PPL421 - LAND LAW I

COURSE GUIDE

1.0 Introduction

PPL421 - Land Law I is a 400level, compulsory law course offered by the department of Private and Property Law, of the Faculty of Law, National Open University of Nigeria. It is the first of two courses on Land Law and it focuses mainly on customary land law.

2.0 Working through This Course

The course should take you about 12 weeks (excluding Tutor-Marked Assignments and Examinations) to complete. You need to allocate your time to each unit in order to complete the course successfully and on time.

To complete this Course, you are advised to read the study units, recommended texts and other source materials provided in the course material. Each unit contains In-Text Questions (ITQs) and Self-Assessment Exercises (SAEs) together with suggested answers to the SAEs provided. This help to deepen your understanding of the course. Midway into your study you will be required to take your Tutor-Marked Assignments (TMAs) which form part of your continuous assessment. At the end of the course, there is a final examination.

You will find all the components of the course listed below.

3.0 Course Materials

The major components of the course are:

1. Course guide
2. Study units
3. Recommended Textbooks and web-sources
4. Assignment file
5. Presentation Schedule

Each study unit consists of two weeks' work and includes specific learning outcomes; directions for study, reading materials, In-Text Questions (ITQs) and Self-Assessment Exercises (SAEs). Together with the Tutor Marked Assignments, these questions and

exercises will assist you in achieving the stated learning outcomes of the individual units and of the Course.

We have included a large number of examples and Self-Assessment Exercises (SAEs). These have been selected to bring out features of central importance. You will gain immeasurably by giving ample time to the Self-Assessment Exercises (SAEs), and by comparing your efforts with the relevant Answer Box and then drawing the lessons from the exercise. We do not expect you to come up with answers that are identical with the answers provided. These exercises provide an opportunity to put in practice what has been described in the text and then *evaluate* your performance. This will not only tell you whether you have fully grasped the particular technique, but it will serve to confirm it. If you are not happy with your effort, ask yourself what was missing; then rework the passage in the text and revise your exercise to take account of the approach demonstrated in the answer.

You may find it helpful to read the text of a unit before working the examples and exercises. This will give you a general overview of the whole topic, which may make it easier to see how individual aspects relate to each other. If you break off study of a Unit before it is completed, in the next study session remind yourself of the matters you have already worked on before you start on anything new, to maintain continuity of learning.

4.0 Recommended Textbooks, References, and Web sources

Certain texts have been recommended in the course. Each study unit provides a list of references, relevant texts and web sources. You should try to obtain one or two texts and download the references and web-sources for your general reading.

5.0 Assessment

There are two aspects of the assessment of this course; the Tutor Marked Assignments and a written examination. In doing these assessments, you are expected to apply knowledge acquired during the Course. The assessments are submitted in accordance with the deadlines stated in the presentation schedule.

6.0 Final Examination and Grading

The duration of the final examination for Land Law I will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self-assessment exercises you have previously encountered. All aspects of the course will be

assessed. You should use the time between completing the last unit, and taking the examination to revise the entire course. You may find it useful to review your In-Text Questions, Self-Assessment Exercises and Tutor Marked Assignments before the examination.

7.0 Course Score Distribution

The following table lays out how the actual course marking is broken down.

Assessment	**Marks**
Tutor Marked Assessments 1-3	Three assessments (10% each) - 30% of overall course score.
Final examination	70% of overall course score
Total	**100% of course score**

8.0 How to get the most from this Course

In the National Open University of Nigeria, you have the advantage of your course material and your online facilitation classes. The advantage is that you can read and work through the study materials at your pace and get explanations for knotty areas during your online facilitation classes.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning outcomes. These outcomes let you know what you should be able to do by the time you have completed the unit. You should use these learning outcomes to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self-Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self-Assessment Exercise as you come to it in the study unit. There will be examples given in the study units. Work through these when you come to them.

9.0 Tutors and Tutorials

There are 8 contact hours of online facilitation classes in support of this course. You will be notified of the dates, times and links of these online facilitation classes, together with the name and contact details of your facilitator.

Do not hesitate to contact your facilitator if you need help. Contact your facilitator if:

1. You do not understand any part of the study units or the assigned readings;
2. You have difficulty with the self-assessment exercises;

You should try your best to attend the online facilitation classes. This is the only chance to have face-to-face contact with your facilitator and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course facilitation, prepare a question list before attending them. You will gain a lot from participating actively.

10. Summary

You have much to cover in this course. You may find that some of the units call for at least a full study session of their own. You may also find that the Self-Assessment Exercises require more time, as necessarily the text with which we are now dealing is longer. The course builds upon work you have already done; in a number of places you should be on reasonably familiar territory.

We wish you success with the course and hope that you will find it both interesting and useful.

NATIONAL OPEN UNIVERSITY OF NIGERIA

FACULTY OF LAW

COURSE CODE: PPL421

COURSE TITLE: LAND LAW I

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MODULE 1

Unit1: Introduction/Historical Evolution of Land Law in Nigeria

Unit2: Sources of Nigeria Land Law

Unit3: Legal Concept of Land

Unit4: Terminology

Unit5: Implication of the Duality of Laws

Unit 1: HISTORICAL EVOLUTION OF LAND LAW IN NIGERIA

CONTENTS

1:1 INTRODUCTION

Land tenure is a legal phenomenon which gives effect to and reflects the social, economic and sometimes political demands and perspective of the community concerned. The land tenure system may in the long run determine or hinder the development of the nation because it is the only regulation on land use and developmental activities on land. However, in Nigeria apart from the legislations which you will learn about below there was no major all-encompassing law regulating land use in Nigeria until the Land Use Act was enacted in 1978. Olawoye blamed the poor performance of the economy, the inability of the country to feed itself; the inability of both the public and the private sectors to provide sufficient shelter for the people; as well as inflationary trends in the economy which impacted on the on the system of land tenure.

In this unit, we will start by defining 'land tenure' and examine the various legislative interventions until the Land Use Act of 1978.

1.2 LEARNING OUTCOMES

By the end of this unit, you should be able to

a. Define 'land tenure'

b. Discuss

   i. the historical development of land law in Nigeria,

   ii. the various legislations affecting land in Nigeria

   iii. various attempts at reforming the customary law in Nigeria.

1.3 What is Land Tenure?

There are various definitions of land tenure – each pointing to the same concept. Let's consider some of them:

a. Chambers English Dictionary defines 'land tenure' as ***'the rules and arrangements connected with owning land …' .*** This definition is similar to that of Cambridge Dictionary which defines land tenure as ***'the laws and arrangements relating to owning land, especially land that is used for farming'***.

b. John M. Ashley defines the term **as** ***'a complex social institution which governs the relationship among people with regard to assets such as land, water bodies and forests [having] legal or customary basis, or both'***. Ashley's definition goes beyond a basic reference to rules and acknowledges the nature of land tenure as a either a legal or customary (or both) construct. The definition also recognises that land tenure has a societal connection and extends to things connected to land such as water and trees.

c. The United Nations Convention to Combat Desertification also provides an extensive definition. It defines land tenure as '***the relationship between people and the land, and how local laws and customs define that relationship.* '**It goes on to identify land tenure for all as a human rights question and an issue that impacts biodiversity, food security and migration. Again this definition recognises the place of legal and customary rules in shaping the concept and goes on to include possible implications for land tenure on wider issues.

As you can see, in most cases, land tenure is indeed wide and complex. Extending beyond land ownership, it refers to and defines the relationship between the holder of land and the community on the one hand, and/or the relationship between the holder of land and another party having superior title on the other hand. Interests in land (if any) are defined, delineated and explained within the framework of the land tenure system.

As Ashley alludes in his definition, you must bear in mind that land tenure is community specific. It is normally dictated by the socio-economic lives of the individual community as influenced by the customs, economic, political and social realities of the community. Therefore, the Land Tenure System of one community may not be easily imported or adapted by another unless they have similar customs and socio-economic beliefs.

Self-Assessment Exercise 1

In your own opinion, which of the definitions given above is most extensive?

1.4 Historical Evolution of Land Legislation in Nigeria

See Gerhard Huebner v. Aeronautical Industrial Engineering and Project Management Company Limited (2017) LPELR-42078 (SC) (Pp. 36-39 paras. F)

1.4.1 Pre-Colonial Land Tenure

Before the advent of the British Government in 1861, the only recognizable system of Land Tenure in the communities that make up the geographical area now known as Nigeria was the Customary Land Tenure System based on the customs of each respective community. Being an indigenous system of land tenure, customary land tenure differed from community to community. Such customary land tenure was reflective of the systems of accepted practice amongst the people, well recognized and enforced within the community. This customary system of land tenure is all-embracing and it defines the rights, privileges, interests and title that may be enjoyed on land under customary law. Hence, in *Owoniyi v Omotosho* (1961)1All NLR 304 Baraimian FJ aptly defined customary law (of which customary land tenure is a part) as "a mirror of accepted usage".

Being a product of customary law, customary land tenure is not static but adaptable to 'accepted usage' in line with changing times. For instance, in some communities the rules of primogeniture, though still practiced, may be modified in the interest of justice to allow female inheritance in the absence of male heirs. In *Kimdey & Ors v. Military Gov. of Gongola State & Ors* (1988) 2 NWLR (pt77) 445 the Supreme Court per Karibi-Whyte JSC highlighted flexibility and capacity for adaptation as one of the characteristics of native[customary] law and a contributor to its resilience in modifying itself in accordance with changing conditions.

Over time, customary land tenure system has had to accommodate changes occasioned by modern influence especially the introduction of the British system of land tenure (Received English Law) and the introduction of written laws regulating land matters (local legislation). This development was catalyzed by the difficulty of adapting customary land tenure to accommodate the growing economic and political developments in the country, blurring of geographical boundaries and forging of the unitary 'Nigerian' identity in place of community identity regulated by customary law. Though other systems of law are now applicable in Nigerian land law, customary law remains recognized as the law governing land holdings

amongst the people who hold their land subject to the customary land tenure. In effect in spite of the two main great influences on the customary land tenure i.e. Received English laws and local legislation, the customary land tenure still governs the interests on land held by the people who agree or hold land subject to Native Law and Custom.

1.4.2 Land Legislation in Southern Nigerian

British incursion into Nigeria commenced in 1851 following the violent 'Reduction of Lagos' as a consequence of which King Kosoko was deposed and his uncle, Akintoye re-installed as Oba of Lagos. Prior to this era, ownership, control and other acts relating to land were regulated by customary land tenure in effect under Yoruba customary law. The Reduction of Lagos also birthed the consulate era in Southern Nigeria with British/Lagos Treaty of 1952 which formally sought to end slave trade and facilitate British protection of Lagos under King Akintoye. Under the consulate era, the British were afforded the privilege of dealing with the locals and enjoying a status akin to that of a favoured trading partner but ownership and control of indigenous lands resided with the locals. For instance, Article VI of the 1952 treaty provides:

> "The subjects of the Queen of England may always freely trade with the people of Lagos in every article they wish to buy and sell in all the places and ports, and rivers within the territories and Chiefs of Lagos, and throughout the whole of their dominions; and the Kings and Chiefs of Lagos pledge themselves to show no favour and give no privilege to the ships and traders of other countries which they do not show to those of England"

Subsequently, the entire territory of Lagos was annexed in 1861 under the Treaty of Lagos signed by King Dosunmu on behalf of Lagos. This officially marked the beginning of colonialism in Southern Nigeria making Lagos a British colony and starting an era of colonial control of indigenous lands. It is important to note the difference between consular presence and annexation. Unlike consular presence, annexation effectively transferred ownership and control of indigenous lands to the British. For instance, while the British still exercised mere consular presence in Lagos under Oba Akintoye's reign, he, in exercise of his rights as sovereign over the territory of Lagos entered into an agreement with the Christian Missionary Society (CMS) in 1952. Under the agreement which he granted land to them for building churches, schools and residences for their missionaries and staff. This is different from grants of land issued by the colonial government after the annexation of Lagos State without recourse to any other sovereign (the 'Crown' being regarded as the sovereign from 1861 onwards).

British power of control of indigenous land in Lagos State was given legal effect by Article 1 of the Treaty which provides as follows;

> I, Docemo, do, with the consent and advice of my Council, give, **transfer**, and by these presents **grant** and confirm unto the Queen of Great Britain, her heirs and successors forever, **the port and island of Lagos, with all the rights, profits, territories and appurtenances** whatsoever thereunto belonging, and as well the profits and revenue **as the direct, full, and absolute dominion and sovereignty of the said port, island, and premises, with all the royalties thereof, freely, fully, entirely, and absolutely**. I do also covenant and grant that the **quiet and peaceable possession** thereof shall, with all possible speed, be freely and effectually delivered to the Queen of Great Britain, or such person as Her Majesty shall thereunto appoint, for her use in the performance of this grant; the inhabitants of the said island and territories, as the Queen's subjects, and under her sovereignty, Crown, jurisdiction, and government, being still suffered to live there."

Article 1 of the Treaty of Lagos 1861 begs the question as to the What were the rules of land ownership and the status of the King of Lagos in relation to lands (possibly) owned or controlled by others in Lagos prior to this treaty and rights that the British may legally enjoy following the signing of a the treaty with provisions stated above? Prior to the annexation of Lagos, issues relating to land were governed by Yoruba customary land tenure under which families or communities held land since individual ownership of land is unknown to customary law. Though these families/communities were subjects of the King, they were not under his control. Yoruba customary law as practiced in Lagos, land owning high chiefs had rights to land within their domain. Hence, in transferring 'absolute dominion and sovereignty' to the Crown pre-existing individual/communal interests under Yoruba customary land tenure were not transferred automatically. This may therefore be viewed to constitute a foundation for British control of land following the transfer of all lands in Lagos to the British albeit with the recognition of family/communal ownership of lands under Yoruba customary land tenure. Hence, when the British government (in apparent exercise of their 'absolute' power over lands in Lagos State) issued grants of land to individuals who used them as fee simple title, families kicked against such use. In *Secretary of Southern Nigeria v. Holt* (1915) 2 NLR 1, A.C 599 the court agreed with the view that in ceding the territory of Lagos to the British, what King Dosunmu passed on were sovereign rights and any personal proprietary rights only. Accordingly, a mere change in sovereignty following cession did not tamper with the usufructary qualification of his title in favour of his subjects. /therefore, inhabitants of Lagos had rights to their property which must be

fully respected and the Crown cannot displace any ownership title of private landowners and land owning families. See also *Oduntan Onisiwo v. Attorney General of Southern Nigeria* (1912) 2 NLR 77.

In *Amodu Tijani* v. *Secretary of Southern Nigeria* 1921 NGSC 1, the Privy Council appeared to agree with this reasoning. In that case, the Government acquired a plot of land in Apapa belonging to the Oluwa Family of which the Appellant was the family head and one of the Idejos (land owning white cap chiefs of Lagos). In line with the Public Lands Ordinance 1903, the Appellant claimed compensation for the value of the land as vested on him as the Chief representing his community in an ownership usufructary capacity. At the court of first instance, it was held that the appellant did not have ownership rights but rights of management and control. Hence the recommended the quantum of compensation should be calculated on the right to receive payment of rent or tribute and not on absolute ownership. On appeal, the Privy Council reversed the decision and held that the appellant was entitled to claim compensation on the basis of full ownership – which compensation was to be distributed among the members of the community represented by the Appellant as its Head Chief.

After the 1861 treaty, a series of legislations were enacted by the colonial government to ensure total control of all lands in the Colony of Lagos and environs between the 1863 and1865. In exercise of their powers of ownership and control of all lands in the Colony of Lagos, the British colonialists appointed Commissioners to determine the true and rightful owners of the land within the framework of the Lagos Settlement, and issued Crown Grants to various parties. Meek records that 4000 such grants were issued between 1868 and 1912. One enduring examples of such grants include the grant made to the ancestors of the present day Arota Ologun family of Oshodi possibly following proof of pre-colonial grant of land to the Oshodi Tapa and (Oshodi) Arota Ologun family by the Onigbesa of Igbesa before British incursion into Lagos in the 19th century. See *Sunmonu Agedegunu (for and on behalf of Onigbesa family) v. Sanni Ajenifuja & 4 ors* (FSC 413/1961; Suit Ab/16/57)) where the trial judge on proof of acts of ownership over an extended period of 100+ years held that the Oshodi Arota family were entitled to ownership under an absolute grant by the Onigbesa family of Igbesa. See also *Rasaki Oshodi & Ors v. Yisa Oseni Eyifunmi & Anor* (2000) Suit SC.53/1995 of 14th day of July, 2000 where the Supreme Court affirmed the decision of the lower courts, the Arotas (State Grants) Act CAP 14 Laws of Nigeria 1958 and Epetedo Lands Act CAP 61 Laws of Nigeria 1958 (both applicable to the city of

Lagos only).

By virtue of the Foreign Jurisdiction Acts, 1890, the British Crown authorized itself to exercise jurisdiction over all indigenes and foreigners in its protectorates, colonies and dominions. In 1913 the British Government assumed powers to legislate on Nigeria. Pursuant to this, the British Government Promulgated the Interpretation Act, Cap 89, Laws of the Federation and Lagos. By Section 45 of the Act, the English Common Law, the doctrines of equity and the Statutes of General Application that were in force in England as of the 1st January, 1900 were also in force in Lagos in so far as the limits of the local circumstances permitted and subject to Federal Law. It follows that, the English common law rules relating to land tenure, disposition of real property, inheritance, perpetuities and a number of others became applicable in Nigeria. In the same vein, doctrines of equity which included construction of wills, institution and settlement of land, legal and equitable estates and/or, interests in land and the doctrines of notice also became applicable in Lagos.

The following statutes have been held to be statutes of general application in Nigeria – Statute of Frauds 1677, Wills Act,1837, Limitation Acts of 1882, Real Property Act 1845, Partition Act 1868, Conveyancing Act 1881, Settled Land Act 1882 and Land Transfer Act 1887t to mention a few. See the following cases:

- *Young v. Abina* (1940) 6 W.A.C.A. 180 where the West African Court of Appeal affirmed that the Land Transfer Act 1897 was a statute of general application being in force on 1st January 1900*;*
- *Patria v. Akanke* (1944) 17 NLR 149 on the requirements for a valid will as established under the Wills Act 1837*;*
- *Lawal v Youkan* (1961) 1 All NLR 245 where it was affirmed on appeal that the Fatal Accidents Act 1846 and 1864 were statutes of general application applicable in Nigeria. By virtue of Section 14 of the High Court Law of Western Region which provide that all Statutes of General Application in force in England on 1st January 1900 shall be applied in Western Nigeria;
- *Green v Owo* (1936) 13 NLR 43.

With increase in population especially due to influx of non-indigenes and foreigners who came to settle down in Lagos, and the increasing quest for land for developmental purposes, the colonial government passed the Ikoyi Land Ordinance of 1908 which declared certain lands as Crown lands. Crown lands were defined in the Crown Lands Management Proclamation 1906 as 'all lands and all rights in and over lands which at any time of after the commencement of this proclamation are vested in, held in trust for, or otherwise belong to His Majesty, his heirs and successors.' In effect, Crown lands belonged to the British. Crown Lands were different from 'Native lands' which are lands owned by a Native (indigene or local). The focus of the 1906 Proclamation was to regulate the management, control and/or disposition of Crown lands within Southern Nigeria. To this end, the High Commissioner was empowered to sell, lease, exchange or otherwise dispose of Crown lands as necessary on behalf of the British Government

In 1939, in spite of the earlier attempts to settle the problems arising on land at that time, the Government appointed Sir Merryn Tew as Commissioner to carry out a comprehensive investigation on the problem. He later advised the Government and recommended the passing of the following laws – Crown Grants (Township of Lagos) Ordinance, No. 18 of 1947, Arotas (Crown Lands) Ordinance, No 19, 1947, Epetedo Lands Ordinance No. 20 1947 and the Glover Settlement Ordinance No. 21 of 1947. These Ordinances affected land use and Customary Land Tenure in very significant ways. See *Ajibola v Ajibola* (1947) 18 NLR 125*; Glover & Anor v. Officer Administering the Government of Nigeria* (1949)19 NLR 45

In-Text Question 2

"Before the Nigerian independence in 1960, only Statutes of General Application were in force in Nigeria."

How true is this statement?

1.4.2.1 Public Ownership of Land.

One of the earliest legislations introduced by the Colonial Administration is that dealing with acquisition of land for public purposes. The first of such legislation was the Public Lands Ordinance of 1876 which constituted the substance for the Public Lands Act 1903 and the Public Lands Acquisition Act 1917. The 1903 Act empowered the Governor to take lands required for public purpose on payment of compensation for occupied land and unoccupied lands put to beneficial use for at least 6 months

within the preceding 10 years. This power included the power to require any ruler to sell and convey property of a native community in fee simple whether or not any such conveyance was in contravention of any native law and custom. See *Amodu Tijani v. Secretary of Southern Nigeria supra.* This strategy helps the government to free land from the prevalent customary land tenure which restricts the land ownership and holding strictly to the family and communal and hardly individual. In effect land needed for developmental purposes must be compulsorily acquired by government for this purpose. The 1917 Act in similar fashion empowered the Government to compulsorily acquire lands for public purposes.

A number of Ordinances were passed with the aim of acquiring land for use of government and private developments, these include Native Lands Acquisition Proclamation 1900 which prohibited the acquisition of title to land from Southern Nigerian natives without government consent first had and obtained, the Native Lands Acquisition Proclamation 1903, the Crown Lands Management Proclamation, 1906 as amended, the Native Acquisition Ordinance1917, the Niger Lands Transfer Ordinance 1916 and the Crown Ordinance 1918. In 1935, the Registration of Title Act of that year was enacted. This act provided for the registration of land instruments recognized under the Act, Land Registration Act Cap 99 and the Registered Land Act 1965 were also subsequently enacted for the purpose of registration of titles to land.

In 1958 the State Lands Act Cap 45 was enacted which vested the ownership of all public lands in the state. In the Western Region, the Region enacted the Property and Conveyancing law, Cap 100. Other laws are Land Instruments Preparation Law cap. 55, Land Instruments Registration Law, cap 56, Administration of Estates Law, Cap. 2, Public Lands Acquisition Law, Cap 105, Registration of Titles Law Cap. 57, Native Lands Acquisition Law Cap. 80, Recovery of Premises Law, Cap 110.

In the Eastern Region, the Land Tenancy Law1935 was enacted. Others include, Acquisition of land by Aliens Law, 1957, Land Instrument Registration Law 1963, Land Instrument Preparation Law, 1963 and Recovery of Premises Law, 1963.

As you can surmise from various colonial and post-colonial land legislation enacted in Southern Nigeria prior to 1978, the notion of public ownership of land, government control and/or acquisition of private land were recognized albeit to a lesser extent than the Land Use Act. It would appear that they laid the foundations for the land tenure system subsequently introduced under the Land Use Act.

Self Assessment Exercise 2

With reference to relevant authorities, define 'statute of general application'?

1.4.3 Land Legislation in Northern Nigeria.

In considering the trend for land ownership and control in Nigeria, let us begin by stating that rules of customary land tenure as known in the communities of Southern Nigeria were unknown to the North. You must not forget that at the advent of alien (British) activities in the Northern region, the communities of the region were under colonization by the Fulanis having been conquered and brought under the Caliphate of Uthman dan Fodio between the 17th and 18th centuries. Little is known of any customary rules guiding land prior to this period. In line with colonization policies, the Northern city states had established systems of state control and management of land already in place prior to the first British (commercial) treaties with the Emirs of Sokoto and Gwandu in 1885.

Before 1900, the area later regarded as Northern Nigeria was administered by the Royal Niger Company under a Charter of the British Government. The company had during this period acquired all the land along both sides of the Rivers Niger and Benue. On the declaration of the Protectorate, the government took it over and it was converted to Crown Lands. Secondly, having conquered the Fulani who were the reigning tribe in the North, all lands that were being administered by them were taken over by the British Government. The land thus taken over from the Fulani Emirs were classified as Native Lands. The distinction between Crown Lands and Native Lands was that whereas crown land was vested in the Governor in trust for Her majesty. Public Land was vested in the Governor in trust for the people. Series of legislations were enacted to effect these fundamental changes. Crown Lands Proclamation 1902 was enacted following the takeover of control of the Northern region by the British Crown as represented by Sir Frederick Lugard from the Royal Niger Company. The legislation covered all lands, rights and easements previously held by the Royal Niger Company. They were by the legislation vested in the High Commissioner for the time being in trust for His Majesty with sole and absolute title to such lands (whether or not populated by native communities) passing to the British Crown. The same legislation also made reference to 'Public lands' (later called 'native lands') which it differentiated from Crown lands. Public or native lands were described as all other lands within the territory of Northern Nigeria title to which the Government claimed by right of conquest.

In-Text Question 3

How were lands characterized in Northern Nigeria and by who?

Land legislation in Northern Nigeria was significantly influenced by the work of the Northern Nigeria Lands Committee of 1908 which made several recommendations reflected in subsequent legislation. Their recommendations included the complete take-over of control and management of all lands in Northern Nigeria by the government, prohibition of transfer of title to land without the consent of the Governor and arrogation of powers to issue grants for use and enjoyment of lands to the Governor. These recommendations found legislative expression in 1910 under the Land and Native Rights Proclamation. The legislation harmonized the dichotomy between Crown lands and Native Lands by vesting all lands in the Northern Region in the Government. As you must have noticed, having considered land legislation in Sourthern Nigeria, there was no counter-part legislation in the South except the Order in Council 1907 which designated all lands in Southern Nigeria as Crown lands with a ruler's personal property and rights in land secured to him though property in the soil itself lies in under the power of the (British) Government which had the right to grant unreserved portions of same to occupants or settlers. This Order notwithstanding, native interests in land were recognized and respected hence legislative provisions were also made for acquisition of private land for public use upon payment of compensation.

The Native Rights Proclamation 1910 also made provisions for the registration of all registrable instruments affecting land within 6 months after execution of same or one year of a testator's death if the instrument was a will. The 1910 proclamation turned out to be a precursor to the Land and Native Rights Act of 1916 (amended 1918) and re-enacted as the Northern Nigerian land tenure law of 1962. Though he aim of the legislation was stated to be to protect and preserve the right of the natives to the use and enjoyment of the land of the protectorate and the natural fruits thereof in sufficient quantity for the sustenance of themselves and their families, but the real aim was to facilitate the easy dispossession of the natives from their land if and when the land was needed for other purposes especially commercial or economic. Hopkins notes that issuance of land grants turned out to be such a significant source of commercial benefit to the British government that public acquisition of private (native) land became very common. He states that

> 'The land market became the pulse of commercial activity: prosperity and expansion encouraged successful merchants to buy land and extend credit; falling profits and

contraction led to credit squeezes and foreclosed mortgages. Inequalities derived from differential landownership developed as fortunate or skilful businessmen accumulated property, and as the unlucky or the incompetent sank into landless obscurity or moved elsewhere.'

Post-independence, the Land Tenure Law 1962 was enacted by the Northern House of Assembly. This Law, basically re-enacted the 1916 Law with some amendments. The provision that no occupation without consent of the Governor was valid was amended to refer to occupation by non-natives, and the power of the Governor became vested in the minister (later commissioner) responsible for land matters. Under the law the interest which an individual could have in land is a right of occupancy. The right of occupancy could be statutory or customary. The statutory right of occupancy was one granted by the Governor while customary right of occupancy is one derived by force of customary law. It was defined as the right of a native or a native community lawfully occupying land under native law and custom. The law forbids alienation of a statutory right of occupancy without the consent of the Governor. The law makes a distinction between natives and non-natives where the alienation was to a native, the alienation is unlawful, but not void, but where a non-native is concerned then the alienation is void. A native was defined in the law as a person where father belonged to a tribe in Northern Nigeria. Thus other Nigerians and aliens are classified as non-natives and are therefore subject to the same degree of discrimination.

Self-Assessment Exercise 3

Discuss one similarity between the Native Rights Act of 1916 and the Land Tenure Law 1962.

1.4.4 Land Legislations During the Military Regime

Various Decrees and Edicts affecting land were promulgated by various military governments. We shall mention a few of these legislations:

a. The Federal Military Government of General Aguiyi Ironsi in response to public outcry promulgated the Rent Control Decree No. 15 of 1966 (as amended by the Rent Control Decree No. 48 of 1966). The Decree was repealed by Rent Control (Repeal) Decree No.50 of 1971 promulgated by the post-civil war military President – Gen. Yakubu Gowon.

Variants of the 1966 Rent Control Decree were promulgated at state level by some military governors. See for instance, the Rent Control and Recovery of Residential Premises Edict,

1977 of the former Bendel State (now Edo and Delta States) and Rent Control and Recovery of Residential Premises Edict No. 6, 1997 of Lagos State. Though various military state governments also promulgated Edicts The impact of these Decrees and Edicts on the soaring rents in the country is doubtful.

b. The Requisition and Other Powers Decree, No. 39 of 1967 was promulgated to empower the Army and Police to requisition land and other property during the period of an emergency. The Decree was amended in 1975 to create the Central and State Compensation Committee to deal with matters of compensation for compulsorily acquired land.

c. State Lands (Compensation) Decree No. 38, 1968, which deals with issues of compensation in respect of land acquired by the state, was promulgated following the Requisition and Other Powers Decree 1967. It was repealed in 1976 by the Public Lands Acquisition (miscellaneous Provisions) DecreeNo.33 of that year.

d. In 1977, in order to further streamline the various enactments and land tenure systems existing in Nigeria, the Military Government set up Land Use Panel with the following terms of reference: -

(a)to undertake an in-depth study of the various Land Tenure, Land Use, and land conservation practices in the country, and recommend steps to be taken to streamline them,

(b) to study and analyse all the implications of a uniform land policy for the entire country.

(c) To examine the feasibility of a uniform land policy for the entire country and make necessary recommendations and propose guidelines for implementation;

(d) To examine steps necessary for controlling future Land Use and also opening and developing new land for the needs of Government and Nigeria's population in both urban and rural areas and to make appropriate recommendation.

The panel's report led to the promulgation of the Land Use Decree No. 6 1978 now known as the Land Use Act 1978. The Land Use Act was first provided for in Section 326(5)(c) of the Constitution of Nigeria 1989. It remains part of the 1999 Constitution as amended - See Section 315(5)(c).

1.5 Summary

From the foregoing we have seen that prior to colonization, the customary law of the people regulates the land tenure system. In this context, customary law can therefore be viewed as the customs and practices of a people relating to the land tenure system. Prior to independence, the colonialists came to rule over Nigeria. In order to free land for their use and the development of the nation introduced series of legislations. This was continued after independence by successive governments. As with the colonialists, the aim of these legislations was to make land available for governmental use and private development. Customary land tenure system has been modified and amended by civilization and legislation and yet it survived. The various customary rules and legislations examined in this unit, had been attempts to streamline and make land use beneficial to the overall development of the society.

The military government of Nigeria has contributed significantly to the development of land law in Nigeria. Principally through the promulgation of the Land Use Act 1978 which enjoys constitutional protection.

1.6 Reference/Further Readings/Web Sources

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

Niki Tobi (1992) Cases and Materials on Land Law Mabrochi,

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Olong M. D. Adefi, ‘Land Law in Nigeria’ Malthouse Press 2012

J. Finine Fekumo, Principles of Nigerian Customary Land Law (2002) F & F

1.7 Possible Answers to Self-Assessment Exercises

SAE 1
Chambers Dictionary answer is shortest. It defines land tenure in connection with ownership of land only.

SAE 2
Statutes of General Application refers to those laws that were in force in England as of 1st January 1900. See Young v. Abina (1940) 6 W.A.C.A. 180; Patria v. Akanke (1944) 17 NLR 149 and Lawal v Youkan (1961) 1 All NLR 245 to mention a few.

SAE 3
Control of ownership of land. The provision that no occupation without consent of the Governor was valid was amended to refer to occupation by non-natives, and the power of the Governor became vested in the minister (later commissioner) responsible for land matters.

MODULE 1

UNIT 2: SOURCES OF NIGERIA LAND LAW

CONTENTS

2.1 INTRODUCTION

In this Unit we are concerned with the source from which Nigerian Land Law took its root. This is the point from which we can have a better understanding of what the law is, and is the only authority from which we can speak or act. Nigerian land law or real property law has five main sources. They are listed below. We shall discuss them in this unit.

:

1. Customary Land Tenure
2. Received English Law and Legislations
3. Nigerian Legislations or Local Enactments
4. Nigerian Case Law
5. Land UseAct1978

2.2 OBJECTIVES

By the end of this unit you should be able

(i) List the sources of Nigerian land law

(ii) Identify the current laws affecting land use in Nigeria

2.3 MAIN CONTENT

As we stated in the introduction, Nigerian land law has five major sources. They are as follows:

2.3:1 CUSTOMARY LAND TENURE

Customary Land Tenure System refers the indigenous and customary system of land holding and use in particular communities. It is simply the way customary law of the people regulates their land holding, land use and interests existing on land within the community. This system is totally unwritten and very flexible. Flexible because it changes as the community develops and is influenced by social changes and development within the community. The customary law of land tenure is recognized by Nigerian law. Hence, our High Courts are to observe and enforce the observance of customary law which is applicable provided they are not;

- Contrary to public policy
- repugnant to natural justice, equity and good conscience nor
- incompatible either directly or by implication with any law for the time being in force

(See S16 (1) and 18 (3) Evidence Act 2011, Section S26 of the High Court of Lagos State cap 60, Laws of Lagos State of Nigeria).

In-Text Question 1

Why is customary land tenure flexible?

Customary Land Tenure varies from one community to the other and because it is unwritten law, it must be properly proved before the court as the acceptable law governing the particular situation. Proof may be through witnesses and historical books attesting to the practices of the people. Upon proof, and acceptance by the court, it becomes a judicially noticed custom, because it has become notorious and established. After the judicial notice, the parties need only refer to the judicial notice in further proceeding before the court. See Ss. 16, 18(1) – (3)

Evidence Act 2011. In *Oyewunmi & Anor v. Ogunsesan* (1990) LPELR 2880 pp. 23-24 paras. F-A, Obaseki JSC noted that 'Unlike statute laws, customary laws in Nigeria have not been codified and their proof in superior courts is mandatory'.

In Nigeria, there are substantial numbers of cases where customary land tenure has seen so judicially noticed. See for instance, Lord Haldene's judgment in *Amodu Tijani v Secretary of Southern Nigeria* (1921) A.C 399 at 404. See also *Osadebe v. Osadebe* (2012) LPELR-97/ (Appeal No. CA/E/398/2007). In *Olagbemiro v. Ajagungbade & Anor.* (1990) LPELR-2554 (SC) the Supreme Court affirmed the principle that in an action in a High Court or Magistrate Court, customary law may be judicially noticed if it has become notorious by frequent proof in courts or has been frequently followed by the Courts.

Note: Courts may also take judicial notice of a custom on the basis of proof in a single case if it satisfied the requirements of the Evidence Act. See *Olagbemiro v. Ajagungbade & Anor. supra* per Bello JSC (pp. 31-32, paras. A – D). In *Cole v. Akinyele* (1960) 5 F.S.C. 84, [1960] SCNLR 192, the Federal Supreme Court took judicial notice of one single decision of Jibowu, J. as proof of Yoruba customary law of paternity.

2.3:2 RECEIVED ENGLISH LAW

By virtue of the Supreme Court Ordinance 1948, Received English land law are useful and applicable in Nigeria. Section 14 of the Supreme Court Ordinance Cap. 211 (1948 Laws of Nigeria) provides:

> "Subject to the terms of this or any other ordinance, or any law, the common law, the doctrines of equity, and the statutes of general application which were in force in England on the 1st January, 1900, shall be in force within the jurisdiction of the Court concerned."

In-Text Question 2

From your understanding of Section 14 of the Supreme Court Ordinance, what is the limiting date for statutes of general application applicable in Nigeria?

Received English law applicable in Nigeria consist of:

a. Common Law

Also called ‘case law’, ‘case precedent’ or ‘judge-made law’, common law consists of English case law establishing common law doctrines. Such decisions of English courts are often applied by Nigerian courts where the circumstances require. See for instance, Oduola & Ors v. Coker & Ors (1981) LPELR-2254(SC). In that case, the court applied the common rule on recovery of possession. It was noted following the English case of *Martin v. Strachan* 101 ER 61N that at common law, the rule was that recovery of possession must be by strength of the claimant’s title, and not by reason of any defect in the title of the person in possession.

See also Nigerian Tobacco Co. Ltd. v. Agunane (1995) LPELR-2034 (SC); See also B.J Export and Chemical Co. Ltd. v. Kaduna Refining & Petro-Chemical Co. Ltd. (2002) 12175 LPELR (CA)

b. Doctrines of equity on the subject.

Note that principles of equity are not laws in themselves but principles applied at the discretion of Nigerian courts to ‘assist the law’ in achieving justice. In "That is why I have had resort to equitable principles for one purpose alone and that is to assist law. After all, equity does not make law, it is only there to assist law in establishing a remedy where strict adherence to common law rules would occasion hardship or injustice. *In Trans Bridge Co. Ltd. v. Survey Int. Ltd.* (1986) 4 NWLR (Pt.37) 576 at 597, Eso J.S.C noted that "equity is not a warlord determined to do battle with the law. It is part of a legal system which has mixed with the law and the admixture is for the purpose of achieving justice". See also *J. A. Obanor & Co. Ltd. v. Co-operative Bank Ltd.* (1995) LPELR-1583 (SC)

c. Statutes of General Application that were in force in England by 1st January 1900. Important examples of these laws are the Conveyancing and Real Property Act of 1882, Settled Land Act 1881, Fines and Recoveries Act 1888, Land Transfer Act etc. See *Ajao v. Sonola & Anor* (1973) LPELR-288 (SC) where the Supreme Court affirmed that the Land Transfer Act, 1897 applies in Nigeria as part of the "received" English law. Hence, it is applicable in the Lagos State.

In-Text Question 3

What is the statutory authority for the applicability of Received English Laws in Nigeria?

However, the influence and importance of this source of law is dwindling because we now have local pronouncements of the Supreme Court and other courts of record interpreting these legislations to suit our local conditions. Also, most of the received laws have been domesticated therefore the received English law on property will no longer be applicable in those areas where the laws have been domesticated e.g. Property and Conveyancing Law 1958 of Western Nigeria domesticated the Conveyancing and Law of Property Act 1881. The PCL 1958 will therefore be applicable in all the states under the previous Western Region of Nigeria.

We must also understand that though the English Common Law and Doctrines of Equity are very important sources of our law, where they are in conflict with any of our local legislations and laws, the local legislations and laws will prevail. See National Assistance Board v Wilkinson (1952) 2 Q.8. 648. See also *Patkun Industries Ltd v. Niger Shoes Manufacturing Co. Ltd* (1988) LPELR-2906 (SC) (Pp. 21-22 paras. G) per Karibi Whyte JSC where it was noted that "… where a statutory provision is in conflict or differ from common law, the common law gives place to the statute".

Self-Assessment Exercise 1

State two differences between customary land tenure and Received English Law.

2.3.3 NIGERIAN CASE LAW

Judicial decisions and case law generally form a growing source of the land law today. Our courts have been invited on many occasions to interpret the law both customary law and local legislations. In many cases they have also applied also the received laws where applicable. These case laws now form a substantial source of land law today. As with statutes, local decisions will prevail over foreign decisions on the same subject matter where there are conflicts, and the decisions of foreign courts remain only on a persuasive level and is not binding on the Nigerian courts. There have been numerous and series of local legislations affecting land in Nigeria which are nonexistent in foreign jurisdictions. Therefore, there cannot be an equivalent or authoritative pronouncement on issues relevant to such laws. See *SIFAX (Nig) Ltd. & Ors. V. MIGFO (Nig) Ltd. & Anor* (2018) LPELR-49735; *Agboti v. Balogun*

2020 LPELR-49904.

The Privy Council used to be Nigeria's highest court, and the judgment of the court had binding effect, but because of the changes in the law, even the decisions of the Privy Council had been questioned and modified or overturned in recent times, the influence of the foreign cases in this area of the law has seriously whittled down and downgraded, and may not be useful relying on them. See *Holman Bros (Nig.) Ltd. v. Kigo (Nig) Ltd.* (1980) LEPLR 1370 (SC) **Held:** The Supreme Court is not bound by the decisions of the Privy Council whose decisions now only have persuasive influence and may be adopted when appropriate for cogent reasons.

In-Text Question 4

In the event of a conflict between a decision of a State High Court and the English Privy Council which will prevail?

2.3.4 NIGERIAN LEGISLATIONS

Local statutes affecting land constitute another source of land law in Nigeria. Many of these statutes were in force before the enactment of the Land Use Act 1978, and have not been repealed. Some of these are

- Land Registration Law of Lagos State 2015 (which repealed the Registration of Titles Law Cap R1 Laws of Lagos State, Land Instruments Registration Law, Lagos 2003 Cap L58, Electronic Management Systems Law 2007 and Registration of Titles Law and Appeal Rules Cap R4 Laws of Lagos State),
- Property and Conveyancing Law 1959 (Cap 100 Laws of Western Nigeria) applicable in the states of the old Western and Midwestern region including Delta, Edo, Ogun, Ondo, Osun, Oyo and Ekiti. See *AIB Ltd v. Lee & Tee Industries Ltd & Anor* (2003) LPELR-9171(CA); *Jadono v. Akonure* (2021) LPELR-53325 (CA)
- Land Tenure Law (Cap 59 Laws of Northern Nigeria 1963) See *Ogunleye v. Oni* (1990) LPELR-2342 where Belgore J noted that the Land Tenure Law of Northern Nigeria is still the law in the states of Nigeria formerly under the former Northern Nigeria.

- State Lands Law (Cap 122 Laws of Eastern Nigeria, 1963) applicable in all the states of the old Eastern region including Rivers State. See *Ude v. Nwara* (1993) LPELR 3289 (SC); *Eze v. AG Rivers State* (2018) LPELR 45621 (CA)

2.3.5 LAND USE ACT 1978

The Land Use Act 1978 was enacted by the Military Government and today is one of the most important legislations affecting land in Nigeria. While all the other legislations had been regional, the Land Use Act 1978 is general and nationwide in its application and effect. Section 1 of the Act provides:

> *"subject to the provisions of this Act all land comprised in the territory of each state in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of the Act"*

The provisions of the Act is therefore of paramount importance and an important source of Nigerian land law as it has impacted, affected and modified all existing laws, accordingly. Though it saves the existing laws and land tenure e.g. customary land tenure, but only to the existent that it is not inconsistent therewith.

Self-Assessment Exercise 2

Which court is Nigeria's highest court?

Can it modify or overturn the decision of the Privy Council?

2.4 SUMMARY

The five sources of Nigerian land law have been discussed. The importance and utility of each source examined and the current trend has been identified. Following a quick and cursory look at the sources of land law in Nigeria, one may be tempted to conclude that the multiple sources may lead to confusion and problems. But this is far from the truth, the importance of some of the sources is dwindling - while the Received English laws have been important in the past, local legislations are gradually replacing them and rendering them of little use today. Similarly, while English case law is important, their importance is also dwindling and will

remain of persuasive importance only. We can see that we are gradually moving towards a unified system of land tenure in Nigeria with the introduction of the land Use Act 1978.

2.5 REFERENCES/FURTHER READING/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

Niki Tobi (1992) Cases and Materials on Land Law Mabrochi,

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J. Finine Fekumo, Principles of Nigerian Customary Land Law (2002) F & F

2.6 POSSIBLE ANSWERS TO SELF ASSESSMENT EXERCISES

SAE 1

a. Customary land tenure differs from community to community in Nigeria but Received English laws are applicable all over Nigeria

b. Customary land tenure is local but Received English law is foreign

c. In line with the Evidence Act customary land tenure needs to be specifically proved but received English law does not.

d. Received English law has its origin in England but customary land tenure has its origin in the specific community where it applies

e. Customary land tenure is subject to the repugnancy doctrine but Received English laws are not.

SAE 2

The highest court in Nigeria today is the Supreme Court. It can modify or overturn the decision of the Privy Council.

MODULE 1

Unit3: **LEGAL CONCEPT OF LAND**

CONTENTS

3:1 INTRODUCTION

Land law or real property law is designed to regulate the relationship of persons to things whether tangible or intangible, thereby providing a secure foundation for the acquisition, enjoyment and disposal of things or wealth. It describes and regulates the rights, interests and estates on land. It is therefore important to understand and define land, what it is and distinguish between land as a property and or right and other properties. Land is peculiar property because it is immovable unlike other properties, capable of being owned, transferable in its form, and subject to different interests – each existing on land simultaneously and enforceable by each interest holder. For instance, A, the owner of black-acre in fee simple, may lease the same property to B for a term of years. Bin turn may mortgage part of the land for his term of years to C and at the same time build a house on the other portion of the land and let the property to D for a term of years. D in turn may sublet the same house to E who takes possession of the house and who in turn may grant a license to F. All the parties have concurrent rights on the same property and these rights are enforceable in law. Land law therefore helps to understand, create and delimit the rights exercisable and enforceable by the parties claiming such rights. In this unit we will define land and examine the various definitions and concepts on land.

3.2 LEARNING OUTCOMES

By the end of this unit you should be able to

i. Define 'land' from different perspectives
ii. Discuss the concepts associated with 'land'.
iii. Discuss the concept and ambit of the maxim - *quicquid plantatur solo, solo cedit*.

3.3 MAIN CONCEPT

3.3.1 DEFINITION OF LAND

It is generally agreed that land does not just mean the ground and its subsoil, it also includes all other objects attached to the earth surface. This includes trees, rocks, buildings, and other structures whether naturally attached or constructed by man. However, land in law even extends more than this, and it includes further abstract, rights and interests like incorporeal hereditaments, right of way, easements and profits enjoyed by persons over the property or ground belonging to other persons.

Where a transaction is regulated by a statute or law, the definition used in the statute will govern the transaction. Where there is no such definition, then the definition in the

Interpretation Act (Cap 123 LFN 2004) is applicable. Land has been defined in the Interpretation Act as "including, any building and any other thing attached to the earth or permanently fastened to anything so attached, but does not include minerals". The definition seems to be incomplete because, it starts by stating that it merely **includes**, meaning that other things are not stated in the definition and affording as many inclusions as possible. This may therefore permit addition of incorporeal hereditaments like profits, rents and easements. Temporary structures may not qualify as land, but permanent trees may be regarded as part of land. See *Erewa v. Idehen* (1971) LPELR-1157 (SC) where it was held that "… the rubber trees, like timber and those crops other than annual crops which are part of the real property before severance, are also part of the real property, because they have, in effect, that quality of immobility which makes them akin to realty."

In-Text Question

How can you tell that the definition of 'land' in the Interpretation Act is incomplete?

The statutory definition that has adopted the common definition of land and seems to be all-inclusive is the one in the Property and Conveyancing Law (PCL) 1959. Section 2 of the PCL (1959 WN) defines land to include,

> "the earth surface and….everything attached to the earth otherwise known as **fixtures** and all chattels real. It also includes incorporeal rights like a right of way and other easements as well as profits enjoyed by one person over the ground and buildings belonging to another".

The original section 2 of the PCL actually provides, land to include.

> "land at any tenure, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments, also a rent and other incorporeal hereditaments and an easement, right, privilege, or benefit in, over, or derived from land, but not an undivided share in land"

See *UNILIFE Development Co Ltd v. Adeshigbin & Ors* (2001) LPELR-3382(SC); *Orugbo v. Amasakpare* (2021) LPELR-56764(CA)

The word **'fixture'** means any physical property that is permanently affixed (attached) to land e.g. a building. Fixtures are treated as a part of land, Property not affixed to land is called '**chattel**'. Chattels are movable e.g. furniture.

Self Assessment Exercise 1

With the aid of a table, properly classify the following items as either 'fixture' or 'chattel':

i. A 50 tonne lorry
ii. A 5 X10 foot gate house
iii. A 25 X 50 foot portakabin
iv. A Mango tree
v. Ripe Mangoes which have fallen from the Mango tree
vi. Two hundred trips of sand

Lloyd in his book "Yoruba Land Law" makes a distinction between land and improvements thereon under Yoruba customary law, while Dr. Coker in his book "Family Property among the Yoruba" states quite clearly that in customary law, land includes buildings thereon. Olawoye in his book, "Title to Land" describes land as, including,

> "the surface of the earth, the subsoil and the airspace above it, as well as all things that are permanently attached to the soil. It includes streams and ponds. On the other land, things placed on land, whether made of the product of the soil or not, do not constitute land"

It follows therefore that while a crop or tree is planted it forms part of land, and is regarded as land, as soon as it is cut and removed it ceases to be land. In the same vein, where a building is standing it forms part of land, but where the building is demolished it ceases to be land. However, as we have noted above, the fixture must be permanently attached to the land to be regarded as forming part of the land; where the fixture is not of a permanent nature, then it is not land, and can be disposed of without affecting land.

In-Text Question 2

What is the difference between 'fixtures' and 'chattels'?

3.3.2 QUICQUID PLANTATUR SOLO, SOLO CEDIT

From the foregoing definition of land, we can distinguish between natural and artificial content of land. Land in its natural sense includes permanent developments like buildings and other structures including trees. The pertinent question had always been the ownership of the developments on land where the development was made by persons who are not the real owners of such land. The common law principle (of Latin origin) is *quicquid plantatur solo,*

solo cedit - meaning whatever is affixed to the soil, belongs to the soil (also called 'the *quicquid* maxim' or 'the *quicquid* rule') is applicable in this circumstance. See *National Electric Power Authority v. Mudasiru Amusa & Anor* (1976) LCN/2177 (SC). See also *Rev. Stephen Billy v. Barka* (2018) LPELR-44082 (CA) where it was held that the Respondent was not entitled to compensation for economic trees planted by his late father since the owner of land owns whatever is affixed thereon, including economic trees.

Note: The *quicquid* rule will not apply where a fixture was affixed on land with the consent of the owner of the land. In such case, the party who erected the fixture will be entitled to compensation for same. In *Okon v. Asumogha* (2019) LPELR-47593(CA), it was held that contract and principles of equity can arrest the application of the maxim. In that case, the Respondent sand filled, developed and occupied land with the consent of the Appellant land owner who also collected rent from him. The Court of Appeal therefore agreed with the finding of the lower court that equity will not allow the Appellant to recover possession without considering or compensating the Respondent in view of the huge investment made on the land with his consent. Hence, consent given to the Respondent by the Appellant will work against his interest in applying the *quicquid* maxim since equity will not allow the Appellant treat the Respondent as he would for trespassers generally or tenant at will.
The general consensuses amongst scholars is that the maxim though a Latin principle imported into English law is also applicable under customary land law. Elias in his book "Nigerian Land Law" explained thus,

> "the Roman law doctrine of *quicquid plantatur solo, solo cedit* is a principle of English, as of Nigerian property law. Like many other empirical rule of social regulation of a specific legal situation, the concept of the accession of a building or other structure to the land built upon is reasonable, covenant and universal".

Coker agrees that the maxim applies in Yoruba native law and custom. He noted,

> "land is by far the simplest object of property in any system of jurisprudence. In this connection also, land in any application of the term includes buildings thereon. The maxim *quicquid plantatur solo, solo cedit* which is a maxim of most legal systems, is also a part of Yoruba native law and custom".

Olawoye clearly agrees with the authorities that "for the sake of commerce the law does not distinguish between the ownership of the soil and the ownership of the fixtures thereon. The principle *quicquid plantatur solo, solo cedit* applies".

Nwabueze, in agreeing with the above, explained the application of the principle, thus,

> "it must not be supposed, however, that the maxim *quicquid plantatur solo, solo cedit* applies inflexible in all situations. Its application in any particular

> case depends first upon the circumstances of that case, such as the nature of the subject which it is claimed has become part of the soil by attachment thereto, and secondly, upon any statutory enactments modifying the operation of the maxim".

Lloyd however differs on this. He is of the view that Yoruba Customary Law makes a distinction between the physical land and improvements thereon. Obi also agrees with Lloyd that land under African Customary Law does not include developments thereon.

Niki Tobi summarized the position of the two divergent positions thus;

> "although judicial opinion on the issue is not uniform, there is more support of the opinion that the maxim applies in Nigerian Customary Law. It will be inequitable to contend otherwise. It would appear however that the maxim will not apply under customary law if improvements are made on the land with the permission of the owner of the land. In that case, customary law draws a clear distinction between the land and the improvement made thereon".

In-Text Question 3

Compare Lloyd's position on the application of the quic quid rule to customary law to that of Nwabueze.

The rule though applies under customary law, but depends on the circumstances of the case. Where a person builds a house on a land without the consent of the owner, and after the owner has protested severally, will ultimately lose the property to the owner of the land at the suit of the owner as the maxim applies. See the case of *Osho* v *Olayioye* (1966) NMLR 329, *Ezoni* v. *Ejodike* (1964) All N.L.R 402.

However, under Customary Law, where the structure or building was erected with the permission of the owner of the land, the improvements remains the property of the person that constructed the building or structure. In fact customary law allows the maker to continue using the building or structure as long as they remain on the land. See *Adebiy*i v. *Ogunbiyi* (1965) N.M.L.R 395.

Self Assessment Exercise 2

One what basis does Niki Tobi justify the application of the quic quid rule under customary law.

3.3.3 INCORPOREAL HEREDITAMENT

The word '**hereditament**' is an archaic word of Latin origin. It means **any property capable of being inherited**. Hereditament may be corporeal (tangible) or incorporeal (intangible). An incorporeal hereditament is inheritable transferable right existing on land. As stated in Blackstone Commentaries (Vol II, p.17) -

> "Hereditaments, then to use the largest expression are of two kinds, corporeal and incorporeal. Corporeal consist of such as affects the senses; such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled; are creations of the mind and exists only in contemplation. Corporeal hereditaments consist of substantial and permanent objects".

Incorporeal hereditament is that thing which has no physical existence but capable of being owned or possessed with appurtenant rights of sale and purchase. See *De Facto Bakeries and Catering Ltd. v. Mrs. A. Ajilore & Anor* (1974) LPELR-933 (SC).

Land is a physical object, capable of being possessed - this could be done in terms of building, trees, crops or other physical fixtures on it. A corporeal hereditament is the thing itself which is the subject of the right. An incorporeal hereditament is not the subject of the right, but the right itself. Ownership of land, including the ramifications of its possession "an incorporeal right to the corporeal use and profit of some corporeal thing"

Therefore, incorporeal hereditaments will include rights on land though not capable of physical existence or possession but actually existing and capable of being enforced in law. Such rights like easements, profit or rents will qualify under this. Incorporeal rights can also be classified into two, those which gave right to possess them as right of a reversion or remainder; and those like easements which are current enforceable rights.

Note: Though various foreign authorities classify easements as incorporeal rights, Nigerian courts hold a slightly different view. In *De Facto Bakeries and Catering Ltd. v. Mrs. A. Ajilore & Anor* supra, the Supreme Court noted that an easement is not by itself an incorporeal hereditament in the property based right. Instead, it is a right appurtenant to an incorporeal right which is enjoyed as part of a real property.

Self Assessment Exercise 3

Define 'hereditament' and mention the types of hereditaments you know.

3.4 SUMMARY

Land means different things to different people. The definition given to land therefore depends on the culture and the custom of the people. Customary law defines land to suit the culture of the people. While we tried to examine the definition of land, we realized that the legislations which defined land only defined it for the purpose of such legislations. Land is therefore not capable of any general application.

Each legislation defined land to suit such legislation. Customary law definition of land is quite different from the common law, but looking at the two, we discover that there is not much difference. For instance, the point of departure in the application of the maxim *quicquid plantatur solo, solo cedit* is the issue of whether the development is done with the consent of the owner of the property. If the answer is in the affirmative, then the maxim does not apply.

3.5 REFERENCES/FURTHER READINGS/WEB SOURCES

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3.6 SUGGESTED ANSWERS TO SELF ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Fixture	**Chattel**
A 5 X10 foot gate house	A 50 tonne lorry
A Mango tree	A 25 X 50 foot portakabin
Two hundred trips of sand	Ripe Mangoes which have fallen from the Mango tree

Self-Assessment Exercise 2

Tobi notes that it will be inequitable to state that the quic quid maxim does not apply in Nigeria, though it would not apply under customary law if improvements are made on land with the permission of its owner.

Self-Assessment Exercise 3

Hereditament is any property capable of being inherited. Hereditaments are of two types – corporeal and incorporeal.

MODULE 1

UNIT4: RIGHTS IN LAND

CONTENTS

4.1 INTRODUCTION

In our study of land law, we must have a basis understanding of the important terms and nomenclatures that will be used in this study. These terms are also used in everyday language, but they have a different and deeper meaning than the everyday use. It is therefore important to understand these basis terms in land law.

4.2 OBJECTIVES

At the end of this unit you should be able to explain the meaning and the proper use of the following important basic terms of land law:

i. Title
ii. Ownership
iii. Possession
iv. Legal interest
v. Equitable Interest.

4.3 MAIN CONTENT

4.3.1 TITLE TO LAND

In an action for declaration of title to land, **title** connects 'ownership' and in an action for declaration of title to land, the party claiming title must prove facts that will convince the court that the person claiming title is the rightful owner of the property in dispute.

Sir Frederick Pollock (Pollock, 1961, Jurisprudence and Legal Essays, London p.93) described 'title' in these terms - "… **the systematic expression at the degrees of control and forms of control, use and enjoyment that are recognised and protected by law**"

Title is also associated with possession. The person entitled to possession is also assumed to be the person entitled to the title of the land; so that if he is able to prove facts that will entitle him to possession or retain possession of a thing is the person entitled to title. Smith describes title as the "**existence of facts from which the right of ownership and possession could be inferred limitation being only in terms of time. It is the degree of control and forms of control, use and enjoyment that are recognized and protected by law**" (Smith, 1999, op. cit).

Title may be **absolute** or **restricted**. When title is absolute it is synonymous with

ownership title. Where it is restricted, the person is only entitled to occupational or possessory right and not ownership title. Occupational right is also enforceable right, but less in quality to absolute title. Occupational right is therefore a subtraction from absolute title and capable of existing with absolute title on the same parcel of land.

In-Text Question
What is the difference between Smith's and Pollock's definition of title?

Title may also be **original** or **derivative.** Where it is original, it was acquired through self-help like conquest or first settlement. Derivative title is one that was acquired through transfer from the person who holds the absolute title to the property i.e. the owner of the absolute title must transfer all his interest in the property and not subject to any condition whatsoever.

Self-Assessment Exercise 1

a. What form of title is associated with ownership?

b. Restrictive title usually gives …….. Rights.

4.3.2 OWNERSHIP

Ownership implies a complete and total control a person can exercise over land. It is that interest in land that is superior to every other existing interest on land. It is unrestricted and superior to any other. It is a right to possess either mediate or immediate, and it is the right to use the property in any way or manner whatsoever. The court in the case of *Abraham v Olorunfemi* (1991) I NWLR pt.165) 53 explained the term as follows;

> "It connotes a complete and total right over a property it is not subject to the right of another person. Because he is the owner, he has the full and final right of alienation or disposition of the property, and he exercises his right of alienation and disposition without seeking the consent of another party because as a matter of law and fact there is no other party's right over the property that is higher than that of his;

The court went further to explain some of the incidents of ownership when he observed, that, 'the owner of a property

> Can use it for any purpose; material, immaterial, substantial, non-substantial, valuable, invaluable, beneficial or even for a purpose detrimental to his personal or proprietary interest. In so far as the property is his and inures in him nobody

can say anything. He is the Alpha and Omega of the property. The property begins with him and ends with him. Unless he transfers his ownership over the property to a third party, he remains the **allodial** owner" (per Niki Tobi JCA.)

Note:
Allodial is an old English word meaning absolute ownership of land independent of any superior landlord, or feudal obligations. Hence the allodial owner holds land without acknowledgment of any superior or allodial title.

Every legal system has its own special design for ownership. The meaning given to ownership under English common law is different from that of customary law. In England, all land belongs to the Crown as the absolute owner. However, the citizens who occupies land, does so for a period granted by the crown. The right to use and occupy the land is better known as the **Estate enjoyed on the land** and this has transformed into ownership. Hence, though a citizen does not own the land, he owns the Estate on the land exclusively and such right is enforceable against any other person.

a. The Concept of Communal Ownership Under Customary Law

The position is different under customary law. Since every legal system defines what ownership is, the concept also has a definition under customary law. In his Book, Nature of African Customary Law, Elias said

> "What we have said so far, as well as what we shall say later will show that the land holding recognized by African Customary Law is neither 'communal holding' nor 'ownership (in the strict English sense of the term) the term 'corporate' would be an apt description of the system of land holding since the relation between the group and the land is invariably complex in that the rights of individual members often co-exist with those of the group in the same parcel of land".

Under Customary Law, land is seldom owned by individuals; the custom recognized ownership in the community or family. Communal ownership evolved from land settled upon by the community from ancient times - this could be by conquest or first settlement. As a result, the entire land is owned by the entire community and managed by the head of the community. The individual members of the community are allocated portions of the land. These individual allottees are not regarded as owners as all land belong to the community but as against other members of the community, they have superior title.

In *Eze v Igiliegbe & Ors* (1952) 14 WACA 61, the Plaintiffs, claimed an account of rents collected by the Defendants on land which the Plaintiffs, as representatives of two quarters of the community, alleged belonged to the people of the community as a whole and not just the Defendants. In proof of their claim, which the Defendants denied, the Plaintiffs led evidence to

establish that previous grants of land and collection of rent was done by and/or on behalf of the entire community before their quarters were cut off by the Defendants. Challenging this assertion, the Defendant alleged that each quarter had its own land and that their quarters had never shared rent with the Plaintiffs HELD: As a matter of customary law, it is right to presume that land belongs to the community. Since Defendant's assertion is to the contrary they ought to prove that their quarters had title to the exclusion of the community. Having failed to satisfy this requirement, the Plaintiff's claim must succeed. A similar decision was reached in *Ovie v Omoriobokirhe* (1957) 1 WRNLR 69 where it was held that though in possession for a long time, the Plaintiff's title was possessory only and not subject of ownership to the exclusion of the community.

In line with the nature of customary law as a mirror of accepted usage, it is important to bear in mind that what is provided above is the general rule. As customs differ among communities, it is impossible to provide the rule for each community in this course material. However, suffice it to say that the notion of community ownership of land is the rule in an overwhelming majority of communities in West Africa. The decision would be different if a contrary custom is established. Hence, if a community holds a custom which permits individual ownership of land, that custom will apply to individuals in that community as an exception to the general rule. This much was noted in *Ovie v Omoriobokirhe supra* where Onyeama Ag. J noted that the onus is on the plaintiff to establish by credible evidence that, under his local land customs, land could be held by individuals i.e. that the general principle of communal land ownership which has been recognized and acted upon in all courts of W/A does not apply in his locality, or has been modified in its application. See also *Chukwueke v Nwankwo* (1985) 2 NWLR pt 6 p.195 where the Supreme Court affirmed that where such exception is established by evidence, such evidence would constitute a rebuttal of presumption of the general principle of communal ownership.

In-Text Question

What is the general rule on individual ownership of community land?

b. Family Ownership under Customary Law

Family ownership of land is similar to the structure under customary law. The land belongs to the family, and it evolves from the originator of the family first settling on a particular portion of land and after his death the land as property is inherited by his children and thereupon becomes family property. No individual member can lay claim to it and we cannot sell, dispose, mortgage or transfer ownership of the land. In the use of *Amodu Tijani v Secretary of Southern Nigeria*, (1921) AC 399 Lord Haldane explained as follows:

> "The next fact which it is important to bear in mind in order to understand nature land law is that the notion of individual ownership is quite foreign to native ideas, land belongs to the community, the village or the family never to the individual. This is a popular native custom along the whole length of this coast, and whenever we find, as in Lagos, individual owners; this is again due to introduction of English ideas".

Many scholars have criticized the view expressed by Lord Haldane that there is no individual ownership of land under customary law. Olawoye and Smith (op. cit.) agreed that the first settler has always been an individual who later pass title in the property to his family upon his death. Individual ownership may also evolve by act of state e.g. State grant of land to individuals. Currently in Nigeria, the Land Use Act 1978 by virtue of S1 thereof, all land in each state is vested in the Governor of the state, who grants right of occupancy to individuals and corporate bodies. In effect, the only right enjoyed on land today is the right of occupancy, and ownership of land today must be viewed in the light of a right of occupancy on the land.

It is noteworthy that:

i. formal grant of right of occupancy over and under the Land Use Act does not negate community or family ownership of land before 1978. Hence, the whole notion of 'deemed grants' under S. 34 and 36 of the Land Use Act under which pre-1978 valid title will suffice to establish ownership (You will learn more about deemed grants in PPL422 – Land Law II). In *Ogunleye v Oni* (SC 193 of 1987) [1962] NGSC 1 (27 April 1962) the appellant, who held a grant document dated 16th January 1978 issued by Osu Community and certificate of occupancy dated 27th June 1983 successfully claimed damages against the Defendant at the trial court for trespass. The trial court's decision was however dismissed on appeal because the respondent had established that his right to enter the land in dispute was his by inheritance from his late father to whom the land had been granted by the Ahere/Arihese people of Osu in 1936 and who had exercised various acts of possession over the land till 1947 when he died and the Respondent inherited same. The Supreme Court affirmed that a holder or occupier of land in a rural area under a recognized Customary tenure before the commencement of the land Use Act would continue to have the land vested in him and enjoy such rights and privileges on the land subject to the Decree as if a customary right of occupancy had been granted to him by the Local government of that area. The Respondent having established ownership of the land prior to 1978 when the Appellant's claimed ownership commenced holds better right than any right the Appellant could have held under his 1983 certificate of occupancy.

ii. Though individual possessory rights over community or family land would appear to have morphed into ownership in the present day (giving individual community/or

family members right to transfer their interest in land allotted to them as members of the community/family), family/community ownership remains recognized such in practice that individual family/community are usually unable to transfer title of their allotted land to third parties in their own names without recourse to the community/family. The practice in many communities/families (for instance under the community/family system in Aruogba, Amagba or Ogheghe communities in Benin City in Edo State and Oniru/Elegushi/Ojomu families in Lagos State respectively) is that a transferee of such land will still be required to pay necessary fees/levies to the community/family and obtain valid 'community/family receipts' which are recognized and tenderable as evidence in court. Similarly, the parties to the deed of assignment issued over community/family land transferred to third parties are usually the community council/Family (together as Assignor) and the third party purchaser (as Assignee). Such deed of assignment may then be submitted to the State Lands Registry for Governor's consent and registration. The purchaser may choose to execute a separate contract of sale (with root of title establishing family/community's title) with the individual community/family member from whom the land was purchased. However, such contract of sale cannot constitute the basis for seeking and obtaining the Governor's consent and registration at the Lands Registry.

Self-Assessment Exercise 2

As a general rule, individual ownership to the exclusion of the community is unknown to customary law. Mention one case in support of this rule and one case which allows exceptions.

4.4 POSSESSION

In *Oguntade & Awojobi v. Ogun* (2021) LPELR-52895(CA) possession was defined as the occupation or physical control land either personally or through an agent or servant. It is a relationship of a person to a thing. To be protected by law, possession of land must be exclusive. A person claiming possession must prove not only his relationship to the land, but physical acts showing exclusive control of the land. The act of building, or planting on land are acts of possession. He may not necessarily build, he may fence or use some other items to demarcate it, and he will be held to be in possession. See *Thompson vs. Arowolo* (2003) 7 NWLR (PT. 818) 163. In *Wuta-Ofei v Danquah* (1961) 3 All E.R. 596, where demarcation by wooden pegs was held to be sufficient acts of possession.

In-Text Question

What must a person claiming possession prove to establish his claim?

The person in possession is not without rights. Some of the rights of a person in possession include;

i. Right to Exclude Intruders

The person in possession has the right to keep away intruders. Even, where he does not have any legal title, insofar as he is in physical possession his right is protected by law. He can keep out all those interfering with his possession. See *Bello Salami & Anor. v. Lawal* (2008) 6-7 SC (PT II) 242 where it was held that a trespasser in possession can successfully maintain an action against all the world except the true owner. Similarly, Coker JSC noted in *Owe v. Osinbanjo* (1965) All NLR p.72 at 76 that 'once the plaintiff can establish his possession, even if he be a trespasser, the defendant can only justify his entry on the land by showing better title'. See also *Amakor v. Obiefuna* (1974) 1 All NLR (Part 1) 119. Note that where both parties in a dispute claim to be in possession of the same parcel of land, title is put in issue and the Claimant has a duty to prove he has a better title. See *Oyewusi v. Olagbami* (2018) 14 NWLR (PT. 1639) 297.

Though, a person in possession not be able to keep out the person with a better title; if he resists the person with better title person may have to apply to court to eject him from possession. In *Persons, Names Unknown v. Sahris Intl Ltd*. (2019) LPELR-49006 (SC) it was held that though a land owner is not obliged to go to the courts to obtain possession, this is not a course to be recommended. The courts provide a remedy which is speedy and effective and thus make self-help unnecessary. A landowner is therefore entitled to go to court and obtain an order stating that he wants to recover the land, and to issue a writ of possession immediately.

ii. Presumption of Ownership

The person in possession is presumed to have title to the property until the person with better title is established and declared by a competent court. As against other trespassers the possessory title of the person in possession will be upheld. In fact, if the real owner does not take any step for a period of time, the possessory right of the adverse possessor may ripen into title for lapse of time or by larches and acquiescence on the part of the real owner. This is also known as ownership by prescription or Ownership by adverse possession. In *Akpan Awo v. Cookey-Gam* 3PLR/1913/1 (SC-L) the Defendants were in possession of the Plaintiff's land with full knowledge and acquiescence of the latter for over 21 years. When the Plaintiff sought to eject the Defendants, it was held on trial and affirmed on appeal that it would be wholly inequitable to deprive the Defendants of property of which they had held undisputed possession, collecting rents etc. with the knowledge of the Plaintiffs. The Plaintiffs were therefore estopped from claiming title to the land having acquiesced to the Defendants adverse possession for so long.

By virtue of S.16 (2) of the Limitation Laws of Lagos State a valid title holder will be

barred from bringing an action to recover such land from an adverse possessor who has been in undisturbed and continuous possession of the land for 12 years from the date on which the right of action accrued to the title holder. Where title is held by a State Authority, the limitation period is 20 years pursuant to Section 16(1) of the same Law. Section 21 of the same law provides expressly that 'on the expiration of the period fixed by this Law for any person to bring an action to recover land, the title of that person to the land will be extinguished'.

The 12 year limitation period also applies in Edo and Delta States by virtue of Section 6(2) of the Limitation Law Cap 89, Laws of Bendel State. See *Unity Bank v. Akpeji* (2018) LPELR-44995 (CA). For Cross River State, the limitation period is 10 years. See Sections 1 and 7 of the Limitation Law of Cross Rivers State Cap L14 Cross Rivers State Laws.

Note:

1. The rule on ownership by prescription is applicable under the Islamic law principle of Hauzi which provides that the period of prescription under Islamic law is 10 years where the parties are not related by blood or marriage. Where a person has been in undisturbed possession of a landed property for a period of ten years or more while the true owner stands by and does nothing to reclaim his property, he acquires title by prescription except he was in permissive occupancy only. See *Abubakar v. Salihu* (1961 – 1989) SLRN 243; *Ahmadu Idi Aku v. Alhaji Sabo Tsage* (unreported) Appeal No. CA/K/248/89 delivered on 17th October 1990; *Alhaji Audu Yaro Ningi v. Muhammadu Dan Katsina* (1990) 3 NWLR (Pt. 177) 76

2. The rule on ownership by prescription is not applicable to tenures held under native law and custom. This exception has been affirmed in various decided cases. See *Unity Bank v. Akpeji supra; Agboola v. Abimbola* (1969) 1 ALL NLR 287; *Majekodunmi v. Abina* (2002) FWLR (pt. 100) 1336. *Ogunlana v. Dada* (2009) ALL FWLR (pt. 473) 434. See also *Akpan Awo v. Cookey Gam supra* where the Supreme Court of Lagos Colony took notice of the principle but refused to apply it on equitable grounds. The exception is also recognized under various Limitation Laws exclude which claims for possession in respect of interest in lands subject to customary land tenure. (See Section 1(2) of The Limitation Laws of Bendel State applicable in Edo and Delta States; Section 68(2) of Limitation Law of Lagos State). However, the Supreme Court recently delimited the extent of this exception in *Oteri Holdings Ltd v. Oluwa* (2021) 4 NWLR (Pt.1766) 334 and held that the customary law exception will only apply to transactions subject customary land tenure and not to transactions subject to English (or General) law. A summary of the case is provided below.

Oteri Holdings Ltd v. Oluwa (2021) – Case Summary

A dispute arose within the Oluwa Chieftaincy Family of Lagos and Apapa over the number of branches which constitute the family leading to a lawsuit in Lagos State High Court. Whilst the dispute was still pending part of the family land was granted to the Appellant in 1975, under a Deed of lease which the Appellant duly registered at the Lands Registry, Lagos. Following judgment in 1987, 5 branches were certified as part of the family. This decision was challenged vide appeal lodged at the Court of Appeal which was subsequently dismissed for lack of diligent prosecution. A subsequent appeal to the Supreme Court was also withdrawn and dismissed in 1992. Following the appointment of a new family head, a fresh executive made up of members from all five branches was constituted. They therefore sought to recover the piece of land leased to the Appellant vide originating summons dated 22nd September 2011. This was challenged by the Appellant on ground that it was statute barred. The trial court held in favour of the Appellant. The family successfully challenged the judgment of the trial court at the Court of Appeal. Upon further appeal, the court distinguished between the general rule on application of limitation laws to land subject to customary land tenure and land held under general law. The court observed that thigh the land devolved on the Respondents as descendants of Amodu Tijani under customary land tenure, the transaction between the parties was executed under general law (per Deed of Lease) with distinct requirements guiding such transaction from that guiding transaction of customary land. Hence, the cause of action not being founded on the ownership or devolution of the land to the Respondents under customary law but on the root of title to the Appellant's possession which is traceable to a transaction under General law, the applicable law should be General law and not customary law. Accordingly Section 16(2) of the Limitation Act of Lagos State should apply. It was therefore held that the right to challenge the transaction between the Appellant and the 3 branches of accrued in 1992 when the appeal in the dispute on family branches was dismissed by the Supreme Court The Respondents having slept on their rights since then could therefore not seek to resuscitate their claim after 19 years (in 2011 when the filed the originating summons against the Appellant).

Self-Assessment Exercise 3

By its decision in Oteri Holdings Ltd v. Oluwa, the Supreme Court has made the rule on ownership by prescription applicable to transactions subject to customary land tenure. Discuss.

iii. Right to Presumption of Ownership of Land in Evidence

The Evidence Act recognizes the right of the person in possession to presumption of ownership of land in dispute and any connected land within the locality. Section 35 of

the Evidence Act 2011 provides

> Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land with reference to which such acts are done but also of other land so situated or connected with it by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land.

Similarly, Section 143 provides that 'when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.' See *Dada & Ors. v. Bankole & Ors.* Suit No. SC/40/2003 (2008) JELR 47124 (SC).

In *Dimkpa v. Chioma* (2010) 9 NWLR (Pt 1200) 482 @ 509, Kekere –Ekun J.C.A. as she then was stated that -

> "By the provision of section 46 [now 35] of the Evidence Act, acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land."

4.5 SUMMARY

Title to land may be absolute or unrestricted or it may be limited or restricted. There is a differencebetweenrighttooccupyalandandtheownershipright.Thepersonin possession is not necessarily the owner thereof.

The person in possession is assumed by law to be the owner until the contrary is proved. Even, then, he still can enforce his rights of occupation against any other person except the person with superior title or owners. The person who has title to a land is the proper person recognized by law as the true owner of the land. The title depends on the type of right exercisable by the person who is claiming title. Title may be acquired by first settlement or conquest (both forms of original title), or inherited (conferring derivative title). The owner of land is the person that has the most superior title to the property, with right to mediate or immediate right to possession, while the person in possession is that person who is in actual physical possession of the land.

4.6 Reference/Further Readings/Web Sources

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J. Finine Fekumo, Principles of Nigerian Customary Land Law (2002) F & F

Possible Answers to Self-Assessment Exercises

SAE 1

a. absolute title is associated with ownership
b. Restrictive title gives possessory rights

SAE 2

Cases in support of the rule
Eze v Igiliegbe & Ors (1952) 14 WACA 61
Ovie v Omoriobokirhe (1957) 1 WRNLR 69
Amodu Tijani v Secretary of Southern Nigeria, (1921) AC 399
Cases which allow exceptions
Chukwueke v Nwankwo (1985) 2 NWLR pt 6 p.195
Ovie v Omoriobokirhe (1957) 1 WRNLR 69

SAE 3

The statement is incorrect. The Supreme Court affirms that the rule against ownership by prescription remains applicable under customary law. It only limits its applicability to issues arising out of transactions which are subject to customary land tenure. Accordingly where an issue arises out of a transaction not subject to rules of customary land tenure, the rule will not apply.

MODULE1

Unit5: **DUALITY OF LAWS IN NIGERIA**

CONTENTS

5.1 INTRODUCTION

Customary Law and Received English law govern rights on land in Nigeria. In Nigeria, prior to the introduction of English law the entire land tenure was governed by customary land tenure. However with the advent of received English law, customary law still governs land tenure alongside the Received English Law. The problem of duality of law is to identify the law which should govern a particular situation. Since it is possible for the two systems to exist on land at the same time, we must be able to identify the appropriate law to apply at every point in time. The point when and how the customary law is converted to English law and English law is converted into customary law is the focus of this unit.

5.2 LEARNING OUTCOMES

By the end of this unit you should be able to understand

i. the problems of duality of laws in land law
ii. how the problems are solved

Key words

Escheat = a situation in which property or money becomes the property of the state if the owner dies without a will.

Lex rei sitae = a Latin term meaning the law of the place where the land is situated

5.3 MAINCONTENT

In-Text Question 1

Has Nigeria always had a problem with duality of law where land law is concerned?

5.3.1 The Problem of Duality of Tenure

Upon their advent into the regions of Nigeria, the British met a tenure system of landholding which (in their view) made land difficult to access by foreigners who needed them to raise capital and for commercial activities. Their introduction of English common law principles and statutes sought to deal with this problem. However, this raised the issue of duality of tenure as

two different systems of law were then in operation – customary law on the one hand, and English law (common law, equity and statutes of general application) on the other hand. See *Coker v. Animashaun* (1960) LLR 7, where the applicability of English Common Law and Statutes of General Application in the territory of Lagos was affirmed.

In view of the position of two different land tenures in Nigeria, the problem had always been identifying the particular law governing the particular transaction. This is a problem that has agitated the minds of judges over the years. The initial question had been whether it is possible to convert customary land holding to a fee simple estate. The resolution of the problem is not easily attained because the estate in fee simple absolute in possession is the most superior title capable of being held in land in England. This estate is different in its quality and content from the ownership structure under customary law. What this means is that where a customary holding is to be converted into fee simple estate, the maxim n*emo dat quod non habet* (i.e. no one can give what they do not have) will apply. Since the two interests are different in quantum and quality; it becomes impossible to convert one into another.

We may need to explain this further: Originally, a fee simple was an estate which endures for as long as the tenant or any of his heirs (blood relations and their heirs and so on) survived. Thus, at first, a fee simple would terminate if the original tenant died without bearing any descendants or collaterals (e.g. brothers and cousins) even if before his death the land had been conveyed to another tenant who was still alive. By 1306 it was settled that where a tenant in fee simple alienated the land, the fee simple would continue as long as there were heirs of the new tenant - irrespective of any failure of the original tenant's heirs. Therefore, a fee simple was virtually eternal, subject only to **escheat**, if the tenant for the time being died having no heir (See Megarry and Wade, Law of Real Property). In other words the owner in fee simple of land in England is the absolute owner thereof and can deal with the land in any way.

In-Text Question
What may defeat the ownership rights of a tenant in fee-simple?

Customary land holding is totally at variance with the English system. Kingdom C.J. explained the complexity of the problem when he observed, that,

> "the whole idea of fee simple is so contrary to native law and custom that…it cannot exist side by side with native customary tenure in respect of the same piece of land. There can be only one *rex lei sitae* and in this case, there can be no doubt that the original *rex lex sitae* is native law and custom, nor can I subscribe to the proposition that the native law and custom applicable to the area in which the land in dispute is

> situated has so changed that now it is in accordance with it that land can be held and conveyed in fee simple". - *Balogun* v. *Oshodi* (1929) 10 W.L.R 36 at 57.

The problem that has agitated the minds of judges had been how to convert customary ownership to fee simple interest, because the customary interest merely confers possessory right so that it does not confer any attribute of ownership. Tow J. in the case of *Balogun* v *Oshodi supra* also observed as follows: -

> "to say that a person may acquire a freehold interest in land of which the vendor, or the person through whom he claims, was merely occupier on condition of good behavior, would be a stealing preposition which I am not think that the equitable jurisdiction of the court can be involved to convert a more right of occupancy because the occupier purported to convey the freehold by means of an instrument drown in English form".

In *Nelson v Nelson* (1951) 13 WACA 243, the Nelson family decided to use money paid by government as compensation for acquisition of family property to another parcel of land. The conveyance was done in favour of the family head in English form. The family head thereafter sold the land to a third party. In an action to set aside the sale, the court held that the land is family property notwithstanding the form in which it was conveyed.

In the case of *Boulous v Odunsi* (1959) 4 FSC 234, the plaintiff claimed title in fee simple over a parcel of land which he acquired under customary law. His title under customary law was voidable, and could be voided at the instance of the family. He thereafter created a series of conveyances purporting to convert the land to a fee simple estate. The court held that it was not possible to convert such interest under customary law into an estate in fee simple.

Self-Assessment Exercise 1
With particular reference to ownership and its incidences, differentiate between fee-simple estate and customary land holding.

5.3.2 JUDICIAL SOLUTION TO THE PROBLEM

In solving the problem of duality of tenure, Nigerian courts recognised that English and customary land tenure are different in nature and incapable of exact conversion. Hence, notwithstanding the words used in drafting title documents in English language, the original nature of ownership remains paramount (i.e. whether individual ownership or family ownership) such that one is only able to give what he has and nothing more. Hence, absolute interest in land held under customary law, if said to be transferred by deed in fee simple would be not defeat the interest of the land owner. So family land remains family land regardless of

conveyance in ‘fee simple’ and can only be conveyed in line with the rules of customary land tenure guiding family property. The same will apply to land held under individual ownership under customary law. In effect the problem of duality amounts to ‘no more than distinction without a difference’ (See the article by Oluyele Delano SAN on the problem of duality of tenure).

In *Alade v. Aborishade* (1960) 5 F.S.C, Page 167 at 174 the Supreme Court established that family property could not be transferred by a single member of the family alone. Instead, regardless of the terms used, transfer of family property would only be valid if the family head and principal members agree to such transfer. They noted:

> “We have expressed the view that if a family is the absolute owner of land, the totality of the family interest in the land may be transferred if the head and all members of the family agree. Judges have used different epithets to describe this interest: fee simple; fee simple absolute; absolute title; absolute ownership...”

Similarly in *Kabiawu v Lawal* (1965)1 All NLR, Page 329 it was established that the land in dispute had been conveyed to the Plaintiff’s father in by a deed of conveyance fee simple. He thereafter claimed a declaration of title to said land under customary law. The court affirmed his claim, reasoning that an owner of land under native law and custom is free to transfer his absolute interest and describe the entirety of such interest conveyed by him as “an estate in fee simple”.

5.4 SUMMARY

The problem of duality of tenure has its roots in the transplantation of English principles and statutes to operate pari passu with customary rules of land tenure in operation before the incursion of British rule into the communities of land. Owing a lack of understanding of the notion of communal ownership of land under customary law, the initial challenge related to the conversion of customary tenure to fee simple interest. The issue has proven to be simpler than initially thought since the focus ought to be on the substance of interest held and not on the wording of instruments of transfer. Following the *nemo dat* principle it has been established that absolute interest is transferable under customary land tenure as with fee simple as long as the interest transferred does not exist that the powers of the party. Accordingly, family property remains family property whether or not expressed as ‘fee simple’ and should be transferred by agreement of head and individual members of the family. Similarly, individual property is also transferable under customary law regardless of the transfer documents.

5.5 Reference/Further Readings/Web Sources

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the

Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

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Possible Answers to Self-Assessment Exercises

SAE 1

Fee simple estate confers almost eternal ownership on the tenant in fee-simple. This includes ownership rights and the right to do with the land whatever the tenant-in-fee-simple wishes – including sale and other forms of alienation. Customary land tenure is different. It does not confer ownership rights on the allottee of land subject to customary law. Ownership always resides with the community or family as the case may be. As a result, while he is entitled to exclusive possession, an allottee of land under customary law cannot do with it what he wishes or alienate at will.

MODULE 2

UNIT 1: MODES OF ACQUISITION OF TITLE TO LAND

CONTENTS

1.1 INTRODUCTION

The mode of acquisition of title to a land is very important. This is because in an action for declaration of title to land, the claimant must be able to trace his root of title i.e. to the original owner. He must not only prove the title through his predecessor in title he must also prove a valid transfer of the interest to him. *Nsirim v Nsirim* (2002) 3 NWLR (Pt 755) at 697.

Title to land may be acquired through various means. They include:
i. first settlement on land (and deforestation of virgin land)
ii. conquest during tribal wars
iii. gift
iv. customary grant
v. sale, and
vi. inheritance
See *Ajiboye v. Ishola* (2006) LPELR- 301 SC

In Unit 4 of Module 1, we learnt that title to land may be either original or derivative. In this

unit, we will focus on original title. An original title is one that is the very root, and not derived from any other source. It is the foundation of the title beyond which there is no other title. Under customary law, original title to land is obtained by settlement or conquest.

In-Text Question

Mention five modes of acquisition of title

1.2 LEARNING OUTCOMES

By the end of this unit, you should be able to;

i. Discus the modes of acquisition of original title.
ii. Explain why conquest is regarded as a mode of acquisition of original title

1.3 MAIN CONTENT

In-Text Question

The modes of acquisition of title are broadly classified into two: one of them is called 'original title'. What is the name of the other?

1.3.1 Settlement

Settlement connotes the person who first settled on a particular parcel of land settled free from any other adverse claim. Traditionally, a number of original Nigerian city states (e.g. the Nri of Eastern Nigeria, the Benin Empire in Midwestern Nigeria and the Oyo Empire in Western Nigeria) trace their origins from settlement of various ancient African civilisations in their respective parts of the region now known as Nigeria.

A first settler is recognized in law as the owner thereof. The settler may be a family or community or even individual from whom a family or community trace their roots generations thereafter. The title of a first settler is established as an absolute one. The first settler must prove that at the time of first settlement there was no other claimant or settler on the land. In the case of *Owonyin v Omotosho* (1962) W.N.L.R 1, the court held, "But ownership or title must go to the first settler in the absence of any evidence that they jointly settled on the land or that a grant of joint ownership was made to the later arrival by the first. The question, therefore, resolves itself to this – who was the first settler on the land"…

Note: The title of 'first settler' notwithstanding, common ownership may be extended to a latter settler who, subsequent upon the settlement of a previous settler was allowed to settle in the same land and lived in amity with the previous settler to the extent that joint ownership was established. In *Owoniyin v. Omotosho supra,* it was established that though the Plaintiff's ancestor – Owoniyin was the first settler, Okegbemi – the defendant's ancestor came later and abided in the land in dispute with the permission of Owoniyin which subsequently matured to joint ownership with joint acts of ownership including joint founding of new hamlets, joint allocation of portions of the land to newcomers/customary tenants, defence of their joint claim against adverse parties/encroachers. On the strength of this evidence, the court held that it was immaterial whether Owoniyi or Okegbemi settled on the land first if the first settler made the latter arrival his partner and both lived in amity thereafter. Accordingly, the court awarded ownership of the land in disbute to both the Owoniyin and Omotosho families according to native law and custom.

Self-Assessment Exercise 1

Mention 3 principles of law established in Owoniyin v. Omotosho.

Where the first settler merely settled on land and later abandons it without laying claim to any portion of the land, he cannot later come back to claim ownership. **Note** that abandonment is a question of fact. Hence, land left fallow for several years may not actually be abandoned if the land is used for a particular purpose e.g. customary coronation activities (Benin Kingdom), customary burial, evil forest etc. In such cases subsisting ownership of the fallow land may become clear upon any attempt by third parties to encroach on said land.

In case where the first settler allowed others to inhabit the portions of the land, he must exert some form of rent from them to assert of his ownership, where this is not done, if may be impossible for him to do this later. *Owoniyin v. Omotosho supra.*

Today, it may not be easy for anyone to assert that he acquired the land by settlement as no land in Nigeria is free of settlement.

To successfully prove ownership of land under customary law today, the claimant must be able to trace his title to his predecessor-in-title (including the root title holder) inability to do this may be fatal to his claim. In *Ibude v. Saidi & Anor* (2021) 10 NWLR Pt. 1785 at 567 the Appellant successfully traced his title to inheritance from his late father (predecessor-in-title) who had been granted the land in dispute by Oba Akenzua of Benin (the root title holder).

1.3.2 CONQUEST

Acquisition of land by conquest is possible under native law and custom. Whilst the land may have been subject of ownership by another person, upon conquest of the previous owner, the conqueror is regarded as the original owner of the land. The Privy Council in the case of *Mora v Nwalusi* (1962)1 All NLR681 agreed that it is not in doubt that proof of possession following conquest will suffice to establish ownership".

For conquest to suffice as proof of acquisition of title, it must be followed by effective possession of the land previously under owned by the displaced vanquished. In *Echi v. Nnamani* (2000) JELR 55761 (SC), it was held per Karibi-Whyte that 'in plain terms, proof of conquest by a community followed by effective occupation or possession of the land in dispute is sufficient to confer title to land under customary law'

In-Text Question

How would you define 'conquest'?

As a matter of fact, the word 'conquest' portends previous ownership. Hence, since the conqueror displaced and therefore acquired the title from the first settler – his title may be deemed to be derivative and not really original. However, It is still generally agreed that acquisition by conquest is still an original acquisition by conquest is still an original acquisition of title under customary law. (See Olawoye at p.41).

Note however, that it is not possible today to acquire title by conquest; in fact a forceful or violent acquisition of land is a criminal offence.

Self-Assessment Exercise 2

For a claim of acquisition of title by conquest to be successful, what must the claimant prove?

1.4 SUMMARY

There are only two recognized means of acquiring original title under customary law–these are by settlement and by conquest. Settlement is the right of the first settler on land, who is exercising maximum rights of ownership and which is recognized by law. Conquest on the other land is a forceful displacement of the original settler forcefully and establishing the conqueror's occupational rights on the land.

As we noted in this unit, settlement and conquest may not be possible in the present day. However, a claimant must still be able to prove his root of title to any of these two mode of acquisition of title under customary law.

1.5 REFERENCES/FURTHERREADING/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

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Lloyd, (1962) Yoruba Land Law

1.6 ANSWERS TO SELF ASSESSMENT EXERCISES

SAE 1

Owoniyin v Omotosho established the following principles of law

a. Once established as such, the first settler is entitled to ownership of land

b. Common ownership of land is possible upon proof that the first settler accepted the settlement of a subsequent settler and lived in amity with same, engaging in joint acts of ownership with the subsequent settler

c. The first settler's title is absolute

d. Where a first settler allows subsequent third parties to settle on his land, he must exert some rent from them in exercise of his right of ownership. Otherwise he may not be able to do so later.

SAE 2

To establish a claim of ownership by conquest, the claimant must prove :

a. Conquest and forceful displacement of a previous title holder

b. Occupation /possession of the land forcefully acquired by conquest to the exclusion of others.

MODULE2

Unit 2: **ALIENATION OF TITLE UNDER CUSTOMARY LAW**

CONTENTS

2.1 INTRODUCTION

Until recently, it was unthinkable to the family or communal landowner to alienate land. This was because of the belief that land belongs to the present and future generations unborn, and so it is so secured that nobody believed that it could be sold. It is usually given out temporarily, and could be recalled at any time, or even where it is understood that foreigners occupy the land as tenants, the understanding is always that the land ultimately belongs to the family/community as overlords. This attitude has led many observers to opine that land cannot be alienated under customary law. Dr. Elias observed "There is perhaps no other principle more fundamental to the indigenous land tenure system throughout Nigeria than the theory of inalienability of land". In the case of *Lewis v Bankole* (1908) I NLR 81 Osborne C.J. declared, that, "the idea of alienation of land was undoubtedly foreign to native ideas in the olden days".

However, with the advent of colonialism, and improvement in commercial activities, influx of foreigners to cities, the initial and old idea that land is in alienable began to change and also judicial attitude. In the case of *Oshodi **v** Balogun* (1936) 4 W.A.C.A.1 at 2, the Privy Council observed as follows:

> "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 alienation of family land with the general consent of the family and a large number of premises on which substantial buildings have been erected for purposes of trade or permanent occupation have been so acquired…. Their lordships see no reason for doubting that the title so acquired by these purchasers was an absolute one and that no reversion in hand of the chief was retained".

Alienation of land under customary law may take various forms. The owner may sell outrightly, or merely make a gift absolutely to a third party. There may also be conditional gift, or pledge of land or borrowing of land; this with condition that the transfer of possession is temporary and may be recalled or repossessed upon certain agreed conditions.

We shall therefore examine in this unit, the nature of sale, absolute gift, conditional gift, borrowing of land and pledge, as means of obtaining derivative title to land.

2.2 LEARNING OUTCOMES

At the end of this unit you should be able to

a. Discuss the different forms of alienation of land under native law and custom
b. Explain the conditions for a valid sale of land under customary law

2.3 MAIN CONTENT

In-Text Question

Refresh your memory. Can you remember the difference between original and derivative title? If you cannot, do take a minute and look it up in Module 1, Unit 4

2.3.1` SALE

A sale is the permanent transfer of land for monetary consideration or money's worth. It is an act that **permanently** deprives the original owner of all interests' benefits and claims on the landed property, and the original owner ceases to be recognized as the owner thereof. The mere exchange of money is not conclusive proof of sale, there must be no doubt as to the intentions of the parties, the transaction must be conclusive, and the intention of the owner must be genuinely for the purpose of parting with the entire interest in the property. Clearly, the person transferring the property must be a person capable of doing so. If he does not have such right, the sale cannot be valid, and the sale is void. In the case of *Folarin v Durojaiye* (1988) IN.W.L.R (pt. 70) 351, the court held that -

i. there are two clear and distinct ways in which land in Nigeria can be properly and rightly sold, validly acquired, and legally transferred. They are either under customary law or under the received English law. Each method of sale has its peculiar incidents and formal requirements and failure to observe these incidents of sale may invalidate the purported sale.

ii. it is prerequisite to a valid sale under customary law that the purchaser be let into possession.

iii. in order to transfer legal title under English law by purchase there must be a valid sale, payment of money accompanied by acknowledgment of receipt and execution of deed of conveyance in favour of the purchaser see *Erinosho v Owokonoran (*1965) N.M.L.R 479.

iv. Where land is sold under English law or statute law, money is paid and receipts are issued, the purchaser can only acquire an equitable interest if he goes into possession. See *Ogunbanbi v Abowaba* (1951) 3 W.A.C.A. 222.

See also *Abioye v. Yakubu* (1991) 5 NWLR (Pt. 190) 130

For a valid recognised sale of land under customary law, the following conditions must be met:

i. The person selling must have the title under native law and custom, to sell and dispose of the property.

ii. The purchase must be concluded in the presence of witnesses who also witnessed the actual handing over or symbolic delivery of the land bought by the purchaser. See *Chief Okonkwo v Dr. Okolo* (1988) 2 NWLR (pt 79) 632.

Note that the requirement of executed title deeds is not a condition for a valid sale under customary law. As long as the seller has valid title with the purchase concluded in the presence of witnesses and the purchaser being put into possession, a sale under customary law will be valid. This is because writing is foreign to native law and custom. See *Kamalu v. Ojoh* (2000) 11 NWLR (Pt. 679) p.505 @517

Note: Apart from sale, this requirement of hand over in the presence of witnesses applies to all forms of alienation under customary law. See *Cole V. Folami (1956)* 1. F.S.C 66 @ 68, *Ajayi v. Olanrewaju (*1969) 1 All NLR 382 @ 387, *Orun-nengimo V. Egebe* (2008) 9 S.C.L.R (ph.7) pg. 82 @ 102

The decision of the Supreme Court in *Oteri Holdings Ltd. v. Chief Mukaila Kolawole Oluwa & Ors* (2021) 4 NWLR (Pt.1766) 334 further clarifies the distinction between sale of land under customary law and sale of land under English law. The Appellants leased land from the family (represented by three branches thereof) in 1975 and the parties executed a Deed of Lease in respect of same. Following the inauguration of a fresh executive drawn from five branches of the family, the family unsuccessfully sought to recover the land leased to the Appellant. On appeal the Supreme Court clarified the difference between the nature of title held by the family and nature of the transaction between the Appellant and the 3 branches of the Oluwa family. Whilst it was agreed that the Family held customary title, the court held that the land transaction was executed under General [English] law as show in the Deed of Lease. Hence, it was not subject to the customary restriction enunciated in S. 68 of the Limitation Laws of Lagos State. The court therefore agreed with the Appellant that owners of land held under customary law may decide to transact outside customary law.

For a concise report on the case see 'Differentiating between the Applicable Law in Customary Land Transactions (ThisDay Law)
https://www.thisdaylive.com/index.php/2021/05/04/differentiating-between-the-applicable-law-in-customary-land-transactions/.

Self-Assessment Exercise 1

Differentiate between the prerequisites for a sale of land under English law and a sale of land under customary law.

2.3.2 ABSOLUTE GIFT

A gift of land could either be absolute or conditional. An absolute gift is as good as sale as it totally divests the owner of all his interests in the land. A party claiming absolute gift must prove that in fact there was absolute gift of land and not a conditional gift. See the case of *Isiba v Hanson* & Anor (1967) NSCCS. It was held in the case of *Jegede v Eyinogun* (1959) 5FSC 270, that a family which had made an absolute transfer of its land by way of gift could not recall the land upon misconduct.

As with other forms of alienation under customary law, an absolute gift is valid only upon proof of handing over of the land subject of the gift to the recipient in the presence of witnesses. The beneficiary must prove the existence of such a gift and the existence of witnesses who witnessed the transaction. In *Akinyele & Ors. V. Adebayo* (Case No AK114 of 2012) [2015] NGCA 7 it was held that the presence of witnesses is not merely of evidential value but a necessary part of the transaction. Hence, the presence of witnesses gives the transaction not only solemnity but validity.

2.3.3 CONDITIONAL GIFT

Strictly speaking, a conditional gift of land is a tenancy in nature since it ownership of land never passes on to the donee of the conditional gift. A conditional gift only transfers occupational rights to the tenant and not ownership. The donee of the conditional gift is therefore known as customary tenant while the owner/donor becomes his overlord. The customary tenant holds the land for an indefinite period of time. In *Aghenghen & Ors v Wagheroghor & Ors* (1974) 1 SC 1 @ 6, Elias J stated that

> In customary land law parlance, the customary tenants are not gifted the land, they are not borrowers or lessees, they are grantees of land under customary tenure and hold as such, a determinable interest in the land which may be enjoyed in perpetuity subject to good behavior.

Unlike tenancy under English law which is for a term of years, under customary law, the customary tenant's tenure is perpetual subject only to good behavior and periodic payment of "Ishakole" or rent, this is nothing but an acknowledgment of his standing as a tenant. The land is inheritable by his children, but he must not sell or part with possession of the land. Martindale J in *Etim v Eke* (1941) 16 N.L.R 43 at 50 explained the position thus,

> "It is now settled law that once land is granted to a tenant in accordance with Native Law and custom whatever be the consideration full rights of possession are conveyed to the grantee. The only right remaining in the grantor is that of reversion should the grantee deny title or abandon or attempt to alienate. The grantor cannot convey to strangers without the grantee's permission any rights in respect of the land".

The Supreme Court further described the nature of the customary tenancy in *Abioye v. Yakubu* (1991) 5 NWLR pt 190 p130 @217.

> "The legal nature of a holding under customary tenancy is that the holding of the customary tenant is not a gift or a loan nor is the land given for a definite term (which differentiates him from a lessee). Customary tenancy is a grant upon terms and conditions agreed with the owners and provided that he keeps to the conditions of the grant and payment of tribute, the customary tenant can keep and enjoy possession of his holding from years to year in perpetuity bit no matter how long he is on the land he does not and cannot acquire ownership. He is liable to incur forfeiture and lose his tenancy on breach of the terms and conditions particularly alienation without consent and a challenge of the overlord's title. This is because a customary tenant is a tenant from year to year liable under customary law to pay rents or tributes to the Landlord for the use of the land …"

In-Text Question

A conditional gift is, in essence, not actually a gift. Why is this so?

2.3.4 BORROWING OF LAND

Borrowing of land is a temporary grant of use of land to another person. The period is not usually specified, but is tied to the particular purpose for which the borrowing was granted. It could be for a planting season some other temporary purpose which is time bound. In of *Adeyemo v Ladipo* (1958) W.R.N.L.R. 138 the court held that a temporary grant of land for building purposes was unknown to customary law. The reasoning behind this decision is clear – building is usually permanent hence cannot become subject of a temporary grant of land. Upon the expiration of the term for which the land was borrowed or completion of the purpose for which the grant was made, the land reverts to the original owner.

Borrowing is similar to customary tenancy in that it entitles the grantee to exclusive possession but never ownership. However, it differs from customary tenancy where the term is concerned. Borrowing is usually for a specified period but customary tenancy enures in perpetuity subject to good behaviour. See *Muemue v Gaji & Anor* 3 (2001) 2 NWLR pt 697 p289 @ 309.

In-Text Question

Why will a borrower of land be precluded from using the land for construction of a building?

2.3.5 PLEDGE

A pledge is created when an owner of land transfers possession of his land to his creditor as security or rather, in consideration of a loan with the object that he should exploit the land in order to obtain the maximum benefit as consideration for making the loan. (See Olawoye op. cit. 50). Though sometimes referred to as a customary mortgage, a pledge is not a mortgage as time lapse never defeats redemption.

The popular maxim is that *once a pledge always a pledge*. In effect, a pledge is always redeemable, and time does not run against redemption. In *Okoiki v. Esedalue* (1974) 3 SC 15, the Respondents' forefather granted a pledge to the Appellants' forefathers who jointly paid for the purchase of a piece of cloth valued at N30.00. Whilst the pledge subsisted, the pledgees continued farming on the pledged land and upon their demise, their descendants continued same. The Respondents as descendants to the Pledgor sought to determine the pledge and repay the N30.00 loan but the Appellants refused initially asking for a sum equivalent to the present day value of the loan and subsequently contending that the transaction between their forebears was a sale and not a pledge. The court in line with the principle that a pledge is always redeemable ordered the Respondents to repay the sum of N30.00 as offered and take possession of the pledged land. This decision was affirmed on appeal.

The pledgee is not expected to plant economic trees or commit waste. He cannot sell or part with possession. He only takes occupational rights, ownership is never transferred. He is not expected to erect permanent structures. If he does, upon the payment of the debt, the pledgor takes all. Whether the pledgor was aware of the erection of such structures or not, the rule of acquiescence does not apply to pledges. In *Okpowagha v. Ewhedoma* (1970) 1 All NLR 203, the supreme court adjudged the rule against compensation of pledgee for improvements on pledged land a reasonable deduction from the principle that a pledge is perpetually redeemable. As an exception to the above principle, where there are still unharvested crops on the land, the pledgee will be allowed to harvest even after the debt has been paid. See *Amao v Adigun* (1957) W.N.L.R 55. See also *Okoiki v. Esedalue supra* where the trial court essentially ordered that the Pledgee family be allowed to harvest their

crops subsequent upon redemption of the pledge.

Self-Assessment Exercise 2

Kunle pledged his plot of land to Chinedu in consideration of a loan of N5,000.00 which he pumped into his cement business. After waiting for over 10 years without receiving his money back, Chinedu constructed a building on the land to and Kunle assisted him with space to store his cement for the construction. If Kunle repays the loan, will Chinedu be entitled to compensation for the building constructed on Kunle's land?

2.4 SUMMARY

Clearly, under customary law, land may be put to various uses by the owner, and in the exercise of his powers as the absolute owner, may pledge, loan it out, give the land conditionally to tenant or unconditionally, and may sell outright. These are all examples of forms of alienation of land under customary law.

Sale of land is outright parting or transfer of ownership of land. It is total and absolute and irreversible. Absolute gift is also absolute like sale. Conditional gift, pledge, borrowing of land only give occupational rights only, and the ownership still resides in the owner.

2.5 REFERENCES/FURTHE RREADING/WEB SOURCES

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2.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

One prerequisite for sale of land under English law is reduction into writing vide a Deed of Assignment in favour of the purchaser. Where payment is made and the purchaser is put into possession without the execution of a valid deed of assignment, all the purchaser obtains is equitable title. Execution of a deed of assignment is not a requirement for sale of land under customary law. Instead, the requirements for sale under customary land are payment in full, legal capacity, transaction in the presence of witness and putting the purchaser into possession.

SAE 2

Kunle's knowledge and actions notwithstanding, Chinedu will not be entitled to compensation. The pledgor's acquiescence cannot work in favour of the pledgee since a pledge is perpetually redeemable.

MODULE 2

Unit 3: CONTROLANDMANAGEMENTOFCOMMUNITYLAND.

CONTENTS

3.1 INTRODUCTION

In this unit we shall examine the nature and extent of communal lands under customary law. Under customary law, land is either owned by the community or family. We will therefore examine how the community land is managed and controlled, how customary law regulates the powers of the chief or head of the community so that all the members of the community may derive maximum benefits from the community land. The position of the head of the community is important, and should be properly understood.

3.2 LEARNING OUTCOMES

By the end of this unit, the student should be able to

i. Explain the position of customary law on ownership of communal lands

ii. Discuss the position of the head of the community in the control and management of communal land.

3.3 MAIN CONTENT

3.3.1` CONTROL AND MANAGEMENT OF COMMUNITY LAND

In-Text Question
Who owns communal land under customary law?

The creation of communal land is not easily determined. However, most traditional history of most communities always traced their origins either to a particular family or individual who migrated from a particular place, travelled over a long distance to settle in the present site where the community is now based. Some are acquired by conquest, this is by displacing the previous settlers on the land and taking over the land as the owners thereof. Upon settlement, the land is regarded as belonging to the community as a whole and not the property of any individual. The Privy Council confirmed this when the court observed in *Amodu Tijani v. Secretary, Southern Nigeria* (1921) 2 AC 399 that land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to land. Coussey J. A similarly noted in *Udeakpu Eze v. Samuel Igbilegbe* JELR 84426 (WACA) –

> "there can be no quarrel with that statement of customary tenure. As a general principle it has been applied in numerous cases and in postulating, as the learned judge did, that the land belongs to the community and then, in deciding on the evidence in this case, that it belonged to the Nze community, he was not departing from the principles of native customary tenure".

Self-Assessment Exercise 1
'Community land is only created through conquest. Land acquired by settlement belongs to the individual settler.' How correct is this statement?

In managing communal land, the chief or head of the community is traditionally and under customary law the only legitimate person and authority having the power to manage and control the entire communal land. The legal position may be problematic especially if it is viewed from the English law perspective. This is so because; the only similar institution or devise is that of the trustee. However, the chief is not a Trustee as known under English Law. The most fundamental difference between the position of the chief and a Trustee is that the Trustee is the legal owner of the trust he holds, managing same in trust for the beneficiaries whereas the chief is not the legal owner of the land, the land belongs to the community as a whole and never that of the chief. He may however be called Trustee of the communal land in a loose use of the word as simply the person in charge and control managing the land on behalf of the entire community with wide powers but accountable to the community. He cannot therefore treat the community land as his own personal property.

In *Kuma v. Kuma* 5 WACA 1 Rayner CJ noted that "though all members of the community have an equal right to community land, the chief or headman of the village or family/community has

charge of the land and in the loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee and as such holds the land for the use of the community or family"

In-Text Question
How is the legal position of the community head different from that of a trustee?

It has been suggested that the position of the chief could be likened to that of a caretaker, who takes care on behalf of the community. This may not be entirely true. The caretaker does not have such wide powers of management and control that the chief exercises, where a member of the community who is not the chief acted as a caretaker, Kingdom C.J observed that, "perhaps the term 'caretaker' is, strictly speaking, a misnomer, but it is a term which is commonly used in this country [Ghana] to mean the member of the family, not necessarily the head, who acts as agent of the family in conducting its affairs" *Rutterman v Rutterman* (1937) 3 W.A.C.A 178.

The chief cannot also be regarded as an agent of the community. Though, there may be a specific appointment of the chief as agent of the community for specific purposes, he generally is not an agent. This is because, in the exercise of his powers, he is not mandated or directed by the community, and the community are not regarded as his principal, and cannot restrict or abrogate his powers.

He, in fact, exercises ownership rights over all community lands on behalf of the entire community. The ownership of the land remains in the community, but the exercise of the rights of ownership is in the chief. Therefore – in the case of *Onitola v Bello* (1958) 3 F.S.C 53, the court held that the head of Onisemo family in Lagos was the person entitled to the management of all the properties of the family, to the possession of all such properties and all monuments of title relating thereto. It follows, that it is impossible for the community land to be alienated without his consent and participation. In *Agbloe v Sappor* (1947) 12 WACA 187, the court held though that that it is impossible for land to be legally transferred and legal title given without this consent. The chief is the only proper authority within the community to allocate land to members of the community or outsiders. Any grant of community land to anybody by any other person is not voidable but totally void.

In terms of dealings with outsiders, only the chief is entitled to collect tributes, rents, proceeds of sale and compensation for community lands on behalf of the entire community (see *Amodu Tijani v Secretary of Southern Nigeria op. cit).*

The chief is also the only and proper party in any action for and on behalf of the community. He is regarded in law to be in possession of all the land, and no individual is allowed to maintain an action on behalf of the community. In *Oragbade v Onitiju* (1962) 1All N.L.R 232 the plaintiff brought proceedings on his own behalf and on behalf of the Ifetedo community claiming an area of land as communal property. The defendant entered counterclaim wherein he brought a declaration of title to the disputed land and also an injunction against the plaintiff and Ifetedo community. The court held that, where a member of a class claims an interest in the subject matter which is adverse or repugnant to the claim of the class as a whole, his interest in the subject matter is not common with that of other members of the class, and he can neither sue nor defend as their representative. In the present day, a suit instituted/defended on behalf of a community /family is usually instituted/defended by the chief as first plaintiff/defendant, together with the principal member or elders-in-council as co-defendants (see the parties to *Oteri Holdings Ltd. V. Oluwa Family supra* before the Supreme Court

Example Box 1
Parties to a Family/Community Suit (Oteri Holdings Ltd. V. Oluwa Family (2021) 4 NWLR (Pt.1766) 334)

Oteri Holdings Ltd. - Appellant

V.

1. Chief Mukaila Kolawole Oluwa (The reigning Oluwa of Lagos and Apapa)
2. Dr. Akeem Oseni (Odofin Branch)
3. Mr. Jaiye Oluwa (Odofin Branch)
4. Alhaji Imam Ishola Akapo (Asalu Branch)
5. Engineer Waheed Bakare Oluwa (Asalu Branch)
6. Chief Nasiru Oluwa (Idewu Branch)
7. Prince Babajide Sumonu (Idewu Branch)
8. Mr. Abiodun Tijani Oluwa (Amore Branch)
9. Mr. Salisu Oluwa (Amore Branch)
10. Alhaji Akeem Ototo (Faro Branch)
11. Dr. Mondiu Babatunde Sarumi (Faro Branch)

(For themselves and on behalf of the Oluwa Chieftaincy Family of Lagos and Apapa) — Respondents

It is important to note that the powers of the chief though exercised on behalf of the community is not as a result of their mandate or delegated authority. His powers are derived from customary law, and he exercises this power as an inherent and attribute of his position. It cannot be withdrawn, limited or curtailed. *See Odunsi v Ojora* (1961) All NLR 283 where the Supreme Court held that it is the inherent prerogative of a head of family who has been appointed or capped in accordance with native law and custom to manage its property. Hence, it is not competent for the family to divest him thereof without his consent and transfer it to somebody else. Where there is no duly appointed chief or head, the community can depute one of its members to act as head and exercise the powers of management of the communal property but that is a different thing from appointing a member to act in competition against the duly capped head.

Self-Assessment Exercise 2

Chao Family of Ogida is made up of 4 branches – Cee Branch (headed by Chief A.B Cee who also doubles as the Chao Family head), Hech Branch (headed by Mr. F. G Hech), Aye Branch (headed by Dr. B. C. Aye) and Oww branch (headed by Amb. M.N. Oww). The family has sold a portion of its land to Mr. Mickey Howard and you have been asked to draft the deed of assignment.

State the parties to the assignment as you state it in the Deed.

The above powers of the Chief notwithstanding, he is expected to consult his senior chiefs and elders-in-council before reaching any major decision, and together they constitute the chief or king in council. In *Kuma v. Kuma supra*, Rayner CJ went on to add that the Chief or headman of the village/community cannot make any important disposition of the land without consulting the elders of the community or family and that their consent must in all cases be given before a grant can be made to a stranger. In some communities, the administration of the village/community land is vested in all the heads of families/family branches in the village/community and the village head or chief occupies a position akin to that of a family head in respect of family property (see Example Box 1 above for instance).

3.4 SUMMARY

The position of the chief or head of the community is not the same as the English institution of trust as he is not strictly a Trustee though judicial authorities referred to him as such. He is not also an agent of the community, but he stands in a position, in the words of Nwabueze, of a manager of the community land. Even, then the nomenclature of manager may not be entirely correct as the manager is an employee of his company, is entitled to some form of emoluments in form of salary or fees; and is totally under the control of his employers. The chief is not so subject - he is not paid any salary or emoluments, and he is not under the control of the community or the people. The

manager may be removed from office at any time by the employers but the chief cannot. The Supreme Court in the case of *Odunsi v Ojora* held that it is not competent for the family to remove a chief properly appointed and capped in accordance with native law and custom, without his consent, Nwabueze observed that "The truth is that the position of the chief in relation to communal land is a peculiarly peculiar one, a uniqueness which is borne out by the fact that without the active participation of the chief, no outright alienation of the land can be validly made, notwithstanding that all the other members desired and approved it".

The chief is likened to the alter ego of the community. He manages, controls and generally is in charge of the land for the benefit of the community. He allots land to all the members of the community in need of land, he is the authority that can sue and be sued on behalf of the community, he fights for the community in terms of ensuring that no part of the communal lands is trespassed upon, and also ensures that proper compensation is paid to the community where the communal land has been acquired by government. He ensures ultimately the equitable distribution and proper use of the communal land.

3.5 REFERENCES/FURTHER READINGS/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

Niki Tobi (1992) Cases and Materials on Land Law Mabrochi,

Remigius N Nwabueze, 'Alienations Under the Land Use Act and Express Declarations of Trust in Nigeria' (2009), 53, 1 Journal of African Law, 59–89

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Coker, Family Property among the Yorubas (2nd ed)

Lloyd, (1962) Yoruba Land Law

3.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

The statement is not correct. Whether acquired by conquest or settlement, under customary law individual land subject of original title becomes family land thereafter.

SAE 2

1. Chief A. B. Cee (Family Head of the Chao Family of Ogida)
2. Mr. F. G Hech (Hech Branch)
3. Dr. B. C. Aye (Aye Branch)
4. Amb. M.N. Oww (Oww Branch)

(For themselves and on behalf of the Chao Family of Ogida) } ASSIGNOR

AND

Mr. Mickey Howard - ASSIGNEE

MODULE2

Unit4: INDIVIDUAL RIGHTS IN COMMUNITY LAND

CONTENTS

4.1 INTRODUCTION

Every member of community in Africa and under customary law has certain important rights in the community which must be respected by the chief and enforceable by the individual members of the community. All the powers of the chief are expected to be exercised for the benefit of the entire community. While strangers may not be able to enforce any specific rights in the community, the individual can enforce his rights within the framework of customary law.

In-text Question

For whose benefit does the Chief exercise his powers?

4.2 LEARNING OUTCOMES

By the end of this unit you should be able to explain

i. the rights and privileges of individual members of the community
ii. the position of strangers in the community.

4.3 MAIN CONTENT

4.3.1 RIGHT OF ALLOTMENT

Every member of the community is entitled to use the communal land. The chief must ensure that every deserving member of the community is allotted a parcel of land for farming, to build his house thereon or other rights. See *Kuma v. Kuma* 5 WACA 1.

The member's right does not depend on the pleasure or discretion of the chief. He is under a duty to allot land to every member from the communal land. The member is entitled to enforce this right in court - *Lewis v Bankole* (1908)1 N.L.R 89. The court's jurisdiction extends to protection of individual rights of members of the community. If the court discovers that any member is being cheated, the court may order outright sale of the land and or partition of the land. *Ajoke v Oloko* (1959) LLR 152). Once a portion of communal land has been allotted to a member of the community, then he exercises all occupational rights thereon, to the exclusion of any other member of the community. The chief can no longer allot the same portion to another member of the community, in effect; the individual member acquires permanent rights in the land. The rights being permanent are actually ownership rights and are inheritable by his heirs. See *Agbloe v. Sappor* (1947) 12 WACA 187. In the case of *Oragbade v Onitiju (1962) 1 All N.L.R. 32.* It was held where land has been allocated to some individuals within the community land, that such land are no longer the property of the community. In such areas the allocation of community land to a member confers ownership on the member.

Self-Assessment Exercise 1

a. According to the decision in Oragbade v. Onituju, after allocation to a community member, land no longer belongs to ……..
b. A member refused allocation of communal land may enforce his …….. in court.
c. A community member to whom land is allotted may use it for ……..

The effect of this is that the chief cannot make inconsistent grant of the communal land to members of the community, where this is done the latter allotment is void. The chief cannot revolve the grant already made to a member of the community and re-allocate to another member or strangers in the case of *Adewoyin v Adeyeye (op. cit)* and also *Asiyanbi v Adeniji* (1966) NMLR 106 the Supreme Court held that the Oni of Ife could not grant land already enjoyed by a family to another person, whether a member of the family or not, without consulting the family, and that any such rule of

customary law will be rejected as being contrary to natural justice, equity and good conscience. In *Agbloe v Sappor supra* the chief and principal members of the family were ordered to pay damages for trespass committed through unlawful entry into land lawfully occupied by a member. The court further directed that he is also entitled to injunction to restrain any threatened interference, and to a declaration of his possessory title.

The member of the community's interest is akin to that of a tenant; except that he does not pay any rent and cannot be evicted for any reason except for acts that are totally criminal to the community such as armed robbery, and other serious misconduct that threaten the existence of the community. Forfeiture is possible under customary law but is rarely resorted to.

4.3.2 RIGHT TO SHARE IN COMMUNAL INCOME

Apart from actual user, whatever income or profit is derived from communal land is the property of the entire community. Income or profit may accrue to the community in form of rents from customary tenants, sale of communal lands, compensation from government paid for acquisition of community lands, etc. In effect the income is paid to the chief, who must give account of the moneys to the community. The chief is entitled to deduct all charges and outgoings, after which the money must be shared amongst all members of the community.

Every member of the community has a right to share in the income accruing to the community from proceeds from the community land. If the chief appropriates the money for his own personal use, the members are entitled to ask for account of the entire income. In the case of *Osuro v Anjorin (1946)* 18 N.L.R 45, the court entered judgment in favour of a member of a family for account and payment of whatever is due to the member of the family. *See Archibong v Archibong (1947) 18 N.L.R 117.*

4.3.3 RIGHT TO PARTICIPATE IN MANAGEMENT OF COMMUNITY LAND

The chief is obliged to inform the individual family heads and important elders of the community before taking any impendent step affecting the community property. *Kuma v. Kuma supra*. The family head must also inform members of his family who participate in decision making in the community. The consent of the entire principal members of the community is required before the chief may take important decisions affecting the community land. It is also important that all principal members must agree to a sale or disposition of community land, where this is not done, the sale is not void, but the members may challenge the sale, and ask for account. However, they cannot nullify the sale.

Self – Assessment Exercise 2

Mention 3 rights of members of the community.

4.3.4 POSITION OF STRANGERS

The communal land is exclusively for the benefit of the members of the community and not strangers. A stranger interested in community land may apply for a grant of the land from the chief or traditional authorities. The stranger cannot acquire ownership of communal land, when granted, he will remain a tenant of the community and the stranger may only use the land for the purpose for which the land was granted to him, which may only be for farming purposes; and where the stranger builds houses on the land, he remains customary tenant of the community.

4.4. SUMMARY

Individual rights of members of the community have long been recognized under native law and custom. These are rights to allotments, income sharing and management of the communal rights. The individual rights of the members of the community are legally enforceable rights, and assist in ensuring that there is probity , transparency, and discourages cheating.

4.5 REFERENCES/FURTHER READING/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

Niki Tobi (1992) Cases and Materials on Land Law Mabrochi,

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Coker, Family Property among the Yorubas, (2nd ed)

Lloyd, (1962) Yoruba Land Law

4.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

a. The community

b. Rights

c. farming, building or any other legal purpose

SAE 2

The rights of community members include

a. Right of allotment

b. Right to share in the communal income

c. Right to take part in management of community property

MODULE3

UNIT 1: CREATION OF FAMILY PROPERTY

CONTENTS

1.5 Summary

1.1 INTRODUCTION

This module will focus on all aspects of family property under customary law.

In this unit, we will focus on the creation of family property. The family is a very important unit in customary law, and land is rarely held individually but collectively. As communal land holding is diminishing in importance, family land holding is becoming more important and relevant in Nigeria today. Communal lands as we have noted above are normally allotted to the members of the community, and such members have the right to occupy and use them exclusively for their use and benefit. Upon the death of the original allottee the land is normally inherited by the children and family property is created. There are five main ways by which family property may be created. We shall examine these and also the legal position of grandchildren, slaves and domestics with regard to family property.

1.2 LEARNING OUTCOMES

By the end of this unit you should be able to

i. Define 'family'

ii. Explain how family property is created

iii. Discuss the position of grandchildren, slaves and domestics with respect to family property

1.3 MAIN CONTENT

1.3:1 DEFINITION OF FAMILY

Dr. Elias described the family as the smallest social unit in the body polity. A family is generally regarded as the man, his wife or wives and children. Children are both male and female children. Strictly, brothers, sisters, cousins do not form members of the family *Suberu v Sunmonu* (1957) 2 FSC 33.

In terms of family property under native law and custom, the family property is that property belonging to the family as a unit. It is, in its real form, undivided interest in land. Until it is determined continues to be held jointly by the entire family as a unit.

For purposes of determining who has an interest in family property, membership of the family does not take cognizance of the extended family members. In essence, the members of a family that can inherit their father's land are the collective members of the family who can lay claim to the joint ownership of the family property. However, ownership of family property as we will soon see may depend on the manner of creation and intention of the originator of the family or the original owner

of the family property. See *Nezianya v Okagbue* (1963) 1 All NLR 352.

In-Text Question

How does the legal definition of 'family' differ from the dictionary definition of 'extended family'?

In cases where the family property was created by will, the persons mentioned in the will even if they include outsiders, will constitute the family and are entitled to the family property. In *Sogbesan v Adebiyi* (1941) 16 N.L.R 26, a testator devised his property to be held as family property and appointed his brother as the head of the family. The court held that the family included his brothers and sisters and their descendants. The judge explained that "it would be contrary to the conception of native law and custom as well as good sense to appoint a person who himself is given no interest in the property to act as head of the family". In cases where specific names of children are mentioned amongst all the children, then only those children mentioned and their descendants will be entitled to create the family property.

The above definition of family notwithstanding, inheritance rights differ from place to place. As a general rule, a widow cannot inherit her late husband's property and therefore does not form part of the members of the deceased husband family. In the past, Ibo customary law excluded daughters from inheriting family land. See *Lopez v Lopez* (1924)5 NLR 50. The said custom was declared contrary to the Section 42 of the Nigerian Constitution and therefore void in the seminal case of *Ukeje v. Ukeje* (2014) 11 NWLR (PT. 1418) 384. The principle in *Ukeje v. Ukeje supra* has been enacted into law in some States where customary law prevented female children from inheritance. See Rivers State Prohibition of the Curtailment of Women's Right to Share in Family Property Law No 2 of 2022. See also Female Persons Right of Inheritance of Property Law 2022 of Abia State.

Self-Assessment Exercise 1

Assuming that there is no law in your state which specifically guarantees the right of female children to inherit family property, what authorities would you rely on in challenging a custom in your village which seeks to disinherit female children?

1.3:2 CREATION OF FAMILY PROPERTY

There are seven ways family property may be created. They are as follows:

A. INTESTACY

This is also known as creation of family property by operation of law.

Intestacy occurs when a person dies without leaving a will. Where a land owner dies intestate, the land is naturally inherited by his children under native law and custom, and thereby becomes family property. See *Lewis v Bankole* (1908) 1 NLR 89. In *Miller Bros. v Ayeni* (1924) 5 NLR 42, property acquired under English law of fee simple was held to become jointly held family property under customary law following the death intestate of the landowner leaving three sons. See also, *Ogunmefun v Ogunmefun* (1931) 10 NLR 82.

It is immaterial whether the deceased landowner died leaving only one issue, the land will still be constituted as family property. This was the decision in *Abeje v Ogundairo* (1967) LLR 9. Olawoye has criticized this decision on the basis that a family property connotes joint ownership, and therefore cannot arise where there is a sole heir. However, Smith supports the decision and has argued that the position taken by Olawoye is unfounded and should be ignored because a family property is not founded on the existence of one sole heir, many or no child at all. Instead, the conditions for creation of family property by intestacy are,
(1) that the land owner died intestate and
(2) that his estate is governed by native law and custom
Accordingly, once those conditions are met the property devolves on his children as family property.

The position taken by Smith is preferred because under native law and custom, land is regarded as inheritable property not only belonging for the use of the current generation, but also for generations' unborn belonging to the family. The current generation of children is therefore holding land in trust and as a sacred object for their own use and generations after then. *See Olowosaga v Alhaji Adebajo & others (1988) 4 NWLR (pt. 88) 275*.

In-Text Question

What are the conditions for creation of family property by intestacy?

B. WILL

A testator may create family property by specifically stating in his will that he wishes to create family property. This is by declaring in his will that his property be held on his death jointly by his children as family property. In the case of *Frank Coker v George Coker & ors* (1938) 14 N.L.R 83, one Edward Foster in his will made the following bequest of his dwelling house which was situated in Lagos – "I leave and bequeath my present dwelling house to the whole of my family or blood relation and their children's children throughout and cannot be sold for any debt or debts that may

be contracted by any of them, but at present the house should be occupied by my grandson Nath and my son Edward subject to the approval of my executors or otherwise……" The house was sold by order of court and the suit was to determine who is entitled to share in the proceeds of the sale. The court held that the intention of the testator was to make his dwelling house a family house, following the Yoruba custom and so that consequently those entitled to share in the proceeds of its sale were those of his descendants entitled under the custom to reside in the premises at the time of sale. Similarly in *Jacobs v Oladunni Bros.* (1935)12 N.L.R 1, the testator devised land acquired in fee-simple to his four children with specific instructions that the property was to be retained as family property according to the native laws and customs and usages prevailing in Lagos. It was held that family property (and not an English tenancy-in-common) had been created with each individual family member holding a joint interest which could not be severed.

Note that, beyond terminology used in a will, the court would usually consider whether or not creation of family property was actually the intention of the testator. Hence in G*eorge v Fajore* (1939) 15 NLR1 where a will devised a house to twelve persons as 'tenants in common with prohibition on alienation, the court held that the prohibition outweighed terminology and agreed that family property had been created under customary law. See also *Shaw v Kehinde (1947)* 18 N.L.R.129 where it was held that the testator had created a life estate in favour of his son but that since such estate was unknown to customary law, the property will revert to family property upon the death of the son. See also *Branco v. Johnson* (1943) 17 NLR 70

Self-Assessment Exercise 2

With reference to decided cases, explain why the court jettisoned the English terminology used in a will, in favour of customary law.

C. CONVEYANCE

Family property may be created by conveyance *inter vivos*. Where a land owner (whilst still alive) confers title to his property on named members of his family by Deed with a declaration of his intention to create family property in the named members, family property is thereby created. One of the first known cases where family property was created by conveyance is *Giwa v. Otun* (1932) 11 NLR 160. In that case one Asosi died intestate without issue. Upon his death, his household servants succeeded him in title under customary law. His head servant subsequently received a crown grant of the land to himself only. Upon the death intestate of the said head servant, his son Adekanbi, to whom title passed as heir under English law executed deed of trust effectively acknowledging the other domestics as joint beneficiaries together with his late father's descendants. Similarly in the case of *Olowosago v Alhaji Adebanjo & others* (1988) 4 NWLR (pt 88) 275, the family conveyed by Deed of grant parcel of land to eight people who were children and grandchildren of the land owner, the land was subsequently sold to the plaintiff, the Respondents relied on the Deed of grant; it was held that the Deed created family property. The

court also explained that to qualify as family land, it will be necessary to identify not only the origin of the land by also its status.

In-Text Question

What instrument is used to create family property by conveyance *inter vivos*?

D. PURCHASE OF LAND WITH FAMILY FUNDS

Where land is purchased with money belonging to the family, a family property is thereby created. In the case of *Nelson v Nelson* (1951) 13 WACA 243 the Nelson family decided to use money paid by government as compensation for acquisition of family property to another parcel of land. The conveyance was done in favour of the family head in English form. The family head thereafter sold the land to a third party. In an action to set aside the sale, the court held that the land is family property notwithstanding the form in which it was conveyed. Also in *Dosunmu v. Adodo* (1961) LLR 149, the court held that land purchased on behalf of a family, albeit vide deed of assignment in the name of the family head, was family property and therefore subject to native law and custom.

E. DECLARATION

Where a land owner during his lifetime decides to designate his land as family property for the benefit and enjoyment of members of his family only; family property is thereby created. In some cases, such declaration could be a dying declaration i.e. a declaration by a landowner on his death bed that his land be designated by family property. In *Ayinke v. Ibidunni (1959)* 4 FSC 280 the court agreed that disposition of properties could be made under native law and custom by a dying declaration made in the presence of witnesses. As with transfer of land under customary law, such declaration is however not automatically accepted as valid without proof that it was made. Such claim is established by the evidence of credible witnesses who were present and can attest to the declaration having been made. See *Orido v. Akinlodu* (2012) 9 NWLR (Pt. 1305) 370.

F. CONQUEST

Family property may also be created by conquest. Where there is only one particular progenitor, (usually a hunter or warrior) who fought and conquered the original settlers and chased them from the land n time past, upon his death, his children will inherit under native law and custom, and thereby a family property is created. *See Mora v Nwalusi* (1933) 1 WACA 278, *Kuma v Kuma (1934)* 2 W.A.C.A 178.

G. SETTLEMENT

Family property is also created by first settlement. Where the original land owner was the first settler on land, upon his death the property will devolve upon his children under native law and custom. The property therefore becomes family property. In the case of *Idundun v Okumagba (1976) 10 SC 227* the Supreme Court accepted the finding of the lower court that the family that was able to prove that their ancestor first settled on land created family property and the family are the owners thereof. See also *Ajala v. Awodele & Ors.* (1971) NMLR 127, *Ekpo v. Ita* (1932) 11 NLR 68.

1.3.3 POSITION OF GRANDCHILDREN

As we have discussed above, the family includes only the man, his wife or wives and children. Family property therefore belongs only to the family or those who can inherit the property of the deceased under native law and custom, or otherwise as discussed above. Therefore, as a general rule, a grandchild is not entitled to any share until the death of his own parent, and then he can step into their shoes. In the case of *Lewis v Bankole supra* the court held that a grandchild could not demand as of right a portion of family land for building. See also *Balogun v Balogun* (1943) 9 WACA 78.

Note: Where family property is created by will, conveyance or declaration with a grandchild specifically mentioned as a member, the grandchild will be entitled to a share of the said property.

1.3.4 SLAVES AND DOMESTICS

Slaves and other domestic servants, no matter how long they have stayed in the family are not part of the family. They are therefore not entitled to any portion of family property. The Supreme Court in the case of C*hairman, L.E.D.B v Fahn (unrep FSC 140/621 16/3/63)* observed that slaves and domestics were their masters' chattels and were themselves the object of inheritance. One may need to separate domestics from the observation of the Supreme Court. This is because domestics are mainly working for their master for a fee or reward. While the slave is entirely the property of the owner. The slave may in fact benefit from family property of a landowner where the owner includes the slave or domestic in his will or declaration. See *Dabiri v Gbajumo* (1961) 1 All W.L.R. 225.

You will recall that we mentioned the case of *Giwa v. Otun supra* where domestic servants inherited the estate of their master who died without an heir. That was possible because the property in question was not family property. Indeed there was no family to speak of since the deceased died without an heir.

In-Text Question

Differentiate between inheritance by domestic staff in *Giwa v. Otun supra* and the position of the law concerning inheritance of family property by slaves and domestics.

1.4 SUMMARY

The form in which a family property is created will determine the status of the parties in relation to the property. Family property is owned by the family as a unit and does not belong to the individual members. A party who asserts that a property is family property must be able to prove when and how the property was converted from individual ownership of the land holder to that of his family. See *Ekpo v. Ita supra.*

There are seven different ways by which family property may be created. Anyone who desires to prove that he holds land by virtue of family holding must be able to prove the manner of creation to the originator of the family. Outsiders cannot claim any right to family property. Grandchildren and extended family members are also excluded unless they are mentioned by the originator of the family by will or declaration.

1.5 REFERENCES/FURTHER READING/WEB SOURCES

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Lloyd, (1962) Yoruba Land Law

1.6 SUGGESTED ANSWERS TO SELF ASSESSMENT EXERCISES

SAE 1

Section 42 of the Constitution guarantees freedom from gender based discrimination

Ukeje v. Ukeje

Mojekwu v. Mojekwu per Niki Tobi JCA

SAE 2

The courts considered that, terminology notwithstanding, it was the intention of the testator to create family property and not tenancy in common.

Jacobs v Oladunni Bros. (1935)12 N.L.R 1

G*eorge v Fajore* (1939) 15 NLR1

Shaw v Kehinde (1947) 18 N.L.R.129

Branco v. Johnson (1943) 17 NLR 70

MODULE 3

UNIT 2: MANAGEMENT AND CONTROL OF FAMILY PROPERTY

CONTENTS

2.1 INTRODUCTION

Ownership of family property is joint and indivisible. The family itself may comprise of large number of children who may be spread all over the country. There is need to determine or appoint someone or some of their members to represent them in negotiations on the family property, to generally administer the properties, to equitably determine how best to share the family property amongst them in order to appropriate the greatest benefit for all the members of the family. In this unit we will focus on the person (family head) who carries out these functions and those he/she may need to work with in management and decision making (the principal members).

The status and duties of the family head are quite similar to those of the community head/chief. We discussed them in Module 2 of this course material. You may do well to refresh your memory on them.

2.2 LEARNING OUTCOMES

By the end of this unit you should be able to explain

i. the status and duties of the family head
ii. the accountability of the family head
iii. the responsibilities of the principal members of the family.

2.3 MAIN CONTENT

2.3.1 THE FAMILY HEAD

The management of the entire family property is vested in the family head. He holds the property as 'trustee' on behalf of the family. See *Bassey v. Cobham & Ors*. (1924) 5 N. L. R. 90. The use of the word 'trustee' is not the same as the trust under English Law. He stands as *alter ego* or representative of the family in the administration of the family property. The position is a delicate one under customary law. This is because he is not the owner of the family property and he does not have the power to deal with the family property as his own. In fact as regards the family property he does not have a better or greater right than any other member of the family. He cannot alienate any part of the family property without the consent of the family members. See *Lewis v Bankole supra*.

In-Text Question
How is the status of the community head similar to that of the family head?

The family head under Native Law and custom is the eldest member of the family. Upon the death of the originator, the eldest male child called 'Dawodu' in Yoruba native law and custom becomes the family head, and upon his death the most senior member will succeed him. It is noteworthy that Yoruba native law and custom also recognises headship of a family by the oldest female child. In *Lewis v. Bankole* (1909) 1 NLR 80 it was held that a Lagos woman could be head of the family if she is the eldest and the others who are junior to her are female. In *Adejumo v. Ayantegbe* (1989) All N.L.R 468, part of the Plaintiff's unchallenged evidence of root of title was that one Madam Asimowu Ayankunle of the Bilewu branch was head of the Omosowon Family.

Under Benin native law and custom, the eldest male son called 'Omodion' also steps into the role of the family head upon the death of the originator. Similarly, under Igbo native law and custom, the eldest son is called 'Okpala'. He also steps into the role of family head upon the death of the originator and upon his death his children will assume the headship. Where over time one family grows and splits into several branch – each representing a direct descendant of the originator, the head of the most senior branch of the family is entitled to control and administer their joint family

land. *See Ngwo v Onyejena (1964) 1All W.L.R 352.*

Headship of the family by the eldest son is by right under most customs. However, there are exceptions in under various customs. Among the Efiks of Cross River State, it is recognised that the eldest son may require the support of other family members to succeed as family head. Hence, the family may decide to elect any of their members if they do not want the most senior member to become the head of family. See *Ewa Ekeng Inyang vs. Effanga Ekeng Ita and Ors* (1959) 9 N. L. R. p. 84. In *Inyang v Ita* (1929)9 W.L.R 84. Berkeley J. stated

> "….it is certain that the headship of a house belong as of right to the senior male member of that house. But he took it at his peril. If he failed to find support within the family only two courses were open to him. Either he went into exile or else he stayed and was put to death. In either case the succession to the vacancy devolved on the next Senior Male, if he choose to take it up…"

Among the Qua tribe (second major tribe) of Cross River State, the head of the family may be appointed by the senior members of the maternal relatives of the deceased whether of or not, the he has surviving children.

In-Text Question

How do the Efik/Qua tribes of Cross River State differ from other customs with respect to headship of the eldest male child by right?

In some cases, the wish of the originator of the family will be respected if he nominates any other person apart from the eldest member of his family. *See Sogbesan v Adebiyi (Supra).* There is usually no formal requirement for appointment of the family head. As soon as the originator of the family dies, the eldest son naturally takes control, sometimes without any formality; he calls meetings of all the children, he chairs the meetings, he represents them and gives reports etc. in other cases, there is a formal presentation of the head by elderly relations to other sons and daughters, and he is thereafter acknowledged as the head of family.

Self-Assessment Question 1

Mention the exceptions to the rule that headship of a family belongs to the eldest son by right.

2.3.2 STATUS AND ACCOUNTABILITY

The true position appears to be that, as the physical *alter ego* of his family, the head of family is the proper person to exercise the ownership rights for the family, subject to the individual rights of the members. He represents the family with respect to the exercise of these rights. Once the title of

ownership is clearly separated for the exercise of the rights and powers to which it gives rise, the position of the head of family can then be perceived in its true perspective. The former is vested in the family as a quasi-corporation while the later belongs to the head of family. Clearly, the powers of the head of family over the family property are held and exercised by him not as the individual or absolute owner, but as a representative or manager for the family. Because he stands in a representative capacity only, he is required to exercise the powers solely for the benefit of the family only. He is not expected to make any profit or special benefit for himself without the consent of the family to the family who is claims to represent. He must therefore be held accountable for all rents, profits and other benefits or money collected on behalf of the family in respect of family property, in the case of *Akande v Akanbi* (1966) NBJ 86. Somolu J. observed as follows:

> "These days, it is my view that it has become an acceptable part of the duties of heads of families, especially where they hold large family properties in trust for the family, with the possibility of them having a large sums as a result of the sales of portions thereof. To keep account of all the transactions in order to let the members see the true position at all times and to justify their confidence. In my view, I hold as a matter of law today that it is far better to impose restrictions on the heads of family by making them liable to account, even strict account than to lay them open to temptation by unnecessary laxity in the running of family affairs which inevitably follows non-liability in that respect. To hold otherwise will … open the flood gate of fraud, prodigality, indifference or negligence in all forms and will cause untold hardships on members of the family especially the younger members".

Quite clearly, it is the duty (in fact responsibility) of the family head to represent the family in all transactions on behalf of the family. However, whatever, income is received belongs exclusively to the family, and he is under a fiduciary duty to account for all monies collected on behalf of the family. The members can sue to ask the head of family to account for whatever he collects on behalf of the family. In the case of *Osuro v Anjorin* (1946)18 N.L.R 18, a member of the family successfully maintained an action against the family head to account for all rents collected for the family from family property. Similarly in the case of *Achibong v Achibong* (1947) 18 NLR 157. The learned judge Robinson J observed, on the powers of the family head and his duty to account, that:

> "He is given considerable latitude, but his actions must be capable of reasonable explanation at any time to the reasonable satisfaction of the members of a sub-branch of the House. He cannot treat House money as his own. If it is his own, he can throw it away or misuse it. He cannot do that with House money, if he thinks reasonably it is a good cause and for the good of the House. He should certainly keep accounts and work on some rules, either laid down by himself or preferably after consulting with the heads

of the House".

In the case of *Odunsi v Bolaji* (unrep. Suit IK/70/62 High Court Ikeja) the court held that a family head who received $100,000.00 compensation money on behalf of the family must be held accountable, he observed that having failed to give the family members their fair share, of the money, having not disclosed the exact amount of the money to the family, he must account for the whole money to the family.

Self-Assessment Exercise 2

To whom is the family head accountable and for what?

In Ghana, the principle used to be that neither a chief nor the head of family can be held for account either of state funds or family funds; even where he is found to have misappropriated such funds, the appropriate action will be to remove the family head. See *Abude v* Onome (1946) 12 WACA 102, *Fyun v Gardiner (*1953) 14 WACA 260. See also Alienu, Customary Law in Ghana p.137. The above is no longer the position. By virtue of the Head of Family Accountability Act 1985, the family head is now accountable to the family for family property within his control or custody, and is required to take and file an inventory of the family property. Where he fails to render account or file an inventory, any family member may apply to court for an order compelling the family head to do so. However, such application will only be entertained if the court is satisfied that the applicant has taken steps to settle the matter within the family but failed on all such attempts.

In-Text Question

What is the present rule on accountability of chiefs/family heads in Ghana and how does it differ from the previous position under customary law?

2.3.4 PRINCIPAL MEMBERS

The principal members of the family are the respective eldest members of each branch of the

family where the family is a polygamous family. In case of monogamous family, then all the children are principal members of the family and upon the death of any child then, his/her eldest child or anyone nominated by the family succeeds as the principal member representing that branch of the family. The principal members are important in the administration of the family property. They must consent to any decision by the family head in respect of family property. The family head accounts to them and also passes useful information through them to the entire family. In some cases, junior members of the family may be co-opted to join as a principal member, and he will be allowed to sign documents or behalf of the family. See *Esan v Faro* (1947) 12 WACA 135.

Self-Assessment Exercise 3

Differentiate between the principal members of a monogamous family and that of a polygamous family

2.4 SUMMARY

The family head is the eldest member of the family recognized or appointed to manage the family property. He is also accountable for any money received on behalf of the family. He carries out the administration of the family property for and on behalf of the family strictly and is not expected to make any secret profit. He does this with the consent and cooperation of principal members of the family.

The family head is a very important person in the family structure, and is the only representative and administrator of the family property. He is the voice, and *alter ego* of the family. He however, is not the absolute owner of the family property but he is a part owner, and as the manager, whatever proceeds he makes from the family property must be accounted for strictly. He holds his power over the family property for and on behalf of the family.

2.5 REFERENCES/ FURTHER READING/ WEB SOURCES

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2.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

- Among the Efiks and the Quas of Cross River state, the family members may elect someone other than the eldest male child to head the family.

- Among the Quas, senior members of the family may elect someone from the deceased person’s maternal relatives as family head despite the deceased being survived by children.

- The originator may, before his death, appoint someone other than the eldest male child to take over as family head upon his death.

SAE 2

The family head is accountable to family members for all monies received on behalf of the family or in respect of the family property in the course of his management of family property.

SAE 3

In a monogamous family all the children are principal members whilst in a polygamous family the principal members are the eldest child of each branch of the family.

MODULE 3

UNIT 3: NATURE OF MEMBERS' RIGHTS IN FAMILY PROPERTY

CONTENTS

3.1 INTRODUCTION

The members of the family are not without rights in the family property. Though all powers of management and control reside in the head of family, they are expected to be exercised for the benefit of the members of the family. The benefits accruing from the proper management of the family property are true rights of the members. The family members therefore could enforce these basic rights in court of law as enforceable rights under customary law.

You will recall that we looked at members' rights in community land in Module 2 Unit 4 of this course material. Family members have similar rights. You will therefore find the lesson on community members' rights useful. You may wish to go back to Module 2 and refresh your memory.

3.2 LEARNING OUTCOMES

By the end of this unit you should be able to explain

i. the rights of the members of the family in family property
ii. how law treats improvements made by members to family property.

3.3 MAIN CONTENT

3.3.1 NATURE OF MEMBERS' RIGHTS IN FAMILY PROPERTY

A member of a family has the following rights in family property:

A. RIGHT TO ALLOTMENT FROM FAMILY LAND

A member of the family is entitled to be allotted a portion of the family property for his exclusive use and enjoyment. He may build his house on the land as well as farm on it. Once the land is allotted to him he holds the land to the exclusion of any other member of the family. A member's right over family land is only limited to land allocated to him and is not expected to enter into or takeover land that has not been allocated to him. See *Lewis v Bankole* (1908) 1 NLR 81. A member is entitled to exclusive enjoyment of his allotment for the purpose for which it was granted, and any attempt by the head of family to disturb his quiet enjoyment may be actionable in trespass. *See Agbloe v Sappor supra.*

With regard to his allocated land, a member's status is not however that of ownership, but in actual fact he stands in the position of a tenant on the land. The only difference is that he does not pay rent, his tenure is not determinable and his children will inherit the land after his death. If inheritance of the allocated land is not convenient, the family may re-allocate another portion to the children. However, it is clear that a member's right to live, farm and enjoy the allocated land cannot be disturbed even by the family. The member may therefore go to court to compel the head of family to allocate family land to him. See *Amodu Tijani v Secretary Southern Nigeria* (1924) 4 NLR 18. In *Ajobi v Oloko* (1959) LLR 152, the court ordered a partition where it was discovered that the family head had refused to allocate land to some family members.

A member cannot sell or dispose of the land allocated to him from the family property as he only has right of use. He cannot also use the land as collateral for his personal debt. *See Jacobs v Oladuni Brothers* (1935) 12 NLR 1. Furthermore, the member cannot, by Will, pass the family property to persons who are not his heirs directly. In the case of *Ogunmefun v Ogunmefun* (1931)10 NLR 82 where a testator devised her share in her family property to certain relations, the disposition was held void.

In-Text Question

How is an allottee of family land different from a tenant?

B. RIGHT TO SHARE IN INCOME ACCRUING FROM FAMILY PROPERTY

The income and profit including tributes, rents, proceeds of sale of family property, compensation for compulsory acquisition of family property from government and all other income derived from

family property belong exclusively to the family and is not the personal property of the family head. Therefore, such income must be shared amongst all members of the family. Though the family head is allowed to deduct all his expenses from the income before sharing and in some cases he is allowed the biggest share, each member is entitled to his share of the income. See *Apoeso v Awodiya* (1964) NMLR 8. The family head or anyone delegated by him is the right person to receive the income on behalf of his family. Afterwards he must account for the money, as he stands in a fiduciary position to the family, he cannot appropriate the funds for his oven personal use, if he does not then the family is entitled to demand for an account. *See Osuro v Anjorin* (1964)18 NLR 45.

In-Text Question
Why should the family head account for monies received on behalf of the family?

C RIGHT TO PARTICIPATE IN THE MANAGEMENT OF THE FAMILY LAND

This is similar to the right of the member of the community in the communal property. In the case of the family, the family head is not expected to administer the family property solely on his own, or treat the family property as his personal property, he must consent with the principal members of the family who must give their consent to important decisions like alienation of family property or sharing of income accruing from family property. The principal members also are required to inform all the members of their own branch of the family about important decisions for their input too, where the family head refuses to obtain the consent of the principal members of the family such decision or transaction may be held voidable at the instance of the members of the family. See *Adedibu v Makanjuola* (1944) 1All NLR 39, *Aderawo Timber Company v Adedire* (1963) 1 All NLR 429.

D. RIGHT TO ACT WHERE THE FAMILY HEAD REFUSES TO ACT

The court has held in serves of cases that where the family head refuse or neglect to act especially in cases where he ought to file action in court to defend family property, the member of the family way action its behalf. See *Bassey v Cobham* (1924) 5 NLR 92

Self-Assessment Exercise 1
Discuss the rights of members in family property

3.3.2

IMPROVEMENT ON FAMILY LAND

Family property will not cease to be so merely because the member has caused improvements to be made thereon with his own resources. The family property is allotted to individual members of the

family for the purpose of building and/or farming however the title to the land does not thereby pass to the member. He owns all the improvements made with his resources but the title remains that of the family. He may in fact alienate the improvement and the buyer will be expected to remove the improvement from the family land. In the case of *Bassey v Cobham (supra)* where a member of the family had used his own money to reclaim marshy family land, the court held that the land still remains that of the family. Similarly in *Shelle v Asajon* (1957) 2 FSC 65, the member of the family replaced the old thatch roof of the family house which she occupied with corrugated iron sheeting, it was held that she did not thereby become owner of the house. Jibowu Ag. C.F. explained the position of the law thus:

> "The person who lives in a family house is expected to keep the place in good state of repair in order to make the house habitable or more comfortable for him, the occupier".

It is clear therefore that spending extra resources on family property does not confer special privilege or right on the member beyond the right of the family; as the family remains the allodial owner thereof.

In-Text Question
Who owns improvements made with a member on family land?

Consequently, the family is entitled to recover possession of the family land allocated to a member who mortgage same and is to be sold by court order in execution of a judgment debt. See *Omolodun & Others v Olokude* (1958) WNLR 130. See also *Salako v Oshunlami (*1961) WNLR 189, *Santeng v Derlewa* (1940) 6 WACA 52 (this was a decision on customary law of Ghana where the court held based strictly on justice of the case that any member who built on family land becomes the owner of the land and can pass the title in his will). In summary; the ownership of family land will remain that of the family in spite of improvements made thereon by the allottee.

Self-Assessment Exercise 2

The quic-quid rule portends that the owner of land owns improvements thereon. To what extent is this applicable to improvements on family property?

3.4 SUMMARY

The rights of members of the family in respect of family property is safeguarded and perfected under customary law. They have the right to be allocated family land, share in the income from family property, be part of the management of the family property and also intervene in the management in cases where the family property is at risk and the family head has refused to take

action. The member may improve the family property allocated to him but that does not translate to ownership if he continues to reside in the family property.

3.5 REFERENCES/ FURTHER READING/ WEB SOURCES

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Lloyd, (1962) Yoruba Land Law

3.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Right of allotment of a portion of family land

Right to share in family income

Right to take part in the management of family property

Right to act in the interest of the family if the family head refuses to do so

SAE 2

The rule does not apply. While the family remains the allodial owner of family land, improvements made on family property using a member's funds belong to the member. The member may take them off the land or sell them to a third party who can take them off the land.

MODULE 3

UNIT 4: ALIENATION OF FAMILY PROPERTY

CONTENTS

4.1 INTRODUCTION

It has never been the practice in the olden days to alienate land under customary law. Land is seen as inalienable, and the present owners hold it in trust for future generations. Non-members of the family are not allowed any access to family property. However, in some cases, there may be gift of family land to close relatives or allowing customary tenants where the land is so vast and the family believes such will be in the interest of the family. However as time goes on, the practice has developed that the family may alienate family land, and transfer all their interest to third parties. In the case of *Oloto v Dawodu (1904) 1 NLR 58*, it was observed that

> "If the family is absolute owner of land there is nothing to stop the family if the head and all the members agree, from transferring the totality of their interest in it. It is a question of the nature of the grant as to whether they meant to transfer their entire interest in the piece of land or only a part of such interest".

In effect, where the family has agreed and consented to the sale or alienation of their interest in family land, then nothing sops them from being able to do so and machinery for passing a valid title by the family of family property.

4.2 LEARNING OUTCOMES

At the end of this unit the student will be able to explain the mode and machinery for the alienation of the family property, the role of the head of family, and other members.

4.3 MAIN CONTENT

4.3.1 ALIENATION OF FAMILY PROPERTY

As we have discussed above, the family property is exclusively and absolutely that of the family and only the family can sell or otherwise alienate the family property to third parties. *See Alao v Ajani* (1989) 4 NWLR (pt.113) 1. The concerns of the law is to ascertain when, how, and modalities for transfer of valid title by the family to 3rd parties, or how can the 3rd party acquire a valid title from a family, and where there are competing interests what rules of priority will be applied to the transaction. The family being a single entity, it can only act through its accredited representatives and agents. The proper person therefore to transfer validly any interest in the family property is the head of family and the principal members of the family.

The head of family must join in the conveyance of family property with the consent of the principal members of the family. *Agbloe v. Sappor (supra)* where the head of family and the principal members of the family do not consent to a purported sale or transfer of family land, the sale is *void ab initio.* The position of the law has been established beyond doubt in the case of *Ekpendu v. Erika* (1959) 4 FSC 79. See also *Lukman v Ogunsusu* (1972) 1 All NLR (pt.41), *Mogaji v Nuga* (1960)5 FSC 107. An example of parties to an assignment of family land is provided in Example Box 2.

Example Box 2
Parties to an Assignment of Family Property (with a female family head)

DEED OF ASSIGNMENT
BETWEEN

Madam Funke Folawiyo (Family Head)
Mrs. Ona Garuba (Principal member)
Dr. Faith Emeke (Principal Member) Assignors
Miss Olatunde Gbogbolowo (Principal Member)
(For themselves and on behalf of the Gbogbolowo Family)

AND

Ambassador Kunle Folarinwa Assignee

In Text Question
Who are the accredited members of a family?

4.3.2 RULES ON ALIENATION OF FAMILY PROPERTY

Where the principal members of the family alienate the family property without the consent of the family head, the sale is void. The principal members of the family are on their own incapable of passing any valid title in the family property without the concurrence of the family head where this is done the sale is void, and of no effect whatsoever, no title is passed and no interest is transferred. *See Ekpendu v Erika (supra).*

In cases where the head of family alienates the family property without the concurrence of the principal members the sale is voidable. It is voidable at the option of any member of the family. In the case of *Esan v Faro* (1947) 12 WACA 135, the court held where the principal members of the family opposed a sale by the head of family and majority of the members of the family, that the sale was invalid the acquiescence of the majority of the principal family members notwithstanding.

Self-Assessment Exercise 1

i. If family land is sold by the family head with the concurrence of all but one principal member of the family, the sale will be ------

ii. If family land is sold by the family head without the concurrence of all the principal member of the family, the sale will be -------

iii. If family land is sold by all the principal members of the family without the concurrence of the family head, the sale will be -------

The rule that sale by the head of family without the concurrence of the principal members of the family is voidable is subject to three important qualifications:

1. The rule will not apply where the head of family had sold the family land as his own personal property. See *Solomon v Mogaji* (1982)11 SC 1, *Adejumo v Ayantegbe* (1989) 3 NWLR (pt.110) 174. In *Adjarho & Anor v. Aghoghorvwia & Ors.* (1985) 1 NSCC 376, an eldest son and family head sold family land as his personal property without the family's knowledge and consent (admittedly under the mistaken belief that the land was his by inheritance). The court held that he sale was void.

   This above exception is based on the *nemo dat* principle (*nemo dat quod non habet*

meaning no one can give what he does not have) such sale is void and not voidable because family land does not belong to the family head but to the family.

The intention of the head of family is important. He may actually be conveying as the representative of the family, while the conveyance is expressed as if he is selling as the beneficial owner thereof. In such case, the transaction will be voidable and not void. *See Akano v Anjuwon* (1967) NMLR 7.

2. The family head cannot make a gift of family property without the consent of the members of the family. Where this is done, the gift is *void ab initio*. In *Oshodi v Aremu* (1952) 14 WACA 83, the family head made a gift of the family land to a member of the family without the consent of the members of the family. The member later sold the land to a purchaser who sold it to the defendant. The court held the gift to be null and void. Again this exception hinges on the *nemo dat* principle.

3. The family head cannot unilaterally order the partition of family property. Even if it is to members of the family, the partition will be held to be void and of no effect. *Onasanya v Siwoniliu (1960) W.N.L.R* 166.The rationale for this rule is that partition has the effect of a determination/alienation of family property.

Partitioning can only be validly done by order of court or with the consent of all members of the family. See *Yesufu v. Adama* (2002) LPELR-CA/L/400/97. As joint owners they must all consent to a determination of family property – a determination being final with the effect of changing the nature of family property to individual ownership.

In-Text Question
Under what circumstances will alienation by a family head without concurrence from the principal members be void?

4.3.3 DISTINCTION BETWEEN VOID AND VOIDABLE DISPOSITION

The distinction between void and voidable transaction is very important. The success of an action to in validate an unlawful disposition will depend on the relief claimed in the court.

A void transaction is one that is simply treated as if it was never made. A transaction that has no legal effect whatsoever - that has not transferred any right or interest to anybody. It is actually not necessary to ask for a declaration to void it, because it is void ab initio. Hence so that all the transactions or dealings based on it cannot stand, as you cannot place something on nothing. In *Thomas & Thomas v Nabhan Trading (1947)12 WACA 229* the appellants successfully voided a lease said to have been made on their behalf by parties who had no power to grant such lease.

A voidable transaction, on the other hand, is one that is considered valid when made but tainted with irregularity which may make it liable to be voided by those having power to do so. It can only be voided by action in court at the instance of the person aggrieved or entitled to do so.

The court can set aside a transaction that is voidable, while the court needs only to declare a void transaction void and there is nothing to be done to it further. The effect of setting aside a voidable transaction is that it relates to the inception of the transaction, and just like a void transaction it is rendered *void ab initio.*

In-Text Question
Distinguish between void and voidable transactions

4.3.4 EFFECT OF VOIDABLE TRANSACTION

The court will set aside a voidable transaction at the instance of the aggrieved member of the family. What the member needs to show is that he is a principal member of the family and his consent was not obtained. However, in order to set aside the voidable transaction the member must act timeously and must not be guilty of delay. In the case of *Mogaji v Nuga (supra)* the plaintiff purchased family land from the head of family with consent of only two branches of the family. Ten years after the sale the principal members who oppose the sale went to court to challenge the sale, the court held that though the sale was voidable, they know about the sale and did not take any action for ten years, it was too late to have the sale set aside.

Time does not begin to run until the aggrieved member has actual knowledge of the voidable transaction. Knowledge of the transaction can be imputed to the member if the member ought to have known, e.g. where the purchaser had taken over the land and has started building on the land, there is a presumption that the member knew or ought to have known about the transaction. Unwarranted delay will therefore block any action to set aside the sale. In cases, where the transaction is voidable, the purchaser gets a voidable title, but if he goes ahead to build or erect a structure on the land, and the aggrieved members did not take action to set it aside, the law is that they are stopped from setting it aside later; because *resittutio in integrium* is no longer possible. In other words, what the purchaser should do is to take steps to ensure that they erect a structure on the land or sell to a third party and claim that *restitutio in integrium* is no longer possible.

We must understand that the rule was made to protect the family property and not third parties. Third parties are therefore expected to make diligent search to ensure that they are not entering into a voidable or void transaction. The rule therefore ought to allow those who after due diligence still went ahead to enter into a voidable title, and have also taken steps to build their property on the land to the knowledge of the members of the family. Such sale can no longer be set aside.

Another issue that needs be examined, is the fact that if the aggrieved member can no longer set aside the sale, and he was not given his legitimate share of the proceeds of the sale, what should be the appropriate course of action? *See Mogaji v Nuga supra.* Since time has operated against his relief, his proper course of action may be to ask for account, and claim his right as a member of the family.

Self-Assessment Exercise 2
What does an aggrieved member of the family need to prove to succeed in a claim to void sale of family land?

4.3.5 EFFECT OF VOID TRANSACTION

A void transaction is void *ab initio* in effect no matter the length of the time, the transaction remains void and ineffectual. Where the person who acquires a void title transfers some to a third party, the third party also takes a void title and may be guilty of trespass if he takes possession. *See Ekpendu v Erika supra.*

4.4 SUMMARY

The alienation of family property is a very important aspect of the management role of the head of family. He must ensure that he alienates family property as family property and not his own property. If he does, he transfers only voidable title which may be set aside by an aggrieved member. The aggrieved member who wants to set aside the sale must act timeously and not delay in which case the sale will not be set aside.

4.5 REFERENCES/FURTHER READING/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

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Coker, Family Property among the Yorubas (2nd ed)

P.C. Lloyd, (1962) Yoruba Land Law

4.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

i. Voidable

ii. Voidable

iii. Void

SAE 2

i. That he/she is a principal member

ii. That his/her consent was not obtained

MODULE 3

Unit 5: DETERMINATION OF FAMILY PROPERTY

CONTENTS

5.1 INTRODUCTION

One of the most striking changes that has taken place in the customary tenure system is the prevalence of outright sale of family land by the family. Sale or partition of the family land will no doubt bring an end to the family property and put an end to all incidents of ownership by the family. In the olden days it was impossible to do this but due to economic developments, and other factors, the family land is now sold freely depending on the agreement of the family.

In this unit we will examine how family property may be determined. Note that the use of the word 'determine' (together with its other variants – determination, determined etc.) is not in the basic English context meaning. It is used in the legal context meaning 'to bring to an end'. In essence, what we are learning in this unit is how the status of land as family property is brought to an end.

5.2 LEARNING OUTCOMES

By the end of this unit you should be able to discuss how family property can be determined.

In-Text Question

What does 'determination of family property' mean in land law?

5.3 MAIN CONTENT

5.3.1 SALE

There is no doubt that the family may make an outright sale of the family property. In effecting such sale, the family head and the principal members must agree to sell the property. They must also agree and jointly convey the property to the third party. The effect of an absolute sale or gift of family land is to transfer to the purchaser all the interest of the family in the property, and totally divests the rights of the family in the property land thereby destroying the incidents of family property previously attached to the property.

To achieve this, the family must transfer all their interest in the property, i.e. an absolute sale and not of conditional sale or gift. A conditional sale like mortgage, lease or a pledge is not absolute, and therefore, cannot determine the rights of the family in the property. The sale must actually determine the interests of the family in the property. The court may also order a sale of family land in appropriate cases. In *Lewis v Bankole supra* the court ordered a sale of family land where it considered that such a sale would be advantageous to the family or the property is in capable of partition.

In-Text Question
Why are pledge, mortgage and lease not sufficient to determine family property?

5.3.2 PARTITION

'Partition' has been described as a legal concept whereby joint possession is destroyed so that each former co-tenant becomes a separate owner of a specific portion of land holding a share in severalty as opposed to an undivided share in the whole. *See Abraham v Olorunfemi (1991) 1 NWLR (pt. 165) at 75* per Tobi JCA.

The members of the family who are entitled to a share of the family land get a share of the land, i.e. the family land is divided into equal shares amongst all the members of the family, each member taking absolute interest free from the incidents of customary land tenure. The modalities are that the land is surveyed and shared, and each member takes his own portion. The head of family and principal members of the family must sign the Deed of Partition conveying the separate portions to the individual members of the family. *See Balogun v Balogun (1943) 9 WACA 78.* In *Alhaji Olowosago v Alhaji Adebanjo (1988) 4NWLR (pt. 88) 275* the court held that having partitioned land and granted a portion thereof to a branch of the family, the land ceased to be family property and became the land of the person(s) to whom the grant had been made.

The court may also order a partition of the family property. The courts are always very reluctant to order a partition of the family property, as the court is always not willing to interfere in the management of the family property. To involve the jurisdiction of the court therefore, the applicant must satisfy the court that it has become impossible for the institution of family ownership to continue. Where the family has denied any member the right of ingress and egress to the family property, or refuse to allot his portion to him, the court may order a partition of the family property, *Lopez v Lopez (1924) 5 NLR 47, Thomas v Thomas (1932) 16 NLR 5.* The court may also order a partition for the sake of peace and justice. *Lopez v Lopez (supra)*

Note: An allotment of family land is not the same as a partition. An allotment does not have the effect of determining family property. Though the allottee(s) may be entitled to exclusive possession, the land remains family property. See *Lengbe v Imale (1959) WRNLR 325* where the court held on the basis of evidence adduced by the Defendants that what occurred was an allotment of family land to various members of the family for farming purposes. Hence, the allottees were not vested with ownership as to entitle them to a declaration of title under customary law.

Self-Assessment Exercise 1
Differentiate between an allotment and a partition

5.3.3 GOVERNMENT ACQUISITION

The family property may also be determined by Government acquisition of the family property. The Government will pay compensation for the acquisition, and to this effect, the interests and rights of the family is extinguished and converted into personality. The compensation will be shared or used to purchase another land, such land will become family land. *See Nelson v Nelson (supra).*

5.4 SUMMARY

Family ownership of land under customary law may be determined and upon its determination the incidents of family ownership of land comes to an end and all rights and interests of the family in the property is extinguished.

There are three main ways to determine family property, (1) by outright sale, (2) Partition and, (3) Government acquisition of family property with payment of compensation. The effect is to bring to an end the customary land tenure of family ownership.

Self-Assessment Exercise 2

How may family property be determined?

5.5 REFERENCES/FURTHER READING/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

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Coker, Family Property among the Yorubas, (2nd ed)

P.C. Lloyd, (1962) Yoruba Land Law

5.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Allotment does not grant ownership rights. It grants possessory rights which are not absolute. However, partition grants ownership rights and is absolute.

SAE 2
Family property may be determined by sale, partition and government acquisition.

MODULE 3

UNIT 6: IMPACT OF LAND USE ACT 1978 ON COMMUNITY LAND HOLDING

CONTENTS

6.1 INTRODUCTION

The Land Use Act 1978 as we have noted above is a fundamental statute affecting Land Tenure in Nigeria today. The Act has substantially modified the existing land tenure systems in Nigeria, but the amazing aspect is that it has not abrogated or pretended to substitute them. In its provisions, it recognizes customary land tenure as a valid and subsisting law regulating land tenure in Nigeria.

6.2 LEARNING OUTCOMES

By the end of this unit you should be able to discuss the impact of the provisions of the Land Use Act 1978 on the Community and family Land Holding under customary law.

6.3 MAIN CONTENT

The Land Use Act 1978 (the Act) has as its objectives, the following;

i. To remove the bitter controversies resulting at times in loss of lives and limbs, which land is known to be generating.

ii. To streamline and simplify the management and ownership of land in the country.

iii. To assist the citizenry, in respect of owing the place where he and his family will live a secure and peaceful life.

iv. To enable the government to bring under control the use to which land can be put in all parts of the country and thus facilitate planning and zoning programmes for particular uses.

In-Text Question

What has been the effect of the Land Use Act on existing land tenure systems?

In this respect, the Act by virtue of its section 1, provided that all land comprised within the territory of each state is held in trust and "administered for the use and common benefit of all Nigerians", while therefore vesting land in the Governor, the Act recognized the existing rights of all citizens on land. In cases where the land is located in urban areas, the land shall continue to be vested in the person in whom it was vested before the Act, if the land is developed. Where the land is undeveloped then, any portion in excess of half hectare will be forfeited to the government. In the non-urban areas, section 36 of the Act provided that the occupier shall continue in occupation as if the customary right of occupancy has been granted by the occupier. Occupier is defined as

> "any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-leases or sub-under lessee of a holder".

All existing rights in land have been converted to a right of occupancy. Where it is in urban area it is deemed granted or granted by the Governor of state and referred to a statutory right of occupancy while in non-urban area it is deemed granted or granted by the appropriate local government and referred to be customary right of occupancy.

Self-Assessment Exercise 1

State 3 objectives of the Land Use Act

The Act has preserved the existing rights being held under customary law by the community and family who are the rightful owners of land under customary law. In section 24, the devolution of rights under customary law on the death of the holder of a right of occupancy is preserved, and thereby the family property is preserved. While section 34(4) recognize any "encumbrance or interest valid in law", and such land shall continue to be so subject and the certificate of occupancy issued". Section 35 on the issue of compensation also recognizes the interest of the landholder under customary law. It provides *inter alia*

> "Section 34 of this Act shall have effect not withstanding that the land in question was held under a leasehold, whether customary or otherwise."

Affirming the position, the Supreme Court per Karibi-whyte in the case of *Ogunmola v Eiyekole* (1990) 4 NWLR (pt 146) p 632 at 653, observed,

> "land is still held under customary tenure even though dominium is in the Governor. The vast pervasive effect of the land Use Act is the diminution of the plenitude of the powers of the holders of the land. The character in which they held remains the same. Thus an owner at customary law remains owner in the same event though he no longer is the ultimate owner. The owner of land now requires the consent of the Governor to alienate interests which hitherto he could do without such consent".

Clearly, the Act has only modified the customary land tenure, but the rights of the land owner under customary law whether family or communal remain intact.

In-Text Question
Differentiate between alienation of interest in community land before the enactment of Land Use Act 1978 and afterwards.

The right enjoyed under customary law have always being known to be absolute rights of ownership. The family or community owner has ultimate rights in the use and management of their land. However, with the coming into force of the Act, the rights had now been converted to statutory or customary right of occupancy depending on whether the land is located in urban or non-urban areas.

As we have noted above, only the family has the power to alienate its land or deal with it in any manner whatsoever. However, before legally valid title can now be passed, the Governor of the state must give consent to the transaction. (Section 22 and 34 Land Use Act). Section 36(5) and (6) seemed to have prohibited any transfer of land that is subject to customary right of occupancy, but the act specifically provides that any such transfer shall be void.

We should emphasize that there is a difference between allocation of land within the family members and transfer of the land to a person not being a member of the family. Where it is within the family, or community, the family or community continues as the absolute owner of land and the member only occupies the land. In that case, there is no transfer of interest by the family. Where the transfer is to an outsider, then it will seem to be prohibited where the land is within non-urban area subject to customary right of occupancy.

The Act has not extinguished the incidents of customary ownerships of the land in Nigeria. Section 36(1) and (2) refers to "occupier" and "holder" of the land. Both may be granted the deemed customary right of occupancy. The holder is the person holding land as customary owner while the occupier is the customary tenant within the meaning of section 50 of the Act. In the highly contested case of *Abioye v Yakubu (1991) 5 NWLR (pt 190) 130* the court was asked to decide whether the provisions of Sections 1 and 36 of

the Land Use Act 1978, read together with the definition of 'holder' and 'occupier' under Section 50, had abolished the rights of customary overlords vis-à-vis customary tenants. It was unanimously held on appeal that the customary tenants were not the 'holders' within the meaning of Section 50. Clarifying this point, Karibi-Whyte JSC noted that:

> "The essential distinction which could be made between a "holder" and an "occupier" as defined, is that whereas the former is a person entitled in law to a right of occupancy, the latter is not a person so entitled. The legal effect of the distinction is that an "occupier" is any person that is lawfully occupying land under customary law who would at the commencement of the Land Use Act be entitled to a customary right of occupancy. Hence, the fact that the "occupier" is in possession, and the "holder" is not, does not alter the true legal status of the parties".

Self-Assessment Exercise 2

Differentiate between the holder and occupier in a customary tenancy relationship as established in Abioye v. Yakubu.

6.4 SUMMARY

The Land Use Act recognizes the interests of the land holder under customary law though the right that may now be enjoyed is subject to the ultimate power of the Governor, customary land tenure is still in existence in Nigeria. The Section 1 of the Act has transferred all land within the state to the Governor of the state to hold in trust for the people. The holders of land under customary tenure continue to hold same as if a statutory or customary right of occupancy has been granted or deemed granted under the Act.

6.5 REFERENCES/FURTHER READING/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

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Coker, Family Property among the Yorubas (2nd ed)

P.C. Lloyd, (1962) Yoruba Land Law

6.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

i. To remove the bitter controversies resulting at times in loss of lives and limbs, which land is known to be generating.

ii. To streamline and simplify the management and ownership of land in the country.

iii. To assist the citizenry, in respect of owing the place where he and his family will live a secure and peaceful life.

v. To enable the government to bring under control the use to which land can be put in all parts of the country and thus facilitate planning and zoning programmes for particular uses.

SAE 2

The holder is the overlord whilst the occupier is the customary tenant

The holder has ownership rights whilst the occupier has possessory rights

The holder's title is absolute whilst that of the occupier is restricted

Notwithstanding the provision of Sections 34, 36 and 50 of the Land Use Act, the occupier's title can never ripen to ownership.

The holder is the person entitled in law to a right of occupancy. The occupier is not

MODULE 4: CUSTOMARY TENANCY

UNIT 1: NATURE OF CUSTOMARY TENANCY

CONTENTS

1.1 INTRODUCTION

In customary land law a customary tenant is not 'gifted' the land. He is not a borrower or lessee. He is a grantee and holds a determinable interest which may be enjoyed in perpetuity subject to good behavior. It is a relationship between the family and third party, where the family or community land holders grants rights of occupation to third parties to occupy and farm on land under customary law. The rights enjoyed on land by the tenant is only occupational and not ownership. In this unit, we shall examine the nature of customary tenancy and the classification thereof.

1.2 LEARNING OUTCOMES

By the end of this unit, you should be able to

i. explain the nature of customary tenancy
ii. properly classify a customary tenancy

iii. mention unique characteristics of a kola tenancy

1.3 MAIN CONTENT

In-Text Question
What kind of interest is granted to a tenant under a customary tenancy?

1.3.1 NATURE OF CUSTOMARY TENANCY

The customary tenancy creates a relationship of landlord and tenant between the land owners and the third party or tenant. The relationship and the interest created must be properly understood. The relationship may be regarded as that of tenancy but there is a difference between customary tenant relationship on the one hand, and landlord and tenant relationship under the English law. The nature of the interest created is not an occupational license with no interest in the land above mere occupation. A customary tenant holds a proprietary right enforceable against the whole world - including the grantor and his descendants.

The customary tenant holds his interest in the land as proprietary right. He may exercise all rights of ownership over the land except that he cannot alienate the property to third parties. Conversely, under English law the tenant is free to alienate his interest at any time if he holds fee simple interest. Where he is a leaseholder, he can also alienate the unexpired residue of his interest in the land to third parties. The customary tenant is not permitted to do this and where this is done the alienation by the tenant of his interest in the land is null and void and of no effect. *See Oshodi v Oloje* (1958) LLR 1.In *Anyaduba v. Nigeria Renowned Trading Company Ltd.* 3PLR/1992/19. Nnaemeka-Agu JSC noted that 'the lack of power to alienate is the very essence of a customary tenancy or right of occupancy by a customary tenant. Any alienation by such a tenant is null and void."

In-Text Question
How is the proprietary interest of the customary tenant different from an occupational licence?

Another important feature of customary tenancy is that it enures in perpetuity. *See Daniel v Daniel (1956) 1F.S.C 50* where the courts affirmed the right of the respondent to customary tenancy granted to his late mother by the Mgbelekeke family and which he inherited following the demise of his late mother. In *Bello Salami & Anor. v. Alhaji Adetoro Lawal* (2008) NG SC 8 it was noted that a customary tenant is always in possession in perpetuity, unless and until the tenancy is forfeited.

This does not connote ownership. Customary tenancy resembles ownership .However, in so far as the right to reversion of the overlord is preserved, whether he collects rents or not, whether he disturbs the tenant or occasionally asserts his rights notwithstanding the fact remains that once a tenant always a tenant and the rule of laches and acquiescence will not stand against the overlord. In *Osegbue v. Ononye & Ors.* (2018) LPELR – 45084 (CA) Abiriyi JCA noted that 'It is settled law that once land is granted to a tenant in accordance with native law and custom, full rights of possession are conveyed to the grantee. The only right remaining in the grantor is that of reversion should the grantee deny title or abandon or attempt to alienate the land.'.

Closely connected with the feature of perpetuity, another, feature of the customary tenancy is that it is inheritable by the heirs of the customary tenant. Some have argued that the tenant cannot transmit his interest to his heirs, while some other authorities have claimed that the tenant will need the permission of the overlord to transmit his interest to his heirs. See *Bamgary v Macaulay* (1932) 1 WACA 225. However, the prevalent view is that the children of the customary tenant are entitled to inherit their father's interest as tenant under customary law. See *Oshodi v. Dakolo* (1930) A.C.667. See also *Abioye v Yakubu (1991) 5 NWLR (pt 190)* where the customary tenants where defendants were descendants of customary tenants over land subject to customary tenancy between their ancestors and those of the Plaintiffs' which commenced approximately 60 years prior to the time of the dispute.

Another important feature of the customary tenancy is that there is no certainty of term. Fixed term tenancies are generally unknown to customary law. Hence it enures in perpetuity subject to good behavior only - except in some cases where the tenancy is granted for a specific purpose or reason. In such a case, the tenancy will be determined upon the completion of the purpose for which it was granted. See *Ochenna v Unosi (1965) 1 All N.L.R 321.*

In-Text Question
State an exception to the rule that a customary tenancy enures in perpetuity.

Unlike tenancy under English law, there are no formal requirements for the creation of a customary tenancy. Under English law, the transaction must be in writing stating all the particulars of the tenancy including the term, parties, property and commencement date. Whereas, customary tenancy, needs only witnesses to witness the handing over of the property and the tenant pays to the overlord kolanut and hot drinks or other form of tribute, depending on the tradition of the area, and he is let into exclusive possession of the land.

Self-Assessment Exercise 1
Discuss three main features of a customary tenancy

1.3:2 CLASSIFICATION OF CUSTOMARY TENANCY

There are two main ways in which a customary tenancy may be classified. By the length of tenancy and by the consideration given.

a. Length of Tenancy

There are two types of customary tenancy under this class. One is that which was given for a definite purpose or reason and the other for an indeterminate period. In cases, where the land was granted for a specific purpose e.g. for farming during a season, at the expiration of that season and the harvest of the crops the land reverts to the overlord and the grantor may terminate the relationship by notice. Note that a customary tenancy granted for building is not one classed in the former category. If the tenancy was granted for the purpose of building and farming then the tenancy is perpetual.

The difference in duration between the two types of tenancy naturally affects not only the purpose for which the tenancy is granted but also the character of the grantee. Tenancies for a short period are generally made for the purpose of farming, fishing and exploitation of crops on the land. In some cases, though, the exploitation of crops, or farming may in fact be in perpetuity, and the tenant is not permitted to change the purpose for which the land was granted except with the permission of the overlord. Where, the land was given to the tenant to build his house and for farming thereon, the presumption is that the term is indeterminate. In the case of *Ochonna v Unosi supra* where land was granted for the purpose of establishing an oil pressing machine. The customary tenant later dismantled the machine and laid it out into plots. The court held that the tenancy is determined upon the change of user.

b. Consideration Given to Overlord

The consideration given to the overlord is an important classification of the nature of customary tenancy created. The consideration may be in form of tribute (or Ishakole in Yoruba customary law) or rent negotiated and agreed by the parties.

The tribute is determined by customary law, of the area and that of the family granting the tenancy. It may be in form of Kolanuts, drinks, or the part of the annual harvest from the land. The tribute normally bears no relevance to the value or size of the land, but is only an acknowledgement of the grantors title. In *Ngwo v. Onyejena* (1964) LCN/1111 (SC) the court ordered the customary tenant to pay tribute of ten yams per farm or fourteen shillings.

In-Text Question
What does ‘ishakole’ mean?

Upon the initial payment, the tenant is enjoined to bring an annual payment in form of crop yields and part of the harvest from the land to show appreciation for the grant and as acknowledgment of his status. Because of the token nature of the tribute, if the tenant fails to bring the tribute, it does not necessarily lead to termination of his right on the land.

In the case of rent, which was a current innovation due to civilisation and increase in economic activities, the tribute is converted to monetary consideration. In this, it may bear relevance to the value of the land. While tribute may not be definite in nature, the rent is always specific and obligatory in nature. It may be argued that rent is foreign to customary law, but we should understand that there is no rule of customary law prohibiting the payment of rent as it is generally recognized as a form of Ishakole in modern terms. In the case of *Ife Overlords v Modakole (1948) (Reported in Elias op. cit. p.115)*. the plaintiffs as overlords claimed 6 cuit. 10r. of cocoa or its equivalent calculated at £18.2s.6d, being the Ishakole due in respect of the year ended 31st December 1947 from the defendants who had been in occupation of plaintiffs land as customary tenants. After that year, the defendants refused to pay the rent. The court held, that Ishakole although usually paid in kind in the past, was in the nature of rent, the obligation to pay which arose, not from the customary law as in the case of tribute but from agreement between the grantors and grantees, and that the defendants were bound to pay the amount which under the agreement they have agreed to pay.

In-Text Question
Differentiate between rent and tribute

Payment of rent or tribute is clear evidence of the existence of customary tenancy. However, the fact that tribute was not paid annually is not also evidence that the relationship is not that of customary tenancy. In the case of *Okuojevor v. Sagay* (1958) WRNLR 70 at 71, the court observed as follows:

> "It has…..been held by the courts in many cases that non-payment of rent or tribute by the occupier is not itself conclusive as to his ownership of land held under customary tenure"

The court may order tribute to be paid in cases where it is found that the relationship is that of customary tenancy but payment of tribute may be appropriate in order to remove controversy. *See Etina v Eke; Ikeonyiu v Adighaghu (1957) 2 E.W.L.R 38.*

Self-Assessment Exercise 2
Discuss the modes of classifying a customary tenancy.

1.3.3 KOLA TENANCY

This form of customary tenancy is prevalent in the former East central states in Nigeria, particularly in Onitsha area of Anambra State. Section 2 of the Kola Tenancy Law of Eastern Nigeria defines kola tenancy as the right to use and occupation of land by virtue of kola or other payment made, or a grant for which no payment in money or kind was exacted. The Kola tenant enjoys all the rights of an absolute disposition. His descendants (male or female) may inherit his interest without reference to the overlord. See *Mojekwu v. Mojekwu* (1997) 7 NWLR 283 where it was held that under the Mgbelekeke family Kola customary tenancy and the Kola Tenancy Law 1935 land held under kola tenancy is inheritable by both male and female descendants of a deceased kola tenant upon production of kola by such succeeding descendant. See also Udensi *v. Mogbo* (1976) 7 SC 1

The Kola tenancy is created when the overlord grants land to the tenant and the tenant gives the overlord Kolanut as a form of tribute or appreciation. The Kola tenancy is different from the ordinary customary tenancy in three basic ways,

1. The rent or tribute is not an incident of Kola tenancy. Once, the Kola is paid, the tenant is not under any obligation to continue paying rents or tributes.

2. The Kola tenant has unlimited right of user, he can grant subleases, to third parties without reference to the grantor; and he does not need to account for whatever he makes on the land to his grantor. In *Mgbelekeke Family v. Madam Iyayi* (unreported) the kola tenant sublet her interest under a Kola tenancy granted by the appellants. The overlord sought to claim part of the rent paid to the kola tenant by third party sub-lessees. The court held that they were not entitled to any party of the rent. But see the case of *Animashawum v. Osuma* (1972) All NLR 367 where a Kola tenant to the Mgbelekeke family (overlords) entered into an agreement to share proceeds of rent due from a third party for his lease of a portion of his interest under a Kola tenancy. The terms of the agreement were entered as consent judgment.

   Though he may validly sublet his interest in the land, the kola tenant cannot alienate the land, if he does so the alienation is void, and may lead to forfeiture. In *Daniel v. Daniel* CWLR (1957) 8, it was affirmed on appeal that under a kola tenancy, the only thing that a kola tenant cannot do is complete alienation.

3. The Kola tenant is not restricted in the use he may put the land. *See Ochonna v Unosi supra.* Evidence of restriction in the way the land is to be used shows that it is not a

Kola tenancy; despite the fact that the rent paid was described as Kola.

Self-Assessment Exercise 3
Differentiate between customary tenancy and kola tenancy

1.4 SUMMARY

The customary tenant is the person who holds land under customary law, as tenant of the grantor. He pays rent or tribute (Ishakole) in acknowledgement of his status. He has no right to dispose of the land, in fact if he does, it will lead to forfeiture of his right. He has exclusive possession and he cannot be restricted in the manner to which he puts the land unless such restriction was created from the creation of the tenancy. A customary tenant is one with proprietary right and not occupational rights only. The payment of rent or tribute (Ishakole) is the initial evidence of the creation of the tenancy, and as a customary tenant he holds the land in perpetuity subject to good behavior. A Kola Tenancy is a unique form of customary tenancy which operates in the Southeastern states of Nigeria – especially the Onitsha Area of Anambra State. It has similar features as a customary tenancy but differs with regard to consideration paid to overlord, kola tenant's right to sub-let the grant and non-restriction of use to which the land may be put.

1.5 REFERENCES/FURTHER READING/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

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1.6 SUGGESTED ANSWERS TO SELF ASSESSMENT EXERCISES

SAE 1

Customary tenancy has the following features:

1. It grants the customary tenant with proprietary rights which he may defend against the world.
2. It enures in perpetuity
3. It is inheritable by the heirs of the customary tenant
4. It usually has no fixed term
5. There are no formal requirements for creating a kola tenancy. Only an exchange of tribute in the presence of witnesses and the customary tenant being put into possession.

SAE 2

Customary tenancy may be classified according to length of time or consideration given by tenant. For length of time, kola tenancy may be for a particular purpose or for building/other permanent purposes in which case it enures in perpetuity. Regarding the consideration given, a kola tenant may pay tributes in kind (or case equivalent) or the consideration may rent reflective of present economic realities

SAE 3

1. Payment of rent or tribute is not compulsory after a kola tenant gives kola to his overlord.

2. The Kola tenant has unlimited right of user, including grant of subleases but not permanent alienation.

3. No restriction of user for kola tenancy.

4. Kola tenancy is only practiced in the eastern region of Nigeria – particularly in Onitsha

MODULE 4:

UNIT 2: RIGHTS OF CUSTOMARY TENANT

CONTENTS

2.1 INTRODUCTION

The customary tenant is not without certain rights and obligations or duties, the rights are enforceable rights in law that is part of the customary law recognized by the people.

2.2 LEARNING OUTCOMES

By the end of this unit, you should be able to explain the legal rights of the customary tenant.

2.3 MAIN CONTENT

2.3.1 RIGHT TO EXCLUSIVE POSSESSION

Once the customary tenant has been given possession of land, the possession is exclusive in that no other person including the overlord can enter possession without the consent of the customary tenant unless the terms of the tenancy permit. See *Sagay vs. New Independence Rubber Co. Ltd* (1977) LPELR-2975 SC

Any unlawful entry in disturbance of the customary tenant's right to exclusive possession is actionable in trespass at the instance of the tenant. If the trespass includes destruction of crops and properties of the tenant, the tenant is entitled to damages. And where the trespass is apprehended by the tenant, he may proceed to court for injunction to restrain the intended trespass to his land. In *Emegwara v Nwaimo* (1953) W.A.C.A 347, the appellate court upheld an order of injunction and an award of damages for trespass against the appellants confirming that having not shown that the Respondent's rights had been extinguished as to give the appellants right to enter the land, their entry amounted to a breach and disturbance of the Respondent's right to exclusive and undisturbed possession of the land

In-Text Question
What relief(s) may a customary tenant claim in the event of a breach of his right to exclusive possession?

Where the overlord has transferred his title in the reversion to another person, then the right to exclusive possession also is sustained against the new overlord. See *Kugbuyi v Dinjo (1926)7 N.L.R 51.* Martindale J. in *Etim v Eke* (1941)10 WLR 43 at 50 observed that,

> "*It is now settled law that once land is granted to a tenant in accordance with native law and custom, whatever the consideration, full rights of possession are conveyed to the grantee"*

In some cases, the terms of the tenancy may allow the overlord access to the cash crops existing on the land, so that the tenant cannot harvest the cash crops or timber on the land. In some localities, also, the tenant cannot reap palm fruits so that a grant of land to a tenant does not include exploitation of such trees. *See Odu v Akinboyesee* (Elias op cit 185). This is the case under Ghana customary law under which only the overlord is entitled to fell palm trees as an unequivocal act of ownership reserved for the owner of the land (the overlord) See also *Egyin v. Aye* (1962) 2 GLR 187. In other words, the right to exclusive possession is qualified, subject to the right of grantor to

enter and enjoy customary rights. *See Ochonma v Unosi supra*. In *Akintola v. Oyelade* (1993) All NLR 45, the appellant's forefather (overlord) granted a customary tenancy to the respondent's forefather (customary tenant) for farming purposes with the right of the overlord to reap the fruits of the trees on the farm reserved. The court was requested to determine whether the right of the overlord to harvest fruits and trees ceased to exist post-1978 after the Land Use Act came into force, and whether an overlord who exercise such right could be held liable for trespass. It was held that though the Act took away the freehold title vested in individuals and communities, customary rights to use and control of land subsist. Hence, a customary tenant remained so with the conditions attached to the relationship. Accordingly, an overlord who reserved the right to harvest fruit trees could not be held liable for trespassing.

This rule is however applicable to economic trees already on the land granted to the customary tenant. Where the customary tenant, after the grant, plants economic trees on the land subject of customary tenancy, he will be entitled to gather the fruits of such trees planted by him. See *Atta & Ors. v. Esson* (1976) 1 GLR 128. This is also the case under Tiv and Idoma customary law in Benue State – a tenant who planted economic trees on land previously subject of customary tenancy may enter onto the land to reap the fruits of the trees.

Self-Assessment Exercise 1

Discuss the exception to the rule that an overlord has exclusive right to harvest cash crops on land subject of customary tenancy.

2.3.2 RIGHT AGAINST THE GRANTOR NOT TO DEROGATE FROM GRANT

Any action of the grantor which derogates from the rights of the tenant, e.g. his right to exclusive possession is a derogation which is not permitted under customary law. The derogation may be committed either physically or through an agent when the overlord granted possession of the same land to another tenant, and the new tenant trespass on the land. The new tenant and the overlord will be held liable in trespass. In the case of *Etim v Eke supra* the plaintiffs were customary tenants of at the defendants. The terms of the tenancy were that the plaintiffs (tenants) were not to reap the palm trees growing on the land except with the permission of the defendants. It was found as a fact that the defendants duly consented to the plaintiffs sharing with them the right to harvest palm nuts. The plaintiffs exercised the rights for some years but later the grantors granted an exclusive right to cut palm nuts on the land to a third party. In pursuance of this, A not only cut a large quantity of palm nuts but also carried away those already cut by the plaintiffs, at the same time he installed some machinery on the land for the purpose of crushing the nuts. The plaintiffs claimed against the grantors for a declaration that they were entitled to share with them and their agents from interfering with this right, and also payment over to them of half the amounts recovered. They also claimed against the third party, damages for trespass for cutting the palm nuts on the land. Martindale J. gave judgment for the plaintiffs for all their claims against the defendants.

In-Text Question
In what ways may an overlord derogate from a customary tenant's grant?

The grantors are not entitled to let the land already granted to customary tenants to another person, and the court will treat such letting as being void and of no effect. It is possible, however, for the customary tenant to adopt the new tenants, in which case, it is in longer in derogation of the tenants' rights, but it will be deemed to have been done by the tenant. *See Bassey v Ita (1938) 4 WACA 153*. In *Animashawun v. Osuma supra* the appellants' forefather was a customary tenant to the Mgbelekeke family. He let out a portion of his interest to a third party and entered into an arrangement with his Overlords under which one-thirds of the proceeds of the rent due from the third party was due to them. Subsequent upon the death of the customary tenant, descendants of the overlord sold the portion to a third party contending that the tenancy had been forfeited when the customary tenant let out the portion of his interest to the third party. It was held that the kola-tenancy subsisted as evidenced by the arrangement under which the customary tenant was entitled to a portion of the proceeds of the rent. Accordingly, the purported sale of his interest was an attempt to derogate from his right and therefore void.

Note however that the extent of the right not to derogate from the grant depends on the rights reserved in the agreement in favour of the grantors.

Self-Assessment Exercise 2
Discuss the rights of a customary tenant and reliefs available to the tenant in the event of a breach.

2.4 SUMMARY

The customary tenant has certain rights enforceable against the whole world including the grantor. The tenant has the right to exclusive possession he holds the land in perpetuity and can maintain action for trespass against anyone that disturbs his possession including the grantor. Also, the grantor cannot derogate from the tenant's grant in whatsoever form.

2.5 REFERENCES/FURTHER READING/WEB SOURCES

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2.6 SUGGESTED ANSWERS TO SELF ASSESSMENT EXERCISES

SAE 1

The Landlord's exclusive right to harvest cash crops on land subject to customary tenancy only covers cash crops planted on the land prior to the commencement of the customary tenancy. The right does not extend to cash crops planted by the tenant. In that case, the tenant has the right to reap the fruit of his labour.

Egyin v. Aye (1962) 2 GLR 187

SAE 2

The rights of a customary tenant include the right to exclusive and undisturbed possession and the right against the overlord not to derogate from the customary tenant's grant. In the event of a breach of any of these rights, the tenant may seek a declaration of title, damages for trespass, account for profit made pursuant to the breach and profit-sharing as well as injunction preventing the party in breach from continuing in the breach.

Emegwara v Nwaimo (1953) W.A.C.A 347

Animashawun v. Osuma

MODULE 4:

UNIT 3: DUTIES OF CUSTOMARY TENANT

CONTENTS

3.1 INTRODUCTION

In the previous unit, we explored the rights of customary tenants. Rights are not without duties. Like two sides of a coin, rights of customary tenants are complemented by duties. These duties also have consequences in the event that a customary tenant fails to abide by them. We will explore some of the duties of customary tenants in this unit.

3.2 LEARNING OUTCOMES

By the end of this unit, you will be able to:

i. Explain the duties of customary tenants

ii. Discuss the consequences of a breach of a customary tenant's duties.

3.3 MAIN CONTENT

3.3.1 DUTY NOT TO DENY GRANTOR'S TITLE

This is a fundamental duty imposed on the tenant by customary law that the customary tenant must never deny the title of the overlord. The temptation is very high especially for customary tenancies that have existed for a long time. The circumstances of the relationship makes denial of title very possible because the terms of the relationship is not written, and the tenancy is actually in perpetuity subject to good behavior only. The tenant may therefore be tempted to assert rights on the property which he does not have.

The denial occurs when the tenant asserts that somebody other than the grantor is the owner, either the tenant claims ownership himself or supports other adverse claimants to oppose his grantor's title. In *Bongay v Macaulay* (1932) 1 W.A.C.A 225 (Sierra Leone), the tenant sub-let part of the land, refused to pay tribute, and publicly claimed ownership of the land, the court held that the defendant's action amounted to a clear denial of the plaintiff's title and rendered him liable to forfeiture and eviction. Similarly, in the case of *Onisiwo & Ors. v. Fagbenro & Ors* (1954) 21 NLR 3. The plaintiffs contended that as the defendants, or some of them, had granted a lease to a third party, the defendants had thereby claimed absolute ownership of the premises or had alienated or attempted to alienate them, and therefore, that the defendants had forfeited their rights of occupation. The defendants contested the native law and custom as contended by the plaintiffs it was held that the defendants' family, by executing the lease incurred liability to forfeiture under native law and custom. *See also, Ladega v Akinloyi* (1969) N.S.S.C 409**,** *Omotaire v Orekpasa* (1984)1 N.S.S.C. 791.

In-Text Question
In what ways may a tenant deny his overlord's title?

3:4 DUTY NOT TO ALIENATE WITHOUT GRANTOR'S CONSENT

The duty not to alienate the land without the consent of the grantor is on offshoot of the continuing duty not to deny the title of the grantor. Alienation without the consent of the grantor is tantamount to assertion of title and this cannot be tolerated. Any form of alienation, whether by way of lease, sub-letting, mortgage, gift etc. is void. An attempt to alienate is also a breach of the covenant not to alienate his interest on the land. The grantor is entitled to resist this and sue for forfeiture of the tenancy.

As indicated in Unit 1 of this module, this duty does not apply to Kola Tenancies. A kola tenant may alienate from his interest if he so desires without recourse to the overlord. See *Animashawun v. Osuma supra.* The kola tenant is also not obliged to share the proceeds of such alienation with the overlord. See *Mgbelekeke Family v. Madam Iyayi supra.*

Self-Assessment Exercise
Why is it important for a customary tenant to seek his overlord's consent prior to alienation?

3.3.3 DUTY NOT TO USE LAND FOR A DIFFERENT PURPOSE

Customary tenancies are usually granted for farming or building or both. It is a breach of the terms of the tenancy for a tenancy granted solely for farming purposes to be converted to building or to construct other structures. *See Akinrinlino v Anwo (1959) W.R.N.L.R 178.*

The duty not use the land for a different purpose is reasonably and not strictly interpreted and applied. In the case of *Agwu v Ogoke* (534/1964 of 31/3/66 Unrep.) the grantor under an alleged customary tenancy sought an injunction to restrain the tenant from putting up concrete building contending that the tenancy permitted only the building of thatched or mud houses. It was held that the grantor's interest in the land was not jeopardized by the erection of a concrete house, as in any event he would not make use of the land so long as the defendants occupied it and built only thatched houses and that whatever damage he had suffered can be compensated by damages.

As with restrictions on alienation, the kola tenant is also not duty bound to use land for a particular purpose.

In-Text Question
What's your opinion on the reasoning behind the court's decision in *Agwu v. Ogoke?*

3.3.4 DUTY TO PAY CUSTOMARY RENTS OR TRIBUTES

As noted above, payment of tribute or rent by the tenant is a fundamental aspect of customary tenancy and the refusal to pay renders the tenant liable to an action for forfeiture. Although non-payment of rent or tribute is not necessarily inconsistent with the ownership of the overlord, the circumstances and the reasons for the refusal to pay tribute may determine whether there is a denial of the tribute of the overlord. In *Oniah & Ors v. Chief Onyia* (1989) 1 NWLR (pt 99) 514 the court held inter alia that the real basis of the misconduct or misbehavior which rendered the tenancy of a customary tenant liable to forfeiture is the challenge of the title of the overlord. Refusal to pay the tribute or rent viewed in its right perspective amounted to denial of the overlords title.

Whether or not, non-payment of tribute is a fundamental breach will depend on the nature of the tenancy and agreement between the parties. For kola tenancies, kola or other tribute representing the tenant's acknowledgment of his overlord's title is only given once. Also, where a tenant fails to tribute, the court may order payment without forfeiture. This was the case in *Ngwo v. Onyejena supra* where the court ordered the tenant to pay tributes but did not order forfeiture.

Self-Assessment Exercise 2
Discuss the duties of customary tenants and consequences of a breach

3.4 SUMMARY

The customary tenancy is subject to obligations which include the duty to pay rents or tributes, duty not to use the land for a different purpose from the purpose agreed under the tenancy, duty not to alienate the land under whatever guise, and the important overriding duty not to deny the overlord's title. Failure to abide by these obligations may result in legal consequences.

3.5 REFERENCES/FURTHER READING/WEB SOURCES

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3.6 POSSIBLE ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

It is important for a tenant to seek the overlord’s consent before alienation because the overlord retains a reversion on the land. His ownership interest is superior to any other and seeking of his consent is acknowledgment of his title. Accordingly, failure to seek his consent is tantamount to a denial of his title.

SAE 2

The duties of a customary tenant include duty not to alienate without grantor’s consent, duty not to deny grantor’s title, duty to pay tribute or customary rent and duty not to use the land for another purpose. In the event of a breach, the grantor may seek forfeiture, damages or injunction depending on the gravity of the breach.

MODULE 4:

UNIT 4: DETERMINATION OF CUSTOMARY TENANCY

CONTENTS

4.1 INTRODUCTION

Customary tenancy is acknowledged to be in perpetuity subject to good behavior. However, it is also agreed that the tenant is required to pay rent or tribute though failure to pay may not necessarily lead to forfeiture of his tenancy. You should note that the customary tenant is not a tenant at will and so cannot be ejected at the will of the grantor. The implication is that a customary tenancy can only be determined for good cause and where such cause exists, specific steps must be taken to determine it. In this unit we shall examine when and how the customary tenancy may be determined.

4.2 LEARNING OUTCOMES

By the end of this unit, you should be able to explain –

i. when a customary tenancy may be determined
ii. how a customary tenancy may be determined

4.3 MAIN CONTENT

In-Text Question

Can you remember what the word determine (determination, determined) means in land law?

If you cannot remember, go back to Unit 5 of Module 3 and refresh your memory.

Owing the perpetual nature of a customary tenancy, determination is not automatic. A customary tenancy may only be determined for specific reasons. Some of them are accomplishment of purpose, abandonment and forfeiture.

4.3.1 ACCOMPLISHMENT OF THE PURPOSE OF THE TENANCY

A customary tenancy for a specific purpose is determined at the accomplishment of the purpose for which it was granted. If it was granted for a farming season, for the cultivation of food crops, then the tenancy is determined at the end of the season and the harvest of the crop. As with pledges, if the determination of the tenancy falls within the period where all the crops have not been harvested, it stands to reason that the customary tenant though no longer beholden to the overlord, will be allowed to access the land for the purpose of harvesting the crops which fall due for harvest after the determination of the tenancy.

Accomplishment of purpose of tenancy may also be inferred to have occurred when the original purpose for which a tenancy was granted is no longer possible or cannot be continued. *Ukwa & Ors. v. Awka Local Council & Ors* (1966) NMLR 41, the appellant community granted a portion of

land to the first respondent in 1939 for the purpose of building a central market called Eke Odenigbo for use by the Awka people. Owing to lack of popularity of the site among the Agulu and Amikwo people of Awka, another market was established in another site in 1949 and that became the central market. In 1952, the respondents started to administer the site originally granted for Eke Odenigbo – making grants of portions thereof and collecting rents from grantees. It was held on appeal that upon the respondents' abandonment in respect of the use for which the land was originally granted, the appellants' right to recover possession was revived unless they, as grantors, made a fresh grant or agreed to the land being used for a different purpose.

In-Text Question

Discuss the purpose for which a customary tenancy was granted in Ukwa v. Awka Local Council and how it was fulfilled.

4.3.2 ABANDONMENT

Whenever the customary tenant abandons the land, the customary tenancy will terminate and the land reverts to the grantor. The important question had always been when can it be said that the tenant had abandoned the land? In the case of *Annan v Bin (1947) 12 W.A.C.A 177.* The court ruled that there is abandonment when the tenant goes away and the house built by him on the land falls into ruins. However, the intention of the tenant is an important consideration, so that even if he leaves the house and the house falls into ruins is not a conclusive evidence of his intention to abandon. The length of time within which he abandoned the land is not of serious relevance as well. In the case of *Bailie v Offiong (1923) 5 N.L.R 29,* the defendant who was a customary tenant in possession of land for many years took ill and relocated to a higher ground for treatment. In the meantime, the house falls into ruins. The grantor's took over and built a house thereon. The tenant went to court to challenge the action of the grantor. The court held that the fact of the house having been allowed to fall down was not conclusive, but was only one relevant fact to be considered in the circumstances which might show what the plaintiff's intention was in allowing the house to fall down, and that the circumstances in this case made it quite clear that it was never the plaintiff's intention to abandon the land. Accordingly, the defendant had been guilty of trespass in re-entering the land. See also *Ezeilo v Obi (1960) 4 ENL 19.*

Note also that the overlord's assumption that a customary tenant has waived his possessory rights is not sufficient to prove abandonment. In *Chief Oloto v. Victor Williams & Charles Williams* (1944) WACA 23-26, the Oloto family, in accordance with customary law, granted to land to some Egba refugees pursuant an agreement with the late Governor Glover. It was the contention of the family that the entire area demarcated for the refugees under the agreement with Governor Glover was never taken up by the refugees. Hence, full ownership of the portion under dispute (which formed part of the portion never taken over) reverted to the family free of tenancy. The family thereafter granted it to some migrants known as 'Efon people' for farming and the Efon people also

moved on and gave up their rights to the land and leaving it vacant and unoccupied for years. The defendants denied this assertion and established that they and their families were descendants of the Egba refugees and successors under the original grant. It was further established that they were 'still there' (in possession). On appeal, the court agreed with the finding of fact that the abandoned land was indeed granted to the Egba refugees to whom the Defendants and their families hence Oloto family's attempt to reclaim the land failed.

Where abandonment is established, then the right of the overlord to recover possession is revived and they may take steps recover possession so as owners and holders of the reversionary interest on the land. See *Ukwa v. Awka Local Council supra*

Self-Assessment Exercise 1

Between time, the intention of the tenant and the assumption of the overlord, what is the best way to know whether abandonment has taken place?

4.3.3 FORFEITURE

As explained above, the customary tenant are not 'Lessees' under English law, but grantees of the land under customary tenure and hold, as such a determinable interest in the land which may be enjoyed in perpetuity subject to good behaviour. In the present day, the customary tenant's interest is almost regarded by the courts as practically indefeasible once permanent buildings or other improvements like extensive commercial farming and/or occupation have been established thereon by the grantees. This is the position of law as explained by the Supreme Court in the case of Lasisi *& Anor. v. Tubi & Anor* (1974) All NLR (pt II) p 438 where Elias CJN explained:

> It is settled law that the possessory right of the customary tenant goes on and on, in perpetuity, unless and until the tenancy is forfeited. Be it noted also that the courts in this country are very slow in granting forfeiture. Indeed, it will be correct to say that, in so far as customary tenancy is concerned, our courts have always been willing and ready to grant a relief against forfeiture, except in extreme cases, where the refusal to grant it would tend to defeat the ends of justice. But such cases are few and far between. They are therefore hard to come by in our law reports.

Elias CJN further explained in *Aghenghen & Anor. v Wagheroghor & Ors* (1974) 1 SC 1,

> "They enjoy something akin to emphyteusis a perpetual right in the land of another. A very important factor is that the grantor of the land, once it has been given to the grantees, as customary tenants, cannot thereafter grant it or any part of it to third party without the consent or approval of the customary tenants. A grantor is not allowed to derogate from his grant"

The fact is that the customary tenancy goes on in perpetuity, unless and until the tenancy is

forfeited. In the case of *Ejeanalonye & Ors v Omabuike and ors (1974) 2 S.C. 33 at 39,* the Supreme Court explained the position thus:

> "……The customary tenant pays tribute and enjoys perpetuity of tenure subject to good behavior, which means in practice that he may forfeit his holding only as a result of an order for forfeiture at the instance of the customary landlords".

In-Text Question

Why is it said that the interest of the customary tenant is practically indefeasible?

It follows that it will take a breach of the tenant's obligations under the customary tenancy to be liable to forfeiture and eviction. Some of the breaches, as explained above include,

(1) Alienating the land or portion of it to third parties without the consent of the overlord. In *Bob-Manuel v. Dokubo* (1944) the West African Court of Appeal held that to allow the respondent (customary tenants) to put tenants on his overlord's land or to collect rent from tenants on it would be to give him the right of a titular owner and a negation of the difference between the right of occupation of a customary tenant and the right to put strangers on the land and collect rents from them. See also *Abowaba v Adesina* (1946) 12 WACA 18.

(2) Putting the land to uses other than those agreed upon. See *Ukwa v. Awka Local Council supra. In Ehimare v. Emhonyoh* (1984) 21 SC 19 at P. 135, one Olumese, a trader was granted a piece of land to use as a temporary place to stay overnight each time he visited the village for his trade. For this purpose, he was allowed to erect a small mud house for temporary use. A subsection erection of a zinc-cement house was held to be a permanent user of the land in breach of the terms of the grant and grounds for forfeiture.

(3) Failure to pay customary tribute or rent - Non-payment of rent is not necessarily inconsistent with the ownership of the overlord. The primary purpose of a rent or tribute in a customary tenancy is not as an economic return on the land but as an acknowledgement of the owner's title. It is important to determine circumstances and reason for the refusal or neglect for the payment of rent or tribute.

(4) Denying the title of the overlord - For denial of title to incur forfeiture, it must be deliberate and willful act of the tenant denying the overlord's title and this will lead to forfeiture of the tenancy. See *Abioye v. Yakubu supra*

Though the list is not exhaustive, the above are the well-known ones. The court will not grant

forfeiture for minor misbehavior, in fact the court will only grant forfeiture in very exceptional cases. See *Ashagbon v Odutan* 12 NLR 7, *Ogbakunmawu & Ors v Chiabolo* 19 NLR 107. In *Lasisi v Tubi supra* the Appellants were customary tenants to the Oloto family. Sometime in 1968 and 1969, the family sold two separate portions of the land to the respondents respectively granting them certificates of title. The respondents were prevented from accessing the plots sold to them by the appellants who contended that their interest as customary tenants subsisted and could not be derogated from. The trial court disagreed with the appellants stating that the rights of the respondents were absolute and indefeasible as purchasers for value of the said lands and registered proprietors under section 53(2) of the Registration of Titles Act. On appeal, the judgment of the trial court was set aside in favour of the appellants. The Supreme Court noted that, based on the *nemo dat* principle, the purchaser can never get what the vendor himself did not possess. Accordingly, the Oloto family are without power to dispossess the appellants (as customary tenants) and the respondents bought the lands in dispute subject to the unextinguished possessory title of the appellants as customary tenants.

Self-Assessment Exercise 2

With reference to relevant cases state the breaches that may render a customary tenancy liable to forfeiture.

Forfeiture is not automatic. The overlord is entitled to overlook or forgive acts of misbehavior of the tenant that are inconsequential. In *Lawani v. Tadeyo & Anor*. (1944) WACA 37, It was held that there is no such thing as forfeiture as misbehavior only makes the culprit liable to forfeiture at the will of the overlord which, if resisted, can only be enforced by reference to courts.

In order to forfeit a customary tenancy, the overlord must take definite steps to recover possession of the land from the tenant. The Supreme Court in the case of *Abioye v Yakubu (1991) 5 NWLR (pt 190) 130,* explained the position of the law as follows: -

> "It cannot, therefore be right to say that the cases show that once the customary tenant committed an act which amounted to misbehavior he forfeited his tenancy, even though the overlord had not sought an order of court therefore. The overlord was entitled to overlook or waive the act of misbehavior. If he did so, the relationship of the parties continued. In this respect the decision in *Ogbakunawu v Chiabolo* 19 NLR 107 that forfeiture is automatic upon misbehavior by the customary tenant is no longer good law! I should not follow it. It could not be automatic in view of the fact that, like in other cases of forfeiture, a customary tenant whose tenancy was threatened with forfeiture on grounds of misbehavior was always entitled to apply for relief against forfeiture, which might be granted by the court, even if it had to impose some conditions". – per Nnaemeka-Agu JSC p.245-246.

Forfeiture may be granted against the whole community though the Supreme Court had said this will be done in very exceptional cases. In *Taiwo v Akinwunmi* (1975)5 SC 143 Forfeiture was granted against a whole community because it was established that for over 75 years, the customary tenants had persisted in disputing the title of the overlord through various means. See also *Akpagbure v Ogu* (1976) 6 SC 63 at 74 where it was noted that denial of an overlord's title is one of the gravest breaches that a customary tenant could commit. The tenants, in that case had grown into a large community of wealthy persons whose youths persisted in asserting title over the overlord's land ceasing to recognize the overlord's title and engaging in various acts inconsistent with the terms of their customary tenure include acts of rampage and setting overlord's farms on fire. In the case of *Ogunmola v Eiyekole* (Appeal No. SC/195/1987) the Supreme Court having found evidence of misconduct and refusal of the respondents to pay the tribute or rent, that the tenants not only refuse to pay the rent but also deny the title of the overlord, the court ordered forfeiture of the tenancy. *See Oniah v Chief Onyia* (1989) 1 NWLR (pt 99) 514.

As we noted above, the act of forfeiture is not automatic but an action taken by the overlord to terminate the tenancy by applying to the court to declare the tenancy forfeited, and recovery of possession. It was possible for the overlord to forcefully take possession, in the olden days. *See Iresa v Oshodi (1934) A.C 99,* but act of self-help is no longer available today. The only reasonable mode is to apply to the court for a declaration for forfeiture of the customary tenancy. Where the right to forfeit the tenancy has been waived or condoned, the overlord cannot later apply for possession. In *Abowaba v Adesina* (1946) 12 WACA 18, the Oloto family granted a plot of land to late Dr. Sapara under a customary tenancy. Upon the death of Dr. Sapara, his administrator sold the land without Chief Oloto's consent and the land became liable to forfeiture though Chief Oloto took no steps to exercise his right of forfeiture. Chief Oloto subsequently accepted the sum of £10 from a successor in title to whom the land had been sold. It was held that by accepting the payment and issuing a receipt therefor, Chief Oloto had waived his right to challenge the sale of the land by Dr. Sapara's representatives.

Self- Assessment Exercise 3

What are the grounds upon which a customary tenancy may be determined?

4.4 SUMMARY

Customary tenancy, though agreed to be in perpetuity, can actually be determined. The continuity in perpetuity depends on good behavior of the tenant, and any act that can be interpreted as a fundamental denial of the title of the overlord is in fact an act that will determine the tenancy.

The customary tenancy may be determined by the accomplishment of the reason for the tenancy, abandonment, alienating the land without consent of the overlord, refusal or neglect to pay rent or tribute and denial of the overlord's title including direct denial of title or indirect denial actions like

supporting adverse claimants e.g. giving evidence in court on behalf of adverse claimants etc.

Forfeiture may be waived or condoned, but the over lord needs to apply to the court for order of forfeiture and possession of the land in order to recover possession from the tenant.

4.5 REFERENCES/FURTHER READING/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

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J. Finine Fekumo, Principles of Nigerian Customary Land Law (2002) F & F Publishers

4.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

The best way to determine whether a customary tenant has abandoned the tenancy is by an indication of the intention of the tenant.

SAE 2

A customary tenancy may be liable to forfeiture if:

a. The tenant fails to pay tributes/rent as agreed between the parties. This, though a breach, is not absolute. It is only a ground for forfeiture where this is agreed that it is a fundamental condition

of the customary tenancy or where it is coupled with other breaches. *Ogunmola v. Eiyekole, Abioye v. Yakubu*

b. The tenant denies the title of the overlord. An act of denial which may constitute ground for forfeiture must heavy, malicious or repeated such that it is clear that the customary refuses to be subject to the overarching title of the overlord. *Bob Manuel v. Dokubo, Ogunmola v. Eiyekole, Abioye v. Yakubu, Taiwo v. Akinwunmi*

c. The tenant alienates all or part of his title without the consent of the Landlord. *Bob Manuel v. Dokubo,*

d. The tenant uses the land for a purpose other than that for which the tenancy was granted. *Ukwa v. Awka Local Council*

SAE 3

A customary tenancy may be determined by abandonment, fulfillment of the purpose for which the tenancy was created, forfeiture

MODULE 4:

Unit 5: RELIEF AGAINST FORFEITURE CONTENTS

5.1 INTRODUCTION

Customary tenancy is essentially a tenancy that is granted in perpetuity. However, this is for the period of good behavior of the tenant upon misbehavior, the tenancy is liable to be forfeited by the overlord. Where this step has been taken, the court has the power invoking its equitable jurisdiction to grant relief from forfeiture.

5.2 LEARNING OUTCOMES

By the end of this unit, you should be able to explain when and how the court will grant relief against forfeiture.

5.3 MAIN CONTENT

5.3.1 RELIEF AGAINST FORFEITURE

The courts have assumed jurisdiction in cases of forfeiture of customary tenancy to invoke their equitable powers to relieve the customary tenant from forfeiture in deserving cases. The existence of this jurisdiction was affirmed in the case of *Ashogbon v Oduntan* (1935) 12 NLR 7. Graham Paul J explained the position thus;

> "I wish to make it clear that in my opinion where a native custom is invoked in support of a forfeiture of a right this court will as a court of equity consider in the particular circumstances of each case whether forfeiture or a suitable penalty would be the proper course. I regard this court in its equity jurisdiction as in some measure… the keeper of

the conscience of native communities in regard to the absolute enforcement of alleged native customs".

In-Text Question

Why do you think courts have to invoke their equitable jurisdiction to grant relief from forfeiture?

We must understand that in invoking its equitable jurisdiction to grant the relief from forfeiture the court will consider amongst other things –

(1) the attitude of the tenant,

(2) the gravity of the misbehavior,

(3) whether it can be remedied or not,

(4) whether it is a flagrant and deliberate denial of the title of the overlord, or a claim of the title of the land by the tenant.

Clearly, therefore, the court's jurisdiction to grant relief is not as a matter of course, but is reached after a careful appraisal of the competing interests on the land. In the case of *Onisiwo v Fagbenro*. (1954) 21 N.LR 3 .The defendants had been customary tenants of the Onisiwo chieftaincy family for over 80 years. Without the consent of the overlord, the tenants granted a lease of 50 years to third parties with option to renew for another 25years. The court refused to grant relief from forfeiture on the ground that their conduct disentitled them to the assistance of equity because, having maintained the attitude that they were absolute owners, they "missed the opportunity of placating the plaintiffs by offering to share the rent they were going to receive and it is rather late in the day to say that they were sorry and that they made a mistake in good faith". The court was of the view that forfeiture was the only way to protect the overlord's right to the reversion, and granting a relief will only allow the tenants to go scot free and try again. Comarmond S.P.J observed as follows,

> "One may feel tempted to attach little importance today to the rights of reversion or to the right of forfeiture established and recognized under native law and custom. One may think that, owing to the impact of Western laws and the existence of social and economic conditions, the old order of things in Nigeria must fade out. I think, however, that the proper way of relegating irksome or outmoded law and custom is to have recourse to legislation" p.7

Self-Assessment Exercise 1
What are the factors a court will consider in deciding whether to grant relief from forfeiture?

Other deciding factors in granting relief are, degree of inconvenience that would be occasioned to the tenant having regard to the length of time he has been in possession and improvements he has made on the land. Thus, in the case of *Uwani v Akom (1928) 8 NLR 19* relief was granted on the ground that it would be inequitable to dispossess some 310 tenants from land they had occupied for over 50 years and had built over 100 houses and farmland.

Relief will not be granted where the tenant has alienated the land to third parties, because that will be tantamount to denying the title of the overlord, or abandonment. In the case of *Chief S.O. Ogunmola & Ors v Eiyekole* (1990) 4 NWLR (Pt.146) 162 the Supreme Court held, inter alia, approving the decision of the Court of Appeal that

> "Without doubt, the principle of customary law is well stated that a customary grantee is entitled to continue his occupation of land only during the period of his good behavior, and that he is liable to have his interest terminated for forfeiture if he is guilty of acts amounting to serious misconduct or misbehavior".

The court, thereafter listed the misbehavior committed by the tenant before finally arriving at the decision to refuse relief from forfeiture, when the court found that

> "The most serious misconduct which is rarely overlooked is denial of the landlord's title as it is in this appeal. Coupled with this was the act of the respondents by pulling down the shrine worshipped annually by the appellants. The shrine is on the land in dispute. In so far as the appellants are concerned, that was an act of desecration".

The court also found the evidence of misconduct and refusal to pay the tribute or rent on record.

> "It is manifest from their evidence and conduct that not only did they deny the title of the appellants they also refused to pay tribute or rent".

The court refused to grant relief from forfeiture based upon the serious misbehavior committed by the tenants. *See also Taiwo v Akinwunmi* (1975) 4 S.C. 143, *Ojomu v Ajao* (1983) 2 SCNLR 156.

In-Text Question

Why will the court refuse to grant relief from forfeiture where a customary tenant alienates land to third parties?

However, where the customary tenant's misbehavior is minor or remediable, the court will be willing to grant relief against forfeiture. See *Lasisi v Tubi* (1974) All NLR (pt II) 72 per Dan Ibekwe JSC. In order to do substantial justice, where the court orders relief from forfeiture, the court may order the tenant to pay the tribute or rent and to henceforth be of good behavior. Where relief is granted this does not render valid an otherwise invalid transaction. For instance, where the tenant had sold or leased land in breach of his obligations, the transaction shall remain void, even if the relief against forfeiture had been granted.

Self-Assessment Exercise 2

How may the court strike a balance between the need to offer a customary tenant relief from forfeiture in cases of minor or remediable misbehaviours and the need to protect the interests of the overlord?

5.4 SUMMARY

Relief against forfeiture is granted by the court based on the circumstances of the case and after weighing the competing interests, and gravity of the misbehaviour of the customary tenant. Though not available under native law and custom to a tenant in breach of his tenancy, relief against forfeiture may be granted by the court invoking its equitable jurisdiction.

5.5 REFERENCES/FURTHER READING/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

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J. Finine Fekumo, Principles of Nigerian Customary Land Law (2002) F & F Publishers

5.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

Some of the factors a court may consider include:

(1) The attitude of the tenant,

(2) The gravity of the misbehavior,

(3) Whether it can be remedied or not,

(4) Whether it is a flagrant and deliberate denial of the title of the overlord, or a claim of the title of the land by the tenant.

(5) Length of time during which the customary tenancy has existed

(6) Nature or extent of improvements on the land

(7) Degree of possible inconvenience to the tenant in the event of a forfeiture – bearing in mind the length of time, improvements and nature of breach.

SAE 2

The court may strike a balance between the competing interests of the overlord and customary tenant by seeking to do substantial justice to both. Therefore, where the court orders relief from forfeiture, the court may order the tenant to pay the tribute or rent and to henceforth be of good behavior.

MODULE 4:

Unit 6: IMPACT OF LAND USE ACT ON CUSTOMARY TENANCY

CONTENTS

6.1 INTRODUCTION

Owing to the nature of customary tenancy as a system of rules accepted by a particular community and one which predates any statutory prescriptions for land law – especially the Land Use Act 1978, the impact of the Land Use Act 1978 on the interest held by the customary tenant will be further examined in this unit.

6.2 LEARNING OUTCOME

By the end of this unit you should be able to explain the impact of Land Use Act 1978 on the interest held by the customary tenant.

6.3 MAIN CONTENT

6.3.1 Impact of Land Use Act on Customary Tenancy

As we explained above, customary tenancy is created where a land owner allows another person (tenant) the occupation of his land for specific purposes, and either for a term (e.g. planting season) or normally in perpetuity subject to good behavior of the tenant. The customary tenant only occupies the land and the title never passes to him. He is expected to pay rent or tribute to the overlord, in the event of misbehavior, the tenancy is liable to forfeiture at the instance of the overlord.

In-Text Question

Between the practice of customary tenancy and the notion of right of occupancy under the Land use Act, which came first?

Upon, the coming into

force of the Land Use Act 1978, the pertinent question that had agitated the minds of jurists and scholars had been – 'what is the quantum of interest held by the customary tenant?' Some authorities have ruled that the rights of the overlord have been swept away by the provisions of the Land Use Act especially section 36(2). The section provides as follows:

> *"Any occupier or holder of such land, whether under customary rights or otherwise however, shall if that land was on the commencement of this Act being used for agricultural purposes continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate local Government and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the custom of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil"*.

Section 36(3) went further to permit the appropriate local Government to issue the customary right of occupancy to the occupier or holder if satisfied that the occupier/holder is entitled to possession and that the land was being used for agricultural purposes.

Section 36 has created some ambiguity as to the nature of interest held over land subject to customary rights. The problem is - who is the holder and who is the occupier? 'Occupier' was defined in section 51 as, "any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-lessee or sub-under-lessee of a holder. On the other hand, the holder is the person entitled to the right of occupancy. The Supreme Court seemed to have laid to rest the arguments on the proper relationship of the customary tenant and the overlord in view of the impact of the Act in the case of *Abioye v Yakubu supra.* In that case, the customary tenants of the plaintiffs, after about 60 years on the land as tenants, put up a signpost on the land that suggested that the land now belongs to them absolutely. The plaintiffs sued for forfeiture of the customary tenancy and the tenants claimed the Act had converted their rights to that of customary right of occupancy under the Act, the High Court held *inter alia,* that the Act did not convert the occupiers (tenants) into holders (owners) of the land. Upon appeal, the court of Appeal held *inter alia,* that being occupiers of the land before the Land Use Act, the tenants are entitled to the customary right of occupancy, and that they now become the tenant of the local government. The plaintiffs appealed to the Supreme Court, which held as follows:

1. The relationship of lessor and lessee, mortgagor and mortgage are continued by the Land Use Act. The Act never sought to disturb existing relationships.

2. The Act did not expressly divest or extinguish the customary rights of the owners of agricultural land in non-urban areas as it did in respect of undeveloped land in excess of half hectare in urban areas. In deciding therefore the grant to the tenant of the deemed customary right of occupancy tantamount to the extinction and extinguishment of the customary right of the owner, the right to tributes, forfeiture and reversion, it is necessary to examine the quantum and content of the deemed customary right of occupancy granted to the occupier in the light of the rules of interpretation of expropriatory statutes.

3. Section 1 has not taken away the right of the customary owners of enjoyment of the

tributes rather it left it untouched.

4. In Section 36(2), the occupier is the customary tenant while holder is the customary owner

5. Where a certificate of occupancy is granted to a tenant who is subject to customary tenancy, the overlord retains his right as a reversioner in case the certificate of occupancy is revoked for any reason and the overlord may apply for a grant of certificate of occupancy to him.

Self Assessment Exercise 1

Enumerate the principles of law established by the Supreme Court in *Abioye v. Yakubu*

6.4 CONCLUSION

The position of the customary tenant under customary law has been left undisturbed by the Act. Except that, he may apply for a customary right of occupancy which does not remove him from the full incidents of customary law.

We may safely conclude therefore that customary tenancy is preserved under the Act. The Act not only recognizes the status of the customary tenant, in fact, he may be ousted from occupation in the event of misbehaviour in spite of the Act. The overlord retains his title, and right to the reversion. Though the tenant may be entitled to apply for the customary right of occupancy, such right is subject to the overriding incidents of customary law.

6.5 REFERENCES/FURTHER READING/WEB SOURCES

C.O. Olawoye, (1981) Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.

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6.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

The principles are as follows:

1. The relationship of lessor and lessee, mortgagor and mortgage are continued by the Land Use Act. Hence, the Act never sought to disturb existing relationships.

2. The Act did not expressly divest or extinguish the customary rights of the owners of agricultural land in non-urban areas as it did in respect of undeveloped land in excess of half hectare in urban areas. In deciding therefore the grant to the tenant of the deemed customary right of occupancy tantamount to the extinction and extinguishment of the customary right of the owner, the right to tributes, forfeiture and reversion, it is necessary to examine the quantum and content of the deemed customary right of occupancy granted to the occupier in the light of the rules of interpretation of expropriatory statutes.

3. Section 1 has not taken away the right of the customary owners of enjoyment of the tributes rather it left it untouched.

4. In Section 36(2), the occupier is the customary tenant while holder is the customary owner

5. Where a certificate of occupancy is granted to a tenant who is subject to customary tenancy, the overlord retains his right as a reversioner in case the certificate of occupancy is revoked for any reason and the overlord may apply for a grant of certificate of occupancy to him.

MODULE5:

Unit 1: **OUTLINE OF SUCCESSION RIGHTS**

CONTENTS

1.1 INTRODUCTION

Succession to land is an important aspect of customary land law, and it regulates how land devolves and is inherited by heirs of the original owner of the property. Customary law has evolved rules and customs that are applicable under various circumstances. These rules of customary law on succession like every other rule of customary law vary from one area to the other. There are also external interventions that will render the rules of customs inapplicable.

1.2 LEARNING OUTCOMES

At the end of this unit, you should be able to

a. Differentiate between testate and intestate succession

b. Define basic terms like 'patrilineal succession', 'matrilineal succession', 'primogeniture' and 'ultimogeniture'

1.3 MAIN CONTENT

1.3.1 DISTINCTION BETWEEN TESTATE AND INTESTATE SUCCESSION

Upon the death of a man, the devolution of his property depends on whether or not he has made a will. Where he made a will before his death, the properties are shared according to the directions in the will, and he is therefore known to have died **"testate".** Testate succession is usually governed by the appropriate succession statutes. In Nigeria, succession statutes include the Wills Act 1837, Wills (Amendment) Act 1852, Wills Laws of various states and Administration of Estates Laws of various states.

Where a person died without a will, then he is said to have died **"intestate".** In the latter, situation, the properties will be governed by the appropriate customary law. Succession under customary law is treated as being entirely intestate. Some may argue that, if the owner of the property gives verbal instructions as to how his properties are to be shared amongst his children and relatives this may be regarded as testate disposition. However, the point is that under customary law, there are rules guiding the sharing of inheritance and it is only where the testator decided to go out of this known rule that exception is taken to the general rule. Even then, the elders may disregard or modify the wishes of the deceased depending on the circumstances of the case, and they are not obliged to follow his wishes though it may be persuasive (See Lloyd, 1965, Yoruba inheritance and Succession, in Derret ed. Studies in the laws of Succession in Nigeria, O.U.P. 155)

In-Text Question

Differentiate between Testate and Intestate Succession and the laws that govern each form of succession.

1.3.2 INTESTACY AND CUSTOMARY RULES OF SUCCESSION

The fundamental rule is that the personal law of the deceased land owner will be the law applicable to his estate. In the case of *Tapa v Kuka* (1945) 18 NLR 5, where the deceased from Nupe land, left property in Lagos, the question for determination was whether it is the law of where the property is situated (*lex situs*) that should be made applicable or the personal law i.e. law of Nupe, the court held that it was the customary law of Nupe that will be applicable. A similar decision was reached in *Osuagwu v. Soldier* (1959) NRNLR 39 where court held that Igbo customary law should apply to property in dispute between two Igbo men despite the property being in Kano. In the Western and Midwestern States of Nigeria, it is the lex situs that will be the applicable law when the issue of succession to real property is concerned. See, for instance, S20(2) Customary Courts *Law Cap 3 LWN 1959).*

The personal law may not necessarily be the law of his native community, but he may have adopted to live as the member of another community and agreed to be subject to the customary law of that community in which case, upon his death, his personal law will be that of his adopted community. See *Olowu v Olowu* (1985) 3 NWLR (pt 13 372) where, upon proof that a Yoruba man had lived, naturalised and adopted Benin as his community before he died intestate, the court held that his personal law should be Benin native law and custom.

In-Text Question

Why did the court accept the personal law of the deceased Chief Olowu should be Benin native law and custom despite him being born Yoruba?

1.3.3 BASIC SYSTEMS OF SUCCESSION UNDER CUSTOMARY LAW

The general rule of customary law is that upon death of a land owner, his property is inherited by his children under native law and custom. There are two basic systems of succession under customary law. We have the patrilineal and the matrilineal. The patrilineal succession is one that is strictly through the fathers' lineage, while the matrilineal is strictly through the mothers' lineage. Succession under most customs in Nigeria are patrilineal though there are pockets of matrilineal types in various parts of the country.

In-Text Question

Mention the basic systems of succession under customary and how they operate.

There are also what is known as primogeniture type of inheritance, in which the eldest son takes and inherits the properties of his late father to the exclusion of others, while in some communities, ultimogeniture system is used, where the youngest child inherits all the father's properties exclusively. There two types are offshoots of the patrilineal type of succession. An example of the patrilineal society is the Igbo society while Benin society is primogeniture. The Yoruba custom permits both male and female children to inherit land to the exclusion of other relatives.

Self-Assessment Exercise 1

Fill in the blank spaces with the correct answers

1. Patrilineal succession favours the …….. side
2. The recipient of inheritance under ultimogeniture is the ……
3. Primogeniture and ultimogeniture are both variants of ……. succession
4. The recipient of inheritance under primogeniture is the ……
5. Matrilineal succession favours the …….. side

1.3.4 TESTATE SUCCESSION

The owner of land who executes a will directing how his land and other properties may be shared is said to have died **testate**. Where there is a written will, then the entire rules of customary law is excluded, subject to limits on testamentary freedom. No special words may be used, but it must be in writing, and signed by the testator and in the presence of two witnesses who must also sign in his presence. Where the will is not properly attested, the gift will fail and the customary law will apply.

The testator may create a family property under customary law where he directs in a will that his property be held as family property. *I Jacobs v Oladuni Bros.* (1935)12 NLR1. Note that the provisions of the Wills Act 1837 applies to testate succession but, it will not apply where the testator attempts to give out family property in his will. In such a case, the principle of *nemo dat quod non habet* will apply because the does not belong to him but to the family. See *Abeje v Ogundairo* (1967) LLR 9.

Self-Assessment Exercise 2

What is Testate Succession and how may customary law apply property created under a will?

Note that the freedom of a testator to distribute his estate as he desires is not absolute. Various Nigerian statutes recognize that whatever testamentary freedom a testator may have, he cannot go outside the compulsory prescriptions of customary law. For instance, Section. 3 (1) of the Wills Law of the former Western Region provides:

> **Subject to any Customary Law relating thereto**, it shall be lawful for every person to demise, bequeath or dispose of, by his will executed in a manner hereinafter required, all real and personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so demised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator.

In Lawal Osula v. Lawal Osula where the deceased sought to disinherit his eldest son and bequeath his *Igiogbe* to another child, the court affirmed that be unlawful because it offends the proviso to

Section 3(1). Belgore JSC noted that

> … Binis like some other tribes in Nigeria have got some age long traditions and norms, some peculiar to them, others in common with the other races in the other parts of the world that cannot be written off by mere legislation. To legislate to ban some of these native law and customs would lead to serious disorder that makes governance and obedience difficult. It is in light of these that instead of entirely discarding a practice that has been tried and tested over centuries, legislation are carefully drafted to accommodate the laws and customs in question and to regulate their practice.

1.4 SUMMARY

There are two types of succession – testate (death with a will) and intestate (death without a will). Testate succession is regulated by the relevant succession statutes while intestate succession is regulated by the customary law of the deceased person. Customary rules on succession in African societies varies from community to community and may be influenced by the English received laws, marriage, and Islamic law.

Under customary law, there are two basic systems of customary law – patrilineal (from the father's side) and matrilineal (from the mother's side). Patrilineal system of customary law may either operate under primogeniture (inheritance by the eldest male child) or ultimogeniture (inheritance by the youngest child).

A testator may elect to create family property by his will. In that case, customary law will regulate the family property so created. Family property so created cannot be given out by a beneficiary through a will.

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1.6 SUGGESTED ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

1. Patrilineal succession favours the **father's** side
2. The recipient of inheritance under ultimogeniture is the **youngest child**
3. Primogeniture and ultimogeniture are both variants of **patrilineal** succession
4. The recipient of inheritance under primogeniture is the **eldest son**
5. Matrilineal succession favours the **mother's** side

SAE 2

Testate succession occurs when a person distributes his estate by a written will which takes effect upon his death. Where family property is created by a will, administration of the property will be subject to rules of customary law.

MODULE5:

Unit 2: **MODES OF DISTRIBUTION OF ESTATE UNDER CUSTOMARY LAW**

CONTENTS

2.1 Introduction

As we highlighted in Unit 1, rules of customary law differ from community to community. One common thread that runs through most customs is the inheritance of a deceased person's estate by his/her children or immediate family members – children usually taking priority. In this unit, we will explore the rules on distribution of estates under various customary laws. As Nigerian tribes are different so are customs. You must therefore bear in mind that the customary laws examined in this unit are not the only ones guiding intestate inheritance under customary law. As you read about Yoruba, Igbo, Benin and Esan customary rules, try and interrogate the rules guiding inheritance under your personal customary law.

2.2 Learning Outcomes

By the end of this unit, you should be able to

a. Discuss the customary rules of succession under
   - Yoruba customary law
   - Igbo customary law
   - Benin customary law

b. Differentiate between the rules of primogeniture under Benin customary law and that of the Esan tribe.

2.3 Main Content

2.3.1 DISTRIBUTION OF ESTATE UNDER YORUBA CUSTOMARY LAW

Yoruba customary law allows only the children to inherit the father's property exclusively. Relatives and other collaterals are therefore excluded. Male and female children share equally, while a widow does not have a right of succession.

In the case of *Lewis v Bankole* (1909)1 NLR 18.The court laid down the following rules in respect of succession among the Yorubas;

1. When the founder of a family dies, the eldest surviving son called "Dawodu" succeeds to the headship of the family. Headship implies all acts of leadership including living in the family residence and the giving orders in his father's house or compound.

2. On the death of the eldest surviving son, the next eldest child of the founder, whether male or female, is the proper person to succeed as head of family.

3. Inheritable property is into equal shares between the respective branches, regard being had to any property already received by any of the founder's children during his life-time.

4. The founder's grandchildren only succeeded to such rights as their immediate parents had in the family property.

When it comes to the sharing proper, the Yoruba custom recognize two modes of sharing –

- *per stripes* or *Idi igi* or

- *per capita* or *ori Ojori*.

In the case of *Dawodu & Ors. v Damole & Ors, the* court explained the position thus:

(1) *"Idi Igi"* is the Yoruba Native Law and custom whereby the estate of an intestate whose wives have pre-deceased him, is distributed according to the number of the mother's (wives of intestate) of the children of such intestate.

(2) *"Idi-Igi"* is an integral part of Yoruba Native Law and custom relating to the distribution of intestates 'estate. It is in full force and observance, and has not been abrogated.

(3) *"Ori – Ojori* a Yoruba Native Law and Custom, whereby the estate of such an intestate is distributed according to the number of his children, is a relatively modern method of distribution, and may be adopted only at the discretion of the head of the family for the avoidance of litigation.

Some have argued that it is contrary to natural justice equity and good conscience to allow sharing by the *Idi-Igi* system, as it will deny many of their equal share. In cases where a wife has more children than others, to share by *Idi-Igi* and not *Ori-Ojori* is believed to be totally inequitable. (*See Niki Tobi, op. cit p. 80).* The Supreme Court however put the rule beyond doubt when the court held in the case of *Olowu v. Olowu (1985) 3 NWLR (pt13) 372,* that it is the eldest child who takes over the management of the estate of the deceased for himself and other children, and also decides which system of distribution should be adopted be it *"Idi – Igi"* or *"Ori – Ojori"*.

In-Text Question
Differentiate between *idi-igi* and *ori-ojori.*

Where the intestate left no issue, the court in the case of *Adedoyin v Simeon* (1928)9NLR 76, laid down the following based on the evidence of customary law adduced before the court-

1. If the deceased left brothers and sisters by the same mother, they have the right of succession to the exclusion of other relations.

2. Where there is no brother or sister by the same mother, the parents are together entitled to succession but more usually the father would leave everything to the mother.

3. If the deceased is survived by only one parent, that parent takes everything.

4. Brothers and sisters of the half-blood by the same father have no right of inheritance, notwithstanding that the property was inherited from their father.

Note however that, where the property in dispute was inherited from the father's family, inheritance is by his paternal relations, and, where the property was inherited through the mother, the maternal relations have the right of possession. *See Suberu v Sunmonu (1931) 10 NLR 79 at 80.*

Grand children take their deceased parents share *per stripes* irrespective of whether such parent

survives the intestate.

Self-Assessment Exercise 1
State the Yoruba rules on succession where an intestate died without an issue.

2.3.2 DISTRIBUTION OF ESTATE UNDER IGBO CUSTOMARY LAW

The Supreme Court had recognized the Igbo custom that the eldest son called the 'Okpala' takes over all the properties of the intestate father, and becomes the head of family, and upon his death, his eldest son becomes the head of family *see Ngwo v Onyejera (1964)1 All NLR 352.*

Succession under Igbo customary law is strictly patrilineal. The house of the deceased belongs exclusively to his eldest son to the exclusion of all other children. All the other properties of the land owner belong to all the family to be managed by the eldest son for the benefit of all. In the past, Igbo customary law barred female members of the family from inheriting land. Though any daughter was living in the family house before the death of the land owner could not be turned out during her lifetime. See for instance *Mojekwu v. Mojekwu* (1997) 7 NWLR (PT 512) per Uwaifo JSC, *Ugboma v. Ibeneme* (1967) FNLR 251

In-Text Question
From your knowledge of the basic systems of customary succession in Unit 1 of Module 5, classify Igbo succession pinpointing the particular variant of your classification.

It is noteworthy that the position has changed where inheritance rights of female children under Igbo customary law is concerned. In *Ukeje v. Ukeje* (2014) LPELR-22724 (SC) the custom has been declared void on ground of inconsistency with Section 42(1) (a) and (2) of the 1999 Constitution (as amended). In that case, the respondent, as daughter to deceased intestate challenged the appellants' application for letters of administration, contending that as daughter to the deceased, she was entitled to share in his estate. In agreeing with her position, the court stated per Rhodes-Vivour JSC

> 'no matter the circumstances of the birth of a female child, such child is entitled to an inheritance from her late father's estate. Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father's estate is in breach of Section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution.

A similar decision was reached in *Anekwe v. Nweke* (2014) 9 NWLR (PT 1412) 393. The court held per Ogunbiyi JSC that

> "a custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society. One would expect that the days of such

> obvious differential discrimination are over. Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of God instituted gender differential should be punitively and decisively dealt with. …For a widow of a man to be thrown out of her matrimonial home, where she had lived all her life with her late husband and children, by her late husband's brothers on the ground that she had no male child, is indeed very barbaric…"

Under Igbo customary law, a widow cannot inherit her husband's property, but she may be allowed to live in the house for her lifetime provided she remains unmarried or is married to a younger brother of her deceased husband.

In case of woman's property, her land is inherited by her sons, where she is married in the absence of sons, the property acquired by her before marriage goes to her own family and not to her husband, and property acquired by her after marriage belongs to her husband or his next of Kin. In *Nwugege v Adigwe (1934) II NLR 134*, the head of the family of a deceased widow applied for a letter of administration of her estate but was opposed by her late husband's son by another wife. The latter was held to be the proper person to administer the estate.

Self-Assessment Exercise 2

With reference to relevant cases, discuss the present position on inheritance rights of female children under Igbo customary law.

2.3.3 DISTRIBUTION OF ESTATE UNDER BENIN CUSTOMARY LAW

As with Igbo custom, the primogeniture rule is applicable to the distribution of a deceased man's estate. The eldest male child called the '*Omodion'* inherits the principal house called '*Igiogbe'* exclusively.

In-Text Question

a. State the names of the eldest male child in Igbo, Yoruba and Benin language

b. As under Benin customary law, is there a corresponding name for the principal house in under Yoruba customary law?

The following are noteworthy concerning the custom guiding inheritance of the Igiogbe:

a. Whilst this right cannot be claimed by another issue, the *Omodion* does not step into his inheritance until he has completed the final (traditional) burial rites of the deceased. *Idehen v. Idehen* (1991) 6 N.W.L.R. (Pt.198) 382

b. The eldest male child with the right to inherit the *Igiogbe* is the one who survives the deceased. Where the deceased previously had an eldest male child who predeceased him, the inheritance right falls to the next male child in line. *Idehen v. Idehen supra*

c. The *Igiogbe* cannot be partitioned. It is inherited by the eldest surviving son absolutely. *Edo v. Edo* (unreported) Suit No, B/36/85

d. The Igiogbe cannot be gifted, whether by will or intervivos grant, to another child or third party. Neither than a declaration disowning an eldest son render such a child unfit to inherit the Igiogbe upon the death of the deceased and the fulfillment of requisite conditions. In *Lawal Osula v. Lawal Osula* (1995) 9 NWLR part 419 SC 259, Chief Osula – The Arala of Benin Kingdom purported to dispose of his *Igiogbe* to another son through a testamentary document though the eldest son was still alive. Upon his death and the eldest son's fulfillment of requisite conditions, he was held entitled to inherit the *Igiogbe* – hence the testamentary disposition of same failed. See also Imade v. Otabor (1998) 4 NWLR (Pt.544) 20 at 33- 34 where the Supreme Court expressly stated that the *Igiogbe* cannot be inherited by gift.

Self-Assessment Exercise 3

Mention three rules guiding the inheritance of the *Igiogbe* under Benin customary law.

Apart from the Igiogbe, inheritance of other real or personal property of the deceased is enjoyed by all the children of the deceased. In the case, the eldest son – as father of the family is deemed to hold them in trust for the children of the deceased. Such gifts may be specifically distributed such that the children enjoy their interests exclusively or the eldest son may administer them on behalf of the other children with everyone enjoying joint interest. Where such properties are specifically distributed two rules apply depending on whether the deceased was monogamous or polygamous. If monogamous, each child is given a portion exclusively. If polygamous, then the '*Urho'* or gate system is employed. Under the *'Urho'* system, distribution is per stripes i.e. the children of each wife are granted a portion of the deceased's estate to enjoy collectively. Hence the estate is distributed not according to the number of children but by the number of wives or women who had children for the deceased. The *'Urho'* system is akin to the Yoruba '*idi-igi'* system discussed above i.e. distribution per stripes.

In-Text Question

What is the equivalent of distribution per stripes under Yoruba and Benin customary law?

The '*Igiogbe'* rule does not apply where the deceased is female. In such a case, her properties are shared among her children with the eldest son given a larger share than other children. As with other customs, widows are also not entitled to a share in their late husband's estate.

Under the customary laws of neighbouring tribes of the Benins, similar rules of inheritance apply with slight variations. For instance, the Esans practice strict primogeniture. Unlike Benin customary law where the eldest son only inherits the Igiogbe exclusively and shares other properties with the other children of the deceased, the eldest son inherits the entire property of the deceased exclusively to the exclusion other children. However, he may share part of the property with his younger siblings if he so pleases.

Where an Esan man dies without any children, his maternal brother inherit his property. If he had no maternal brothers, then his property is inherited by his paternal brothers.

The Urhobos of present day Delta State (another neighbouring tribe to the Benins) also practice strict primogeniture with the eldest son inheriting the entire estate and distributing same as he pleases. See *Salubi v. Nwariaku* (2003) 7 NWLR 426

In-Text Question
The Esans of Edo State practice 'strict primogeniture'. How does it operate?

2.3.4 VARIATIONS OF CUSTOMARY LAW BY MARRIAGE

Section 36 of the Marriage Act 1914 provides that where:
(i) a person who is subject to customary law contracts a marriage in accordance with the provisions of the Act and dies intestate after the commencement of the Act leaving a widow or husband or any issue of such marriage OR
(ii) any person who is an issue of a marriage under the Act dies intestate subsequent to the commencement of the Act,
real and personal property left by the intestate which might have been disposed of by will shall be distributed in accordance with the law of England relating to the distribution of the personal estates of the intestates, any customary law to the contrary notwithstanding.

In effect, the estate of a person who ordinarily would be subject to customary law by virtue of his manner of life (e.g. through a customary law marriage) would not be distributed under customary law in the event of his demise intestate where he has by subsequently entered into a marriage under the Act. The subsequent marriage therefore indicates a different manner of life.

All the states of the western states and mid-western states have adopted the Section 36 in their Administration of Estate Law with slight variations as necessary. For instance see Section 49(5) Administration of Estate law of Bendel State (now Edo and Delta states) 1976 sets out the principle enunciated in Section 36 albeit with variations on quantum of interest for beneficiaries. In *Salubi v. Nwariaku* (2003) 7 NWLR 426 the deceased who had previously married his wife under customary law subsequently also married her under the marriage Act. When upon his death intestate, his widow and eldest son procured letters of administration and proceeded to administer his estate according to the Administration of Estates Law of Bendel State under which the widow was held to be entitled to roughly one-thirds of the deceased's estate. Administration by the son was challenged by his elder sister – the respondent who contended that her mother was entitled to two thirds of their late father's estate and that by the joint reading of Section 36 of the Marriage Act and Section 49 of the Administration of Estates Act, her share ought to be about two-thirds of the estate. The appellant on his part contended that having lived his life and married under Urhobo customary law, same ought to guide the distribution of estate such that he as eldest son would inherit the entire property with the discretion to distribute as he pleased. On final appeal to the Supreme Court, it was held that customary law did not apply but that Section 49 of the Administration of Estate Act ought to apply instead of the Section 36 as decided by the trial court and court of appeal.

2.3.5 RULE IN COLE V. COLE

The rule laid down in *Cole v Cole* (1898) 1 NLR 15 is to the effect that the provisions of customary law or the Marriage Act does not affect succession of persons married outside the country under a monogamous marriage. It was held in the case that on the death intestate of a Christian native outside the colony and protectorate, the succession to his property is not governed by the marriage ordinance which applies solely to marriage contracted locally, and that the English law of succession will prevail over the native customary law.

2.4 SUMMARY

Customary laws differ from one community to another. With particular reference to customary rules of succession. Majority of customary laws follow the patrilineal branch with primogeniture in varying extents.

The Yoruba customary law stands out in that whilst it recognizes the headship of the eldest son, all children regardless of gender are entitled to a share of the inheritance of a deceased intestate. The Igbos and Edos both recognize the role of the eldest male child both in terms of headship and exclusive inheritance of the principal home. Other properties of the deceased intestate are also inherited by the eldest son but in trust for other children who are entitled to a share in such properties whilst the eldest son takes the lion's share. The Igbo custom which prohibits female children from inheritance is no longer valid having been struck down by the Supreme Court as being a breach of the fundamental guarantee of freedom from discrimination. Among the Esan tribe of Edo State (neighbouring tribe to the Benins) strict primogeniture is practiced with the eldest male child entitled to exclusive inheritance of **all** properties of the deceased intestate and the discretion whether or not to share some with his siblings. Like the Esan practice, Urhobo customary law also entitles the eldest male son with the exclusive right to inherit and the discretion to distribute the inheritance as he wills.

The application of customary law to the estate of a deceased intestate may be constrained where a deceased intestate who would ordinarily be subject to customary law is shown to have contracted a marriage under the Marriage Act 1914 whilst still alive. In such case, the estate of such deceased will be distributed according to English law and not customary law.

2.5 REFERENCES/FURTHER READING/WEB SOURCES

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2.6 POSSIBLE ANSWERS TO SELF-ASSESSMENT EXERCISES

SAE 1

1. If the deceased left brothers and sisters by the same mother, they have the right of succession to the exclusion of other relations.

2. Where there is no brother or sister by the same mother, the parents are together entitled to succession but more usually the father would leave everything to the mother.

3. If the deceased is survived by only one parent, that parent takes everything.

4. Brothers and sisters of the half-blood by the same father have no right of inheritance, notwithstanding that the property was inherited from their father.

SAE 2

Pursuant to the Supreme Court decisions in *Ukeje v. Ukeje* and *Aneke v. Nweke*, disinheriting female children is a breach of their constitutional freedom from discrimination. Accordingly, female children are now entitled to inherit from their dead fathers' estate.

SAE 3

1. The *Omodion* does not step into his inheritance until he has completed the final (traditional) burial rites of the deceased. *Idehen v. Idehen* (1991) 6 N.W.L.R. (Pt.198) 382

2. The eldest male child with the right to inherit the *Igiogbe* is the one who survives the deceased. Where the deceased previously had an eldest male child who predeceased him, the inheritance right falls to the next male child in line. *Idehen v. Idehen supra*

3. The *Igiogbe* cannot be partitioned. It is inherited by the eldest surviving son absolutely. *Edo v. Edo* (unreported) Suit No, B/36/85

4. The Igiogbe cannot be gifted, whether by will or intervivos grant, to another child or third party. *Lawal Osula v. Lawal Osula, Imade v. Otabor* (1998) 4 NWLR (Pt.544)