves the marriage. Were it otherwise the converse would also be true that if the wife pre-deceases the husband then the deceased wife's family must either provide a new wife for the husband or else refund the marriage consideration or tanu in order to dissolve the marital bond. This, it is submitted, is not Ewe law.

The basis of the Ewe system of "widow inheritance" or ahosi dede is not the assumption that the marriage subsists beyond the death of either spouse. This may be the explanation why, unlike the Akim Kotoku law stated by Field, no return of

the marriage consideration or tanu is demanded if the widow refuses to be inherited as a wife by the successor to the deceased husband's property. Similarly the successor is not obliged to pay the widow a lump sum compensation as "road money" or modoga if he does not wish to marry her. Neither is the Ewe widow under any circumstances entitled to any portion of the deceased husband's farms or other property as compensation. In Ewe law a widow is regarded for practically all purposes as a feme sole. Hence, even in those days when a wife's child, however conceived, belonged to her husband, any child born by a widow even while still a widow did not belong to her deceased husband's family but to her paramour.[1] The only exception is a posthumous child conceived before the husband's death: he is a child of the deceased husband.

The levirate or ahosi dede among the Ewe can at best be described as a scheme of social security of which the widow may avail herself and which benefits the children of the deceased as well. It is not a legal obligation on any of the parties. On the side of the widow the scheme ensures that, in the moment of her grief, the family of her departed husband would immediately provide for her a new man of the same blood relationship to maintain her as before. That is why the choice is not automatic and does not follow the right of succession to interests in property; for, unless a man of the right calibre can be

1. See pp. 161-162 supra.

found, a poor substitute would not serve the social objectives of the scheme. As far as the children of the deceased are concerned, they would not be too badly shaken by the loss of their father, as they would move into the new matrimonial home of a man who, even in the lifetime of their father, was a classificatory father. Together with any new children to be born, they would all be enjoying the same hereditary property and offices as members of the same family, thus minimising the friction normally found among siblings of the half blood. The new husband, of the same family as the deceased, would treat the children of the deceased as his own, as indeed they are in the classificatory sense. It is primarily for such reasons that the Ewe scheme of levirate or ahosi dede operates.

As evidence that the previous marriage terminates with the death of the husband, the widow's family must be formally notified if she is retained in the family under the levirate scheme. This is not a re-marriage as such, and marriage consideration or tanu is not paid afresh. The widow's family, however, must be notified with drinks or aha to signify that a new husband has been found for the widow. It is not certain whether the family of the widow can ordinarily veto the new arrangement. However, as even during the subsistence of the marriage the woman does not lose the protection of her own family, her family may object to the levirate if the deceased husband or members of his family had been cruel or unkind to the widow or if the marriage had generally been unsuccessful.

The new husband under the Ewe levirate is not a ghost husband but an actual husband. Accordingly, any children born out of the union are children of the new husband and not of the deceased husband. This is perhaps different from the rule in other societies. For, according to Field, for instance, children born to the new husband under the levirate among the Ga of Ghana are counted as the children of the deceased brother.[1] The objective of the Ewe levirate is not to "raise seed" to the deceased husband.

Although there is no obligation on the successor to marry the widow of the deceased, nor on the widow to marry the successor, there is an obligation to maintain the widow. The right to maintenance also includes the right of the widow, while still a widow, to reside in the matrimonial home of her deceased husband. The widow, however, has no specifiable share in her deceased husband's estate. Accordingly, as held in Quartey v. Martey,[2] she cannot maintain an action to enforce a claim against any portion of the estate. The entitlement of the widow to maintenance lasts only dum sola, though not necessarily dum casta; but, as she is not entitled to any specifiable share in the estate, her unchastity may in fact substantially reduce the amount of maintenance she gets.

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1. M.J. Field, Social Organisation of the Ga People, Crown Agents, London, 1940, p.44.

2. (1959) G.L.R. 377.

Testamentary Disposition

Strictly speaking, the making of wills is unknown to Ewe law. The Ewe, therefore, have no name for the nuncupative will of the type found in some other Ghanaian communities. A dying man may declare his own wishes as regards the devolution of his property on his death. Such a declaration, especially because of a mixture of reverence for the dead and the fear of the departed spirits, is given great weight in the deliberations of the family in allocating shares to successors to the estate, and those indicated by the deceased. It is, however, not binding as a will on the family, and the beneficiary under the declaration cannot enforce his claim at Ewe law. If the deceased wished to benefit a particular individual, he could make to him a gift inter vivos which should vest in his own lifetime. Unless this was done, the family is entirely at liberty to vary or even ignore the terms of the purported declaration so that the established rules of succession to intestate property may apply.

In Gbi it was stated that, although the dying declaration would be listened to with attention, yet after the death of the declarant the family would simply say prayers by way of libation and vary or nullify the "dispositions" by the deceased as they thought fit, for if everybody had disposed of his property in that manner nothing would be left in the family. In Aveme it was stated that if a man made a dying declaration while on his

deathbed it would be patiently noted. After his death, however, if the dispositions contained therein were not reasonable in the eyes of the family, the family would set aside the declaration as coming from a man who, because of bodily affliction, was not of the proper mental balance.

The Akan in particular, and it seems also the Ga, have a customary law form of will known generally as samansiw. By the samansiw the Akan or Ga individual may make an oral or nuncupative will touching, but touching only, his own self-acquired property.[1] In Summey v. Yohuno[2] Ollennu, J., set out the essential requirements of a valid customary law will thus:

> (1) the disposition must be made in the presence of witnesses, who must hear what the declaration is and know its contents;
>
> (2) the member of the family who would have succeeded the person making the will, had the latter died intestate, must be among the witnesses in whose presence the declaration is made; and
>
> (3) there must be acceptance, by or on behalf of the beneficiaries, indicated by the giving and receiving of 'drinks'. 3.

The first two requirements are designed to ensure publicity for at least two reasons. One is to inform the prospective heir that he has been disinherited, thereby avoiding future litigation

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1. See, e.g. J.M. Sarbah, op.cit., p.97; R.S. Rattray, Ashanti, 1923, pp.237-239; J.B. Danquah, op.cit., p.198; K. Bentsi-Enchill, op.cit., pp.193-212; and N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, 1966, pp.270-274.
2. (1960) G.L.R. 68.
3. Summey v. Yohuno, (1960) G.L.R. 68, 71.

The second is to satisfy the beneficiaries of the will as to the testamentary capacity of the testator, as the dispositions would be invalid to the extent that they relate to family property in the hands of the testator.

The third requirement is what one finds grossly offensive to Ewe notions. This is the requirement that the disposition under the nuncupative will, to be effective, must be accepted by or on behalf of the beneficiaries with drinks during the lifetime of the testator. Among the Ewe it would be regarded as the height of indiscretion by a prospective beneficiary to present drinks as a thanks-offering or akpedanu to a dying man who has indicated that the beneficiary should succeed to some or all of his interests in property. For the prospective beneficiary to thank a declarant who is lying helpless on his deathbed, in the throes of death pangs, would be construed by the Ewe as the expression of an anxiety to see the early end of the declarant. This is a grave moment when death is imminent, and the Ewe would not suffer a beneficiary to intervene during the care of the sick in order to perfect his own mundane expectations of property by having the dispositions formally confirmed by the presentation of any form of thanks-offering to the dying man. To attempt to do so even in the case of a declarant who is in health will, to say the least, be interpreted as encompassing his death! For the reason of the requirement of thanks-offering alone, if not for any other

reason, no valid nuncupative will can be found among the Ewe in accordance with the stipulations in Summey v. Yohuno.[1]

We might pause to ask if, even among the Akan, a valid samansiw or nuncupative will can be made within the requirements set out in Summey v. Yohuno.[2] In Brobbey v. Kyere[3] the customary law nuncupative will was held as valid but it was not stated that any thanks-offering or aseda was presented in that case. It was only noted that the making of the will was confirmed with the "great oath". In Summey v. Yohuno itself the essential requirements were spelt out by Ollennu, J., only to show that the nuncupative will in that case was invalid. It is the same with Akele v. Cofie[4] and In re Abakah,[5] the nuncupative will being declared invalid in both cases for failure to satisfy the essential requirements. Certainly such a customary law will, especially as judicially defined, is not known to Ewe law.

It seems that the samansiw is a comparatively recent innovation even among the Akan. We are told by Sarbah that the custom of making wills is "of modern growth".[6] An old man in

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1. (1960) G.L.R. 68
2. Ibid.
3. (1936) 3 W.A.C.A. 106.
4. Akele v. Cofie, (1961) G.L.R. 334.
5. (1957) 3 W.A.L.R. 236.
6. J.M. Sarbah, op.cit., p.97. Rattray is not in entire agreement but thinks that the samansiw probably existed before the advent of European rule: R.S. Rattray, Ashanti, 1923, p.239.

Gbi observed to me that the Akan had developed the nuncupative will or samansiw merely to make provision for their own children on the realisation of the unwisdom of their system of matrilineal succession to rights in property on intestacy. Whether we agree with that old man or not, it is noteworthy that Rattray's account of the samansiw among the Ashanti concentrates almost wholly on benefiting a man's children, children who because of the matrilineal system of succession do not fall within the group of successors.[1] The same concern for children is also regarded by Bentsi-Enchill as the basis of the development of the customary law will or samansiw. He says:

> A man's children and wife or wives help him to clear the land and to farm, and he can and often does apportion cleared areas to them by way of gift ... But he may not have done so by the time he dies. The 'samansiw' or death-bed disposition or nuncupative will probably has its most characteristic occasion and inspiration in the last minute realisation of the need to make adequate provision for one's children. 2

The Ewe child, however, succeeds to the property of his father as of right. Hence, although occasionally a father may wish to disinherit a notoriously recalcitrant or prodigal child, or to benefit another relation, an institutionalised form of will has not been developed among the Ewe. The father's intentions are made manifest in the declaration which, though lacking the

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1. R.S. Rattray, Ashanti, 1923, pp.238-239.
2. K. Bentsi-Enchill, op.cit., p.143.

legal effect of a will, receives considerable weight in the counsel of the family. It is perhaps the same with other tribes. Of the Adangbe of Ghana, Pogucki says:

> Nuncupative wills, which are an important form of Akan customary law, appear seldom. 1

Declarations of wishes as to one's successor are made among the Ewe in several circumstances. A chief may declare before his death whom he would like to succeed him on the stool. An individual may indicate who may step into his shoes as "father" to his children, and he may also indicate who should succeed to his interest in a particular item of his property. All these, however, are not in the nature of a nuncupative will with any binding legal effect. The beneficiary or appointee is not expected to indicate his acceptance. His inaction is enough; for it is only when the beneficiary or appointee wishes to reject the property or the position that he has to express his renunciation. Just as a dying chief's indication of his successor is regarded as an indication of a personal preference which is not binding on the living, so also are "dispositions" relating to self-acquired property not treated as being of a binding force. In either case, however, such an opinion of the deceased is highly respected. With this explanation, therefore, we may say that Ewe law does not recognise a nuncupative will as being of a binding legal effect.

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1. R.J.H. Pogucki, op.cit., Vol. II, Land Tenure in Adangbe Customary Law, p.39.

APPENDIX

LIST OF PRINCIPAL INFORMANTS

ABUTIA

Togbe Kodzo Gidi, Fiaga of Abutia
Amega Gabriel Amanie, Stoolfather of Fiaga
Togbe Okai Debra of Abutia Teti
Togbe Keh Kwasi VII, Senior Omankrado
Togbe Bediaku III of Abutia Teti
Togbe Adza Asamoah, Asafofiaga

AKOME

Amega Koku Debra, Stoolfather of Fiaga as Acting Fiaga
Mr. S.K. Agbodza, Linguist

ANFOEGA

Togbe Tepre Hodo III, Fiaga of Anfoega
Amega Christian Amoa, Stoolfather of Fiaga
About three other elders of the Paramount Stool

AVEME

Togbe Gazari IV, Fiaga of Aveme
Amega Paul Komi Tsendzi, Stoolfather of Fiaga
Togbe Drah, Chief Fetish Priest and Chief of Aveme-Dra
Togbe Desufoli IV of Aveme-Dadiase

AWUDOME

Togbe Adai Kwasi X, Fiaga of Awudome
The Fia of Awudome-Avenui

GBI

Amega Kwami Hoedienukpor, Stoolfather of Fiaga, as Acting Fiaga
Amega Christoph Anku Kludze
Togbe Osai of Gbi-Godenu
Several other informants

HO

Togbe Afede Asor II, Agbogbomefia of Ho
Amega Akpo, Stoolfather of Agbogbomefia
Togbe Anyawoe Kwasi, Asafofia

KPANDO

Togbe Yawo Asumadu VI, Chief of Kpando-Dzigbe and Miamefia or Left Wing Chief of Kpando, also Registrar of Akpini Native Court "B", now District Court Grade II, Kpando.
Several other informants

KPEDZE

Togbe Atsridom IV, Fiaga of Kpedze
Mr. Thompson Mensah Semehia
Mr. Kodzo Blege

MATSE

Amega Kro Klutse, Stoolfather of Fiaga, as Acting Fiaga
About a dozen elders of the Paramount Stool

PEKI

Togbe Kodzo Dei XI, Deiga of Peki
Mr. Donkor, formerly Regent of the Paramount Stool
Togbe Gidi Mensah, Head of the Peki Royal Family
Amega Tutu Brempong, Royal Elder
Togbe Agubretu VI, Saamefia in Peki-Blengo

TAVIEFE

Togbe Bansa Kwami Ziga II, Fiaga of Taviefe
Amega George Ziga, Stoolfather of Fiaga
Amega Nelson Tsivor, Odikro in Taviefe-Avenya
Mr. Yak Ziga

WUSUTA

Amega Alfred Kosi, Stoolfather of Wusuta-Wa
Amega Atsu Kpogli, Chief Linguist of Wusuta.

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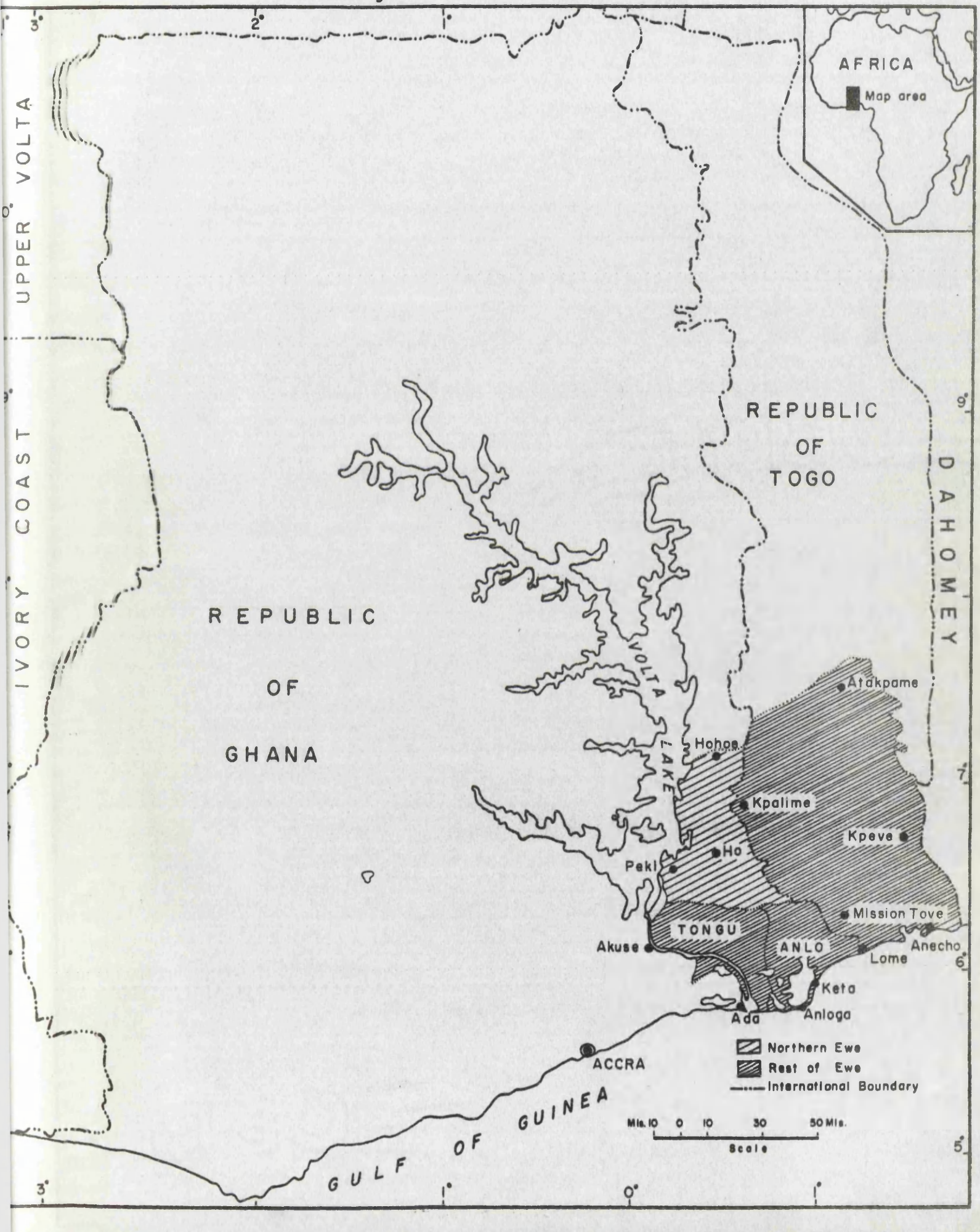
THE EWE IN GHANA AND TOGO
Showing the Northern Ewe of Ghana



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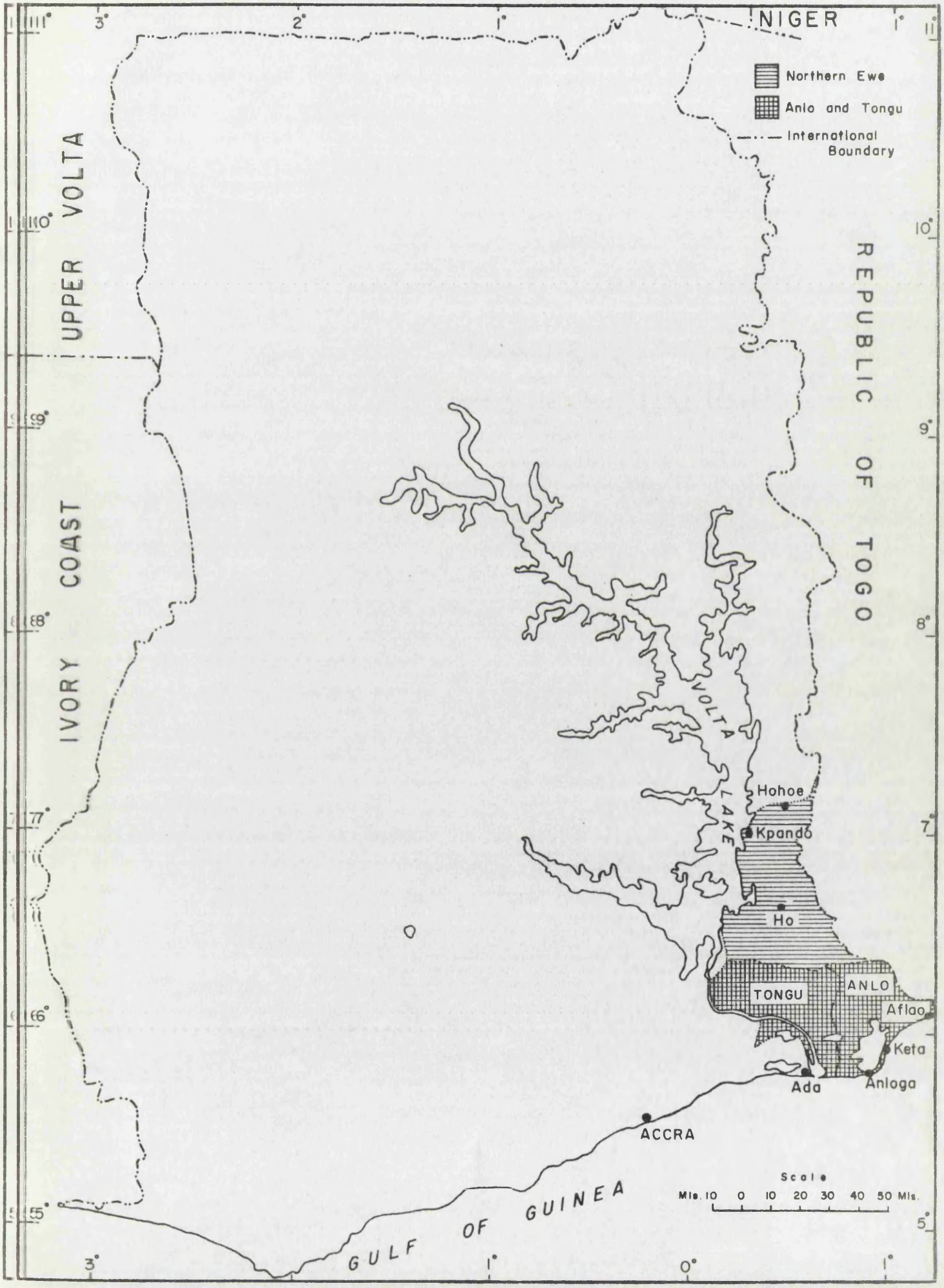
Northern Ewe, Tongu and Anlo



NORTHERN EWE OF GHANA

III