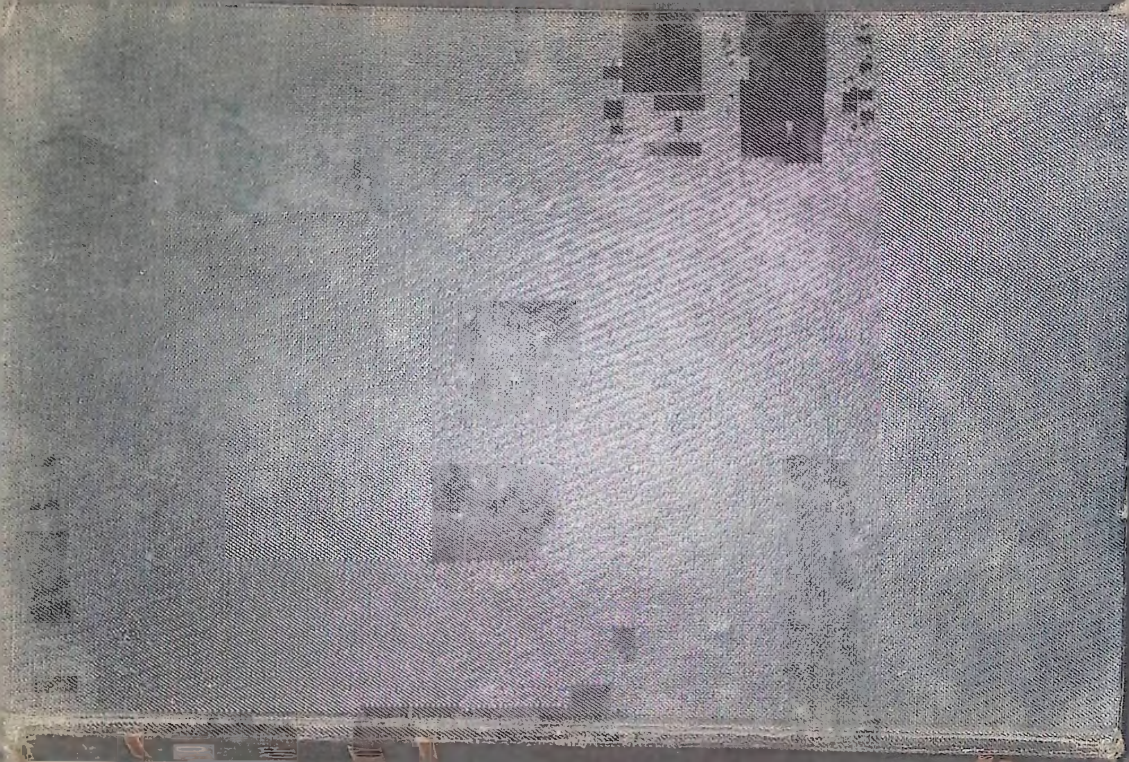

THE IBO LAW of PROPERTY

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THE IBO LAW of PROPERTY

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To MY FATHER AND MOTHER
Who did so much to encourage my
love for learning, but died too soon
to see the fruit of their labour.

PREFACE

This book grew out of a thesis which I submitted in 1961 in part fulfilment of the requirements for the University of London Master of Laws degree. It is the first comprehensive study by a Nigerian lawyer of the all-important subject of the customary law relating to property in Iboland. And it is the first book that deals in any detail with Ibo law of " personal property ".

The method of approach adopted here is essentially analytical and expository; though in a work on customary law such as this, the empirical method cannot altogether be avoided. It was my intention throughout the book to state the customary law in its purity as much as possible. Nevertheless, it would be naïve to ignore the impact which such forces as Western culture contact, statute law and case law have had on the customary law. And so, wherever important rules of customary law have been altered by parliamentary legislation or judicial decision, I have tried to say so, however briefly.

The question of how best to arrange the subject matter of this book has caused me many an anxious moment. Several alternatives were considered. The present arrangement was decided upon mainly because it appears to me to combine a systematic development of the subject matter (which is so important to the academic student) with easy reference (which is of paramount importance to the Bench, the Bar, Customary Court personnel and all those concerned with the administration of law). As so often happens in legal exposition, there are a number of repetitions. To mitigate any inconvenience resulting from this, the table of Contents and the Index have been made especially comprehensive.

The book begins with a survey of Ibo indigenous socio-political organisation, a determined effort being made to keep out of the text those obsolescent social (sometimes mythical) groupings which are pearls to the old school of anthropological field workers, but which in fact have no real significance in contemporary society. There is then a classification of property, followed by an analysis of the rights and interests which communities and individuals can have or enjoy in land. In view of the widespread

doubts and speculations regarding " ownership of land " and " communal land ", these topics are given a special treatment in Chapter 2. There follows an examination of the methods whereby property rights and interests are acquired. Next comes a study of the processes by which property rights are lost or relinquished, either by some *inter vivos* act of the owner or by operation of law. These include abandonment, " showing ", leasing, and pledging; exchange, gift and sale. There is a section on " kola tenancies " and the Kola Tenancy Ordinance of 1935. The next subject—succession—is a complicated one, first because its rules vary with the type of property being discussed, and secondly because very different rules apply in the patrilineal and " matrilineal " areas of Iboland. The subject has been further complicated by decisions of British administrative officers in their capacity as Review/Revision officers, by decisions of the superior law courts applying the principles of " natural justice, equity and good conscience " to customary law rules, and by statute law relating to marriage and inheritance. I have, therefore, been compelled to treat the subject of succession from various points of view. Women, infants, strangers and other persons subject to some legal disability receive special treatment in the appropriate places; so do the new statutory local authorities which sometimes act as over-all land control authorities.

It is customary in circumstances such as the present to acknowledge debts of gratitude to sundry persons. But here I am not just following custom. Instead, I wish to record deep and genuine gratitude to Dr. A. N. Allott, Reader in African Law in the University of London, and Director of the Restatement of African Law Project at the School of Oriental and African Studies. He not only supervised the original research but also read through the manuscript, offering advice and guidance at every step. However, responsibility for any errors—factual or otherwise—must be laid where responsibility properly belongs, viz. on my shoulders. I must also express my thanks to Mr. B. O. Nwabueze, now a lecturer at the University of Lagos, who read the proofs for Chapter I and made many valuable suggestions; to Mr. A. S. Anand, of Kashmir, who read all the proofs and made many useful suggestions regarding footnote references and points of grammar; and finally to Mr. W. C. E. Daniels, now lecturer in the University of Ghana, for his many practical suggestions as to style and presentation generally. Special thanks

are due to Messrs. Butterworths, the publishers, for their prompt and efficient handling of the publication.

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Throughout this book I have used the orthography and word-division recommended by the Onwu Committee and given official approval by the East Regional Ministry of Education late in 1961. The new (official) orthography has eight vowels, viz. *i ị e a u ụ o ọ*. For the benefit of non-Ibo readers, we shall give here a rough guide to their sounds in the English language:

Vowel	*Sound in English*	*Ibo example* (+*English meaning*)
i	–ee– as in feet	*isi* (=head);
ị	–i– as in pip	*ịrị, ịlị* (=to crawl);
e	–e– as in met	*ene* (=hare);
a	–ah– as in bah!	*aka* (=hand);
u	–oo– as in choose	*ube* (=pear);
ụ	–u– as in put	*ụkwụ* (=foot);
o	–o– as in oval	*onu* (=neck);
ọ	–aw– as in hawk	*ọnụ* (=mouth).

We may also note the dotted n (*ṅ*) which has the sound of –ng in words like ring, sing, thing and sting. But as far as this book is concerned, this letter only occurs in the words *aṅala* and *nṅụṅụ* on pages 108, 146 and 147.

CHAPTER 1

INTRODUCTION

(1) Background

(*a*) *Meaning of Ibo*

A great deal of time and energy has been spent by anthropologists, missionaries and administrative officers alike in an effort to discover the meaning (and what is more, the origin) of the term " Ibo ". So far, no positive result seems to have been achieved in this line of research. Nothing daunted, these great students of Ibo society have put forward a host of suggestions and speculations—some of them quite ingenious, others not so clever. The most popular suggestion, shared by no less distinguished scholars than Meek and Basden, is that the word Ibo is a contemptuous term. Some writers indeed go to the extent of saying that the word stands for slave. But if Ibo means slave, one cannot help wondering who the master race are, were or have been.

After a painstaking study of the languages of such neighbouring " tribes " as the Ijaw, the Jarawa, the Ababua and the Igala, and of words ending in *ibo* or *bo* in them, Meek came out with the proposition that perhaps the word Ibo means no more than " the people " or " the men ". But it is submitted, with respect, that however useful the linguistic approach may be *per se*, it is hopelessly inadequate when applied from outside the society being investigated. A simple illustration will, it is hoped, make this abundantly clear. The word " Jew " to many minds is associated with religious zeal, diligence and a remarkable flair for business organization. Nevertheless, it would be ridiculous to put forward an anthropological definition of " Jew " in terms of religious devotion, industry and business acumen. In the same way, the picture the Ibo man conjures up in the mind of the Ijaw man or the Igara man is not necessarily what the term " Ibo " connotes for the anthropologist or the sociologist.

The present writer's first impulse was to leave this undoubtedly fascinating search for " the true meaning " of " Ibo " to the anthropologist, and so refrain from adding to the general confusion and bewildering multiplicity of learned (and sometimes

not so learned) speculations on the subject. But for reasons which will appear shortly, we shall with trepidation hazard a suggestion. Before the advent of *pax Britannica*, with the resulting increase in inter-territorial contact, the world of our progenitors was obviously a pretty narrow one. To them the world consisted of first the lands and peoples of the great River Niger with its numerous tributaries, and secondly the "hinterland" of this great river system. To "the peoples of the river" our ancestors gave the name *Olu*. The rest of their little world was lumped together under the comprehensive term *Igbo* (*Ibo*). Thus it was that the phrase "*Olu na Igbo*" (lit. "*Olu* and *Igbo*") came to denote the entire humanity. It bears this meaning to this day. Also the word *Olu* still connotes "people that live by the water".

This proposition derives some support from, and goes to account for the paradoxical situation that though Onitsha town is generally regarded as the heart and soul of the Ibo nation, the Onitsha man used to detest (and quite often still resents) being called *onye Igbo* ("Ibo man"). Of course, he is not *onye Igbo*. How could he be, living as he does on the banks of the Niger and away from *ani Igbo* (Ibo land)? This is also true of the peoples of Aguleri and Umuleri who live on the banks of the Anambra River, the riverain societies of Abo found south of Onitsha and west of the Niger, and the sophisticated people of Oguta who inhabit the shores of the Blue Lake. For each of these societies *onye Igbo* means "a man from the world beyond the waterside"—a man from the hinterland. To them *onye Igbo* is the personification of all the thrift, all the cunning and grabbing propensity that go with life in the difficult, waterless lands beyond *ani Olu* (riverain lands). In the eyes of the average *onye Igbo*, on the other hand, the *olu* man represents all the laxity of morals, all the extravagance and gullibility which he believes are the natural concommitants of a life of comparative ease and economic abundance.

It is submitted that originally *ndị igbo* ("the Ibo") meant nothing more and nothing less than "Men of the hinterland" as opposed to *ndị olu* ("Men of the waterside"). It is an irony of fate that as a result of sheer numerical superiority on the part of *ndi igbo*, all these radically different types of societies have come to be subsumed under the one name Ibo. Here lies a clue to the problem of diversity of laws and customs among the Ibo. The student of Ibo society is dealing not with a single homogeneous people but with a collection of heterogeneous peoples

who are united by a name that is neither apt for nor acceptable to some of them, and bound together—uneasily—by a language the various dialects of which are often no more like each other than Italian is like Spanish.

(b) Social background

Iboland is situated in South-Eastern Nigeria. It lies between 5° and 7° north of the Equator, and between 6° and 8° east of Greenwich meridian, spanning the River Niger about mid-way between the Niger-Benue confluence to the north and the Atlantic coast to the south. This is the home of what are by general consensus among the most virile and resourceful peoples of Nigeria. The Ibo are believed by some writers to be the second largest "tribe" in West Africa, after the ubiquitous Hausa. But there are others, among them Meek,[1] who rate them as the most numerous single "tribe" on the West Coast, perhaps in all Africa. According to the (admittedly unsatisfactory) population census of Nigeria published in 1953, the Ibo account for 61 per cent. of the population of Eastern Nigeria: just over 4,861,000 out of 7,971,187 recorded. But this figure excludes a considerable area of Ibo-speaking peoples of Western Nigeria. It also fails to take into account the fact that the Ibo are to be found in "colonies", large and small, in practically every Division in Nigeria and beyond.

The Ibo territory covers an area of some 15,000 square miles, and is made up as follows:[2]

East: Onitsha Province;
Owerri Province, except for the small Itu "clan" of Bende Division;
Ahoada Division, except for the Abua "clan" in the Rivers Province;
Practically all of Afikpo Division } in Ogoja
Most of Abakaliki Division } Province;
About 50 per cent. of Aro Chuku District in Calabar Province.

West: Asaba Division in Benin Province; and
Abo Division in Warri Province.

In his *Niger Ibos*, the great early missionary, Archdeacon Basden, alludes to the popular view that the Ibo make "good colonists". "This they do," he says, "in a quiet, unobtrusive,

[1] *Law and Authority in a Nigerian Tribe*, p. 1.
[2] Chubb, *Ibo Land Tenure*, para. 9.

but, nevertheless, effective manner." This is indeed the case. The Iboman has a tremendous tenacity of purpose, a proverbial aptitude for adapting himself to the existing social *milieu*, and a colossal appetite for wealth and power. As a rule, however, he is also a very generous man; and in his home he is hospitable to a fault. By nature the Ibo are a deeply religious people, their reverential awe for the supernatural being matched only by their hatred for autocratic rule in things temporal. Marriage is everywhere patrilocal (or to use the correct anthropological terminology, virilocal), and potentially polygamous. But the practice of polygamy is the exclusive prerogative of the men, and so is strictly polygyny. There is no polyandry (i.e., the marriage of two or more husbands to one and the same woman at one and the same time) anywhere in Iboland. A statement to the contrary which was attributed to Dr. Elias while giving expert evidence in the famous divorce case of *Ohochuku* v. *Ohochuku*[3] must therefore be dismissed as either an unfortunate slip on his part or a sad case of mis-reporting. Descent is generally patrilineal in principle, though as will appear in the section on "Succession", there is a mixed form of matriliny in a number of societies in and around Afikpo.

(*c*) *Traditional organisation of the Ibo*

Meek is generally accepted as one of the greatest authorities (if not *the* authority) on the Ibo peoples, while his classification of Ibo society is unquestionably the most thorough-going there is. We shall therefore begin our discussion of Ibo traditional social organisation with a brief examination of his detailed treatment of the subject in *Law and Authority*.[4] He suggests the following classification of Ibo traditional social groupings:

1. The tribe;
2. The sub-tribe;
3. The large clan;
4. The village-group or small clan;
5. The kindred.

The tribe.—Meek says that the Ibo may be described as a tribe "because they speak a common language, occupy a common territory, and on the whole share a common culture

[3] [1960] 1 All E.R. 253, at p. 254; see also 23 M.L.R., p. 327.
[4] *Op. cit.*, pp. 88–164.

and common outlook on life ". But surely if these be the criteria of a " tribe ", then Wales and Eire no less than England and Scotland would be good examples of tribes. The *Concise Oxford Dictionary* defines a tribe as a " group of barbarous clans under recognised chiefs ". One wonders whether the Ibo of 1937 (when Meek wrote his *Law and Authority*) were really barbarians. Were the Ibo ever organised in " clans with recognised chiefs "? To the bulk of the Ibo peoples the idea of chiefs as personal rulers was completely foreign until the British administrative officer began toying with the idea of creating paramount chiefs in Eastern Nigeria, apparently as political counterparts for the Emirs of the North and the Obas of the West. It is true that Onitsha and Oguta in the East, and all the Ibo societies of the West have always had their Obi. But in the first place these have never been chiefs on a tribal or even clan level in the common acceptation of these terms. In the second place, the influence of the neighbouring chiefly societies of Benin (from which Onitsha and Oguta are said by tradition to have emigrated) on the one hand and of the Yoruba on the other, on the socio-political structure of the Western Ibo is too obvious to need further comment here. One thing is certain. The Ibo present as good examples as any of what the anthropologist calls acephalous societies (societies that recognise no ruling Chiefs). If then the bulk of the Ibo fail to satisfy the basic definition of a tribe, where, it may be asked, is the justification for the application of that term to Iboland? If a compendious term is required, then *nation* is at least as descriptive as, and certainly less reprehensible than, tribe. It may be objected that confusion of thought will result from the use of the word nation for Iboland since the same term is applicable to Nigeria as a whole. To this there is a simple answer. There are not many words outside the pure sciences which have just one meaning and no more. Nevertheless the mind normally finds no great difficulty in picking out the correct connotation intended in a given universe of discourse. We not infrequently hear of England, Wales and Scotland being described as nations. But nobody objects to the use of this term on the ground, for instance, that none of these countries could apply for a seat at the United Nations.

The sub-tribe.—Apparently Meek arrived at this unit not so much by the positive process of grouping closely related " clans " together as by the negative one of welding together a number of

" clans " whose common denominator is the fact that they each regard themselves as distinct from certain other " clans " around them. Thus it is said that the constituent elements of Oratta in Owerri Division each regards itself as distinct from and unrelated to the constituents of Isu and vice versa. Meek therefore builds these peoples into two large units which he gives the names Oratta and Isu Sub-Tribes. But he goes on to make the following characteristic admission:

> " The constituent village groups of each (sub-tribe) are wholly independent, they never meet together for any common purpose, and they do not even claim to be related."[5]

In view of this statement, the scientific basis of this classification is not a little difficult to see. Could it be that here is a positive attempt at discovering social units that are not there and never have been?

The large clan.—A number of village-groups, says Meek, may have enough social solidarity to constitute a large clan, even if the ties that bind them together may be slender. But " between the various village-groups there was in the past little political or social unity," he admits. However, he insists that " there is still (in some places) a sufficient basis of clanship on which to build up some form of clan administration ".[6] This last statement is perhaps a pointer towards the motive at the back of Meek's classification as a whole, namely a desire to build up as large administrative units as possible for purposes of effective indirect rule. It is submitted, however, that there are no clans in *traditional* Ibo society, and never have been. It is amusing to read as one often does in official documents of such groups as Agbaja Clan, Awka Clan and Onitsha Clan. For it is extremely doubtful, to say the least, whether the so-called village-groups that constitute them ever thought of themselves as members of a nominate social or political unit. Who, for instance, could seriously argue that, prior to the advent of British administration, such peoples as Oze, Obosi, Mkpor, Ogidi and Umuoji considered themselves joint members of a social (to say nothing of political) grouping that bore the name of Onitsha? And yet today we find no difficulty in postulating a traditional Onitsha Clan!

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[5] *Op. cit.*, pp. 91-92.
[6] *Op. cit.*, p. 91.

The village-group and the village.—Several kindreds living in close juxtaposition constitute a village, according to Meek. And a number of contiguous villages which believe themselves to be related make up a village-group. This latter may be " regarded territorially as a commune, and socially as a clan " (the small clan). The Ibo, he continues, refers to his village-group as his *ala*, *obodo*, or *mba*.[7] But it is submitted, with respect, that the term clan as here employed differs not a little from the common acceptation of that word, especially in official circles in Nigeria. Nor does " clan " as used in Nigeria denote the socio-political unit known to the Ibo as *ala*, *obodo*, or *mba*.

The kindred.—Meek says that the kindred is the basic social unit among the Ibo. It is " the group of patrilineal relatives who live together in close association and constitute what is known as *umunna* ". This, he says, may be a single extended family comprising a man and his wife, his children and grandchildren, his brothers or cousins and their wives and children. Or it may be a combination of two or more such extended families. Now the difficulty of accepting a classificatory term with such a wide range of contents is obvious. Besides, the use of this term (kindred) is not altogether a happy one. For in the first place, it is a little ambiguous, being applicable to a socio-political unit as well as to a purely, non-territorial social grouping. Again, it can with equal justification be used for persons bound together by maternal kinship ties, as well as for paternal blood relations.[8] From the purely anthropological point of view, this may well be unexceptionable. But it certainly leaves much to be desired from the point of view of the lawyer inquiring into legal rights and obligations with special reference to rights and interests in property in societies occupying defined territories.

Apart altogether from the objectionable nature of such terms as tribe, clan and the like in themselves as applied to the Ibo, there is the difficulty of identifying any existing group with some of those terms. Let us take a look at these terms as used by different writers. Talbot says that there are some thirty subtribes and twice as many clans in Iboland. His list includes Awka Clan, Onitsha Clan and Onitsha-Awka Sub-Tribe among

[7] *Op. cit.*, p. 89.
[8] The objection here is to " kindred " *per se*, not as defined by Meek.

others.[9] As already indicated, there never was any traditional kinship bond however vaguely conceived between the various "village-groups" that are said to make up the Onitsha Clan or the Onitsha-Awka Sub-tribe, for instance. On the contrary, there is evidence that societies who did believe themselves related to one another were grouped in the wrong place by the administrative officer, following the anthropologist. For example, there is a tradition to the effect that Umudioka, Umunachi, Ukpo Ifite, Ukpo Akpu, Ukwulu and Nawgu were children of a common ancestor; yet the first three were placed in Onitsha Division and the last three in Awka. Again, a close study of their dialects and customs leaves one in no doubt whatever that the peoples of Abagana and Nimo, Umunachi and Eziowele have very much in common indeed. And yet we find that the first two are in Awka while the other two are in Onitsha. Surely then these groupings are based on other than ethnological considerations.

Meek for his part sees a clan as a much smaller unit corresponding with a village-group. As we have seen, he says that a village-group may be "regarded territorially as a commune, and socially as a clan", and this he describes as a

> "small group of contiguous villages whose customs and cults are identical, who in former times took common action against an external enemy . . . and whose sense of solidarity is so strong that they regard themselves as descendants of a common ancestor."[10]

He goes on to suggest that there must be at least two thousand clans in Iboland! Thus Meek finds two thousand clans where Talbot saw fifty-nine. What better proof could there be of the fact that there are no such things as clans in Ibo social set-up? As with clans, so with sub-tribes.

Rowling in his *Notes on Land Tenure in Benin . . . Divisions*, published in 1948, classifies Ibo societies into clans, villages and quarters for the purposes of his report. He defines a clan as the district of each independent Native Authority. A village, he says, is simply a component geographical unit of the clan, while the quarter (which he identifies with the *ogbe*) is a subdivision of the village. This arrangement is tempting in its simplicity. But three objections must be made against it. First of all, even if we

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[9] *The Peoples of Southern Nigeria*, Vol. IV, pp. 39–41.
[10] *Law and Authority in a Nigerian Tribe*, p. 3.

assume that clans do exist among the Western Ibo about whom he wrote, his definition thereof is a little vague. For it is uncertain whether the " independent Native Administrations" are indigenous institutions or creatures of the British Administration. If the latter, then it is submitted that the application of an anthropological term to an artificial unit is at the best unscientific. In the second place to define a village as nothing but a geographical expression is not quite satisfactory. Finally, the use of " quarter " in the sense of an *ogbe* is a little confusing, since that term is used in many other parts of Iboland as a larger unit consisting of a number of villages, and not the other way round.[11]

In her entertaining little book on Umueke Agbaja in Okigwi Division, Miss Green suggested classification into the village-group, villages, half-villages and house-groups.[12] This arrangement has the great merit of sticking to and describing the facts of Agbaja social life. Nevertheless one or two remarks seem to be called for. In the first place, the author concedes that the name " town " is sometimes applied to what she calls the village-group. But she maintains that the latter term is to be preferred partly because life in Agbaja is not urban but rural, and partly because houses in the area are scattered and " not huddled together to form a town-like agglomeration of the Owerri ' town ' kind ". It is submitted, however, that both popular and official minds all over Nigeria readily distinguish between *townships* with their urban life and " huddled " houses on the one hand, and *towns* simpliciter which are no more than the *ala*, *obodo* or *mba* described by Meek as the highest socio-political units in Iboland. In the second place, she describes a village as a kindred which she also calls *ụmụnna*. But the use of this last term is an unhappy one in this context. In Ibo socio-political organisation, *ụmụnna* is not synonymous with but a sub-division of a village. In a sense, though, every Ibo social unit may be described as *ụmụnna*. For the constituent members of a unit usually think of themselves as descendants of a common ancestor. But this is obviously not the sense in which Miss Green used that term in the context under review.

The multiplicity of terms and confusion of thought among writers on the Ibo peoples and their societies will have become

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[11] E.g., Onitsha Division. *Vide* Tax Demand Notes and similar official documents of the 1930's and 1940's.

[12] *Ibo Village Affairs*, pp. 9 *et seq.*

apparent from the above brief survey. The main sources of these difficulties appear to be as follows:

(*a*) the proverbial difficulty of the Ibo language with its numerous dialects, and the fact that the same word may have no less than half a dozen distinct meanings according to the intonation, context, etc.;

(*b*) the understandable desire (already hinted at) on the part of the British administrative officer to discover among the Ibo large social units that would facilitate the application of indirect rule in their territory;

(*c*) failure to distinguish between purely social and socio-political groupings.

Let us now attempt a classification of Ibo traditional societies. But first two points must be made clear. The first is that we shall not take cognizance of what is called a bipartite division of Ibo groups. The foreign observer is not unnaturally struck by the fact that practically every social or political group larger than the family is represented by the Ibo as consisting of an inner and an outer division. Thus we find that a village is normally described in terms of an *ama* half and an *owele* half. Now *ama* in this context simply means "part nearest the road" (it means "road" in another context), so that the part of the village described as *ama* is that which lies nearest to the main approaches to the territory of that village. *Owele* means "at the back", and so the *owele* part of a village is that which lies well away from the main approaches to the village and behind the *ama* part. In view of the fact that our progenitors were always chary of building too many inter-group highways and were usually satisfied with just one exit for each group, for fear of enemy surprise attacks from too many fronts, the widespread existence of this bipartite division is not surprising. But it cannot be too strongly emphasised that it had no political or legal significance. Other methods of bipartite divisions were equally widespread, and are still in use. These are into *agụ* and *ụnọ*, *ugwu* and *ndịda* (*mgbago* and *mgbada*). *Agụ* stands for "wilderness" as against *ụnọ* which is the residential area. Where part of a group moves to a new residential site, we have thus a two-fold division, e.g., *Agbaja Agụ* and *Agbaja Ụnọ*. *Ugwu* is the Ibo word for highland as opposed to *ndịda* or lowland, with *mgbago* and *mgbada* as their local dialectical variations. All three methods of bipartite division are universal; all three are equally devoid of political or legal significance; all three will be omitted in our classification.

The other point worth mentioning is that as we saw earlier on, there are a number of social groupings which unlike those discussed above are much more than mere geographical expressions but which nevertheless have no political significance. Their constituent members are traditionally reputed to be descendants of a common ancestor. But at some time in the dim and distant past they lost all political cohesion, if ever there was any. Three examples drawn from Onitsha Division are Anedo, the most conspicuous member of which is Nnewi; Dunukofia (variously said to consist of five and six member towns); and Umuigwedo which has an area of not less than 180 square miles. Some of these groupings have been utilised in building up sizeable local government and customary court units. But in their traditional setting, they were not socio-political groups. Similar to them are those agglomerations to be found in each town. They consist of a number of villages—often four—and in most places are called Quarters. They never were socio-political units, and for the most part have ceased to function as units for any purposes. These too will be left out of our classification.

This pruning operation completed, we are left with four classes of indigenous socio-political groupings in Iboland. We use the term " socio-political " here because these groupings are social and political units rolled in one: social because they are traditionally reputed to be built on a foundation of kinship; political because each of them has always had some recognised political authority—a Council of Elders or other body—who made its laws and saw to their enforcement, controlled the use of its land, and generally managed its affairs. Unfortunately, these groupings are known by widely different names in different parts of Iboland. We shall, therefore, endeavour to find suitable English names for them, and then give a few representative vernacular names. They are as follows:

1. The town: *obodo, ala, mba*;
2. The village: *ebo, aba*;
3. The localised patrilineage: *ụmụnna*;
4. The extended family or compound: *obi, oluama.*

The town: obodo, ala, mba.—This unit corresponds with what Meek, Green and some other writers call the " village-group ". But as already pointed out, the word " town " is now so widely used both colloquially and in official documents that we feel

fully justified in employing it here. Nevertheless, it must be emphasised that we are not dealing with a " town " in the English sense of an agglomeration of contiguous houses. For this (urban area) the word " township " is reserved. The distinction between a " town " and a " township " is brought out most clearly by the fact that in Onitsha, for instance, there is a sharp division between " Onitsha town " on the one hand and " Onitsha township " on the other. There is a well defined boundary—Awka Road to the North and Oguta Road to the West. Until recently, there was dual control: the town by the Obi, and the township by British administrative officers. The same dichotomy is evident in Aguleri where the more rural " town " contrasts sharply in all respects with the " township "—Aguleri Otu.

The town or *obodo* is in most parts of Iboland the largest *political* unit.[13] In some places there is a recognised political head for this unit as a whole. Examples are Onitsha and Oguta in the East, and practically all the Ibo towns of the West. In other places there were no traditional heads in pre-British days, their places being taken by councils of elders or title holders, or both. But the British administration created a number of paramount chiefs who, however, became so unpopular and in some cases so power-drunk that they had all to be deposed.[14]

As Miss Green says of Agbaja,[15] the town rests on a number of different principles. First, it is a local unit in that its inhabitants occupy a common territory.[16] Secondly, it is a mythical kinship unit. Many a town has a legendary account of how its original founder came to it or else arose out of the bowels of the earth, how he found himself a wife (if he did not bring one with him), and how he begot a number of sons.[17] Just as the founder of the town gave his name to the town, so also did his sons give their names to the various villages that make up the town.[18] Thus Agbaja is said to comprise eleven villages each corresponding in

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[13] Towns vary in size from four to thirty-six square miles, populations from a few hundred to tens of thousands.

[14] Some later revived as constitutional heads, e.g. the Igwe of Ogidi; many later got statutory recognition as Chiefs.

[15] *Ibo Village Affairs*, p. 11.

[16] See sketch map of Ogidi at p. 19, *post*.

[17] Daughters are rare if not non-existent in these stories generally.

[18] There are usually stranger elements, though, and in places these constitute separate villages of their own within the town.

name with one of the eleven sons of the original founder.[19] Ogidi is reputed to be the name of the original founder of the town that today bears that name, and its "nine" villages[20] are said to represent the nine sons of Ogidi and his wife.

A large number of factors bind the members of a given town together. There is the (often mythical) blood tie, as pointed out above. There is identity, or near identity, of dialect. In practically all towns there is a central deity—the recognised guardian of socio-religious unity, law and morality. This may be the Earth deity—*ani, ala.* In that case the visible symbol of solidarity for the town would be the priest of this god—the *Ezeani, Ezeala.* In some places, the water deity is the central deity, as in the case of Okija with its *Ulasi,* Obosi with its *Idemili* and Ukpo with its *Kisa.* But though some priest-heads had, and often still have, a tremendous influence on the maintenance of law and order and on the conservation of local *mores,* they could not be described as political heads. In practically all towns, too, there is a senior *Ọfọ* holder, who represents the eldest son of the original founder of the town. His position as head is usually nominal only.

In those towns with recognised political heads—the Obi among the Western Ibo, the Obi of Onitsha, the Obi of Oguta and the like—political authority lay with him in council. But in the bulk of Iboland, the task of government, the duty of legislation and of police work were carried out by either (*a*) a council of elders, *ndị ichie,* or (*b*) a council of *Ọzọ* title holders, *ndị nze,* or (*c*) a ruling age grade (normally selected by the elders or the *Ọzọ* members for a term of years). In any case resort could always be had to the *mụọ, mmanwụ* (masquerades) who were supposed to be the walking spirits of dead ancestors.

With the new administrative machinery set up first by the British and now by the Nigerian (Regional) Governments, the town has greatly dwindled in political significance. As an economic area, it lost its independence with the advent of the motor lorry, the bus and the railway train.

The village: ebo, aba.—In traditional Ibo life, the village was the strongest socio-political unit. Like the town of which it is a part, the village is founded on ties of kinship, common territory,

[19] Green, *op. cit.,* p. 15.

[20] Now purely fictitious: some must have died out and others split up. No one can now say for certain what these nine villages originally were.

religion, dialect and economic activities.[21] But these ties and the accompanying group sentiment are much stronger and more pervading in the case of a village than in the case of a town.

As already indicated, a village is believed to be an off-shoot of the ancestral tree—a unit founded by one of the sons of the original founder of the town. Each village is supposed to bear the name of its founder.[22] And the number of villages in a town generally represents the number of sons born to the man who brought the town into existence in the first place.[1] It is hardly necessary these days to find a vernacular name for the word "village" as this has acquired a definite connotation in the minds of most literate Ibo men and women. However, the words *ebo* and *aba* are perhaps sufficiently representative to be usefully employed here.

The average village covers an area of four square miles and supports a population of some one thousand. This is of course a very rough guide, as villages are known to cover anything up to six square miles and to hold a population of two thousand or more; while others there are with no more than an area of half a square mile and only a few hundred souls.

Like the town, the village has its senior branch, the subdivision which represents the descendants of the eldest son of the founder of the town. The oldest man in this senior branch is usually the holder of the senior *ọfọ* (staff of office). In many places he is known as the *ọkpala*; in others he is the *diọkpa*. This *ọkpala* need not be the oldest man in the village. Indeed he may be a baby in arms, provided he is the eldest living descendant of the original *diọkpala* of the town.

In many parts of Iboland, the villages are exogamous units. But to this rule there are numerous exceptions. And it is a curious phenomenon that in almost all those villages which insist on being exogamous in spite of their dense population or vastness of territory, there is no ban on sexual relationship between those members who belong to different *umụnna* units.

Like the town, most villages have their stranger elements. Some of these came in substantial groups and still retain their separate identity—occupying a specific area of land, and preserving their original name. Others became absorbed into the

[21] Green, *op. cit.*, p. 14.

[22] Hence some writers use the name *umụnna* for a village; e.g. Green, *op. cit.*, p. 15.

[1] But some may consist of foreign elements, e.g. later immigrants.

existing sub-groups of the village and lost all their identity except as a matter of legendary stories passed down from father to son.

The political life of the village was, in the past, run by the *ọkpala* either in fact or in legal theory. He was the actual political head if he had the physical, mental and temperamental endowments for effective leadership. In that case, he usually ruled the village with the aid of a council of elders or of *ọzọ* titled men, or both. If he was a weakling, mentally or physically or both, he remained a figure-head with his official duties limited to ceremonial occasions. Even so, he was never, as a general rule, denied the common courtesy of being kept informed of the affairs of his little State.

Umunna.—This unit is known by the same name all over Iboland and comes immediately after the village, as a subdivision thereof. Meek, and Green after him, chose the term "kindred" for *umunna*. But as already said, that term is not free from ambiguity. "Lineage" is a tempting alternative, but suffers from ambiguity to almost the same extent. "Patrilineage" is an improvement on these two, since it restricts membership to one line only, viz. descendants of a common *father*. But it does not necessarily exclude break-away groups now independent of the parent group. Perhaps then the phrase "localised patrilineage"[2] would best suit our purpose, since it implies the idea of all such descendants residing in, or at least belonging to, the same territorial group as their progenitor (the original founder of the *umunna*).

Though the word itself emphasises the idea of kinship more than any other in our classification, we must not be misled into thinking of it as a purely social grouping. Admittedly, Miss Green is right in saying that "kinship and local principles of social grouping correspond, in Ibo society, like hand and glove . . ." It is this all-pervading idea of blood relationship plus the Iboman's incurable habit of playing up the fact (or the fiction) of his close kinship ties with everybody else in his group that tends to blur the distinction between purely social groupings and fundamentally political groupings. Thus the word *umunna* is used in two different senses. Loosely employed, it connotes "children of the same father". These "children" may be individual persons or whole groups counted by the hundred, so

[2] *Cf.* Forde and Jones, *The Ibo and Ibibio-speaking Peoples of South-Eastern Nigeria*, p. 15.

long as they are reputed to have all descended from a common ancestor. But more technically *ụmụnna* has a precise and essentially political connotation. It is this sense of the word that we are concerned with here.

The unit known as *ụmụnna* cannot properly be described as a family, however "extended", at this stage in the history of Ibo society. Like the village of which it is a part, it consists of all the descendants of a given ancestor who belong together, occupy the same territory and recognise the same immediate authority, plus their wives and less their daughters given away in marriage. The group is known by the name of this ancestor. (There is often, however, an immigrant element in the *ụmụnna* group, who have been sufficiently integrated into the socio-political fabric as to cease to be treated as strangers.) The ancestral founder is now so lost in the mist of time that it is quite impossible to say how long ago he lived, or to trace the relationship between the present members of the group in terms of "cousins" and "nephews" and the like. The population of the average *ụmụnna* runs into several hundreds.

This group is invariably exogamous. In many societies sexual relationship between its constituent members, whether by birth or by marriage, is strictly forbidden. Where this taboo exists it is an "abomination" (*alụ, arụ, nsọ*) to break it. In terms of English law, it is a crime or public wrong, not a tort. Every *ụmụnna* has its own socio-religious head—the *ọpara, ọkpala, diọkpa*. As in the case of the village, the *ọkpala* is the eldest living male descendant of the eldest son of the original founder. Thus he need not be the oldest man in the group, so long as he belongs to the senior branch of it and is the oldest man therein. The extent to which he also wields political power will depend, however, on his personal qualities—his prowess, wealth, sagacity and personal charm.

The task of legislation and maintenance of law and order within the group rests in theory on the shoulders of the *ọkpala*. But invariably he works in conjunction with a council of elders. Indeed, in many places the *ọkpala* and council are largely displaced on political matters by the *ọzọ* title holders of the group (*ndị nze*). Thus the *ọkpala* may or may not be a member of the actual ruling body, according as he is or is not an *onye nze*. The age-grade and the masquerade play a much less important role here than in the case of the village. Social and economic pressures normally constitute sufficient motive for conforming with

established norms, as well as effective sanctions for voluntary deviation therefrom.

The extended family or compound: obi, oluama.—The *ụmụnna* is sub-divided into a number of component units, the principal basis of which (though not the only one) is kinship. The number of these sub-divisions in a given *ụmụnna* is determined by the number of male children born to its founder in the first place, and who in turn were survived by their own male issue. The descendants of each of these (*ụmụnna* founder's) sons constitute what are generally called compounds or extended families today. As the name implies, the extended family comprises a number of families of the English type—anything up to twenty or more. In the past the various "families" lived in vast walled-in or fenced-in premises with one main entrance in front and a tiny exit at the back. Hence the popular name "compound". It will therefore be seen that "extended family" refers to the persons concerned as a group while "compound" points to their residential arrangement.

We are now approaching a stage in Ibo society where there was, and still is, something of the nature of early Greek democracy. It is true that each family had its *ọkpala*, its elders and its *ọzọ* title holders. It is also true that age-grades and masquerades have always existed in these groups and could play leading parts in political or legal matters. But in practice, decisions, whether political, legal or merely social, have always tended to be taken after the fullest possible consultation, formal and informal, on a scale approaching "universal adult suffrage". Women are consulted in private, and are allowed to do their own deliberations as a body. Nevertheless, legislative, social and judicial powers may be exercised by the okpala or *ọzọ* title holders, or both, in council in emergency cases.

The nuclear family, though not a socio-political grouping in the sense defined on p. 11, *ante*, deserves some mention here. It is rather like the family as known to English law and society, but not quite. It consists of a man and his wife (or wives), his children[3] and other dependants, if any. There are two main types of family establishments in the traditional society. In the more densely populated areas or among immigrant societies where defence needs used to be high, the houses are crowded together all over the larger compound so that a man and his

[3] Including married sons however old, but excluding married daughters.

wives occupy buildings squashed in between those of other members of the extended family. In some places they (husband and wives) even live under the same roof. In these societies circular rather than rectangular houses are the rule, so that the man occupies the room(s) nearest the sole entrance while his wives and dependants spread outwards and backwards. But in less densely populated areas man and wives occupy separate buildings situated at discreet intervals of several dozen or even scores of yards. As in the previous cases, the man's establishment (*obi*) is located near the main gate while his wives live at respectable distances behind it.

We began by saying that the nuclear family includes all of a man's sons however old, and whether married or single. So long as a man lives, all his issue (less married daughters and their issue) are regarded by Ibo law as his dependants. As we shall see later, he had to represent them—collectively or individually, according to need—in the event of litigation with outsiders. He has the last word in the matter of seasonal distribution of farmland. And, of course, he is the spiritual head of the family. At his death the family may or may not break up. If the adult members fail to agree among themselves, they will partition the family land on the lines which will appear later.[4] If they choose to retain their corporate identity, the eldest son steps into his father's shoes as family head, and assumes the title of *ọkpala*. " Eldest son " as used in this context includes the eldest son of a deceased eldest son, that is the oldest male member of the senior branch of the family.

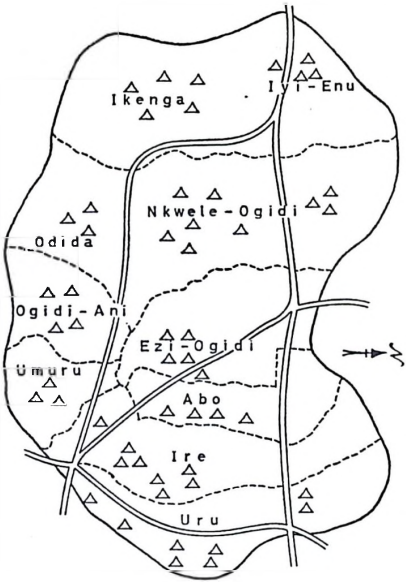
(*d*) *Special Functionaries*

From the many special functionaries found in Ibo society, past and present, we shall take a few who are considered to have a special significance in property matters, especially in the case of land. These are:

(*a*) The *ọkpala*, already mentioned *passim*.
(*b*) The *onye nze*.
(*c*) The priest.
(*d*) The *ọkwa ajuju*.

Ọkpala.—As can be gathered above, " *ọkpala* " is the name given to the living successor to the eldest son of the founder of a

[4] See " Succession ", p. 165, *post*.

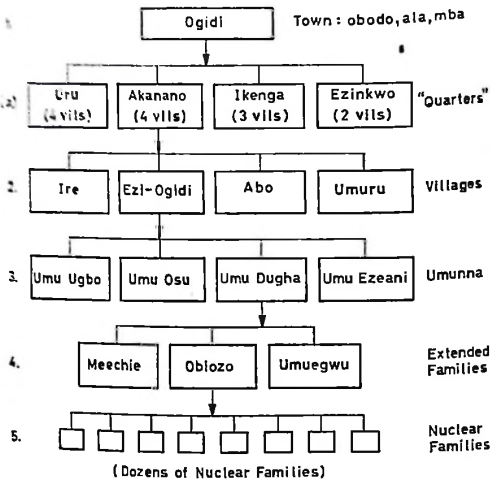


Sketch map of Ogidi Town showing distribution of villages

Based on a map prepared and distributed to local schools by the writer (1944 to 1946)

Schematic Representation of Socio-Political Organisation

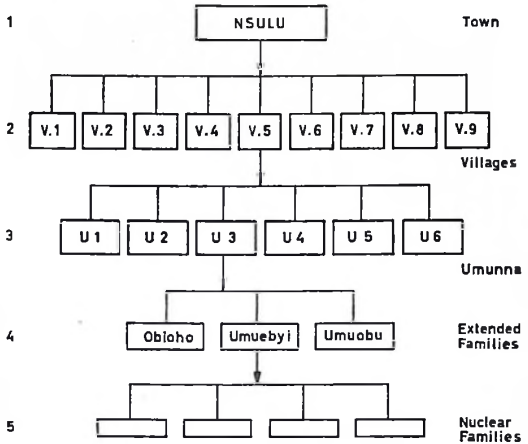
A. Ogidi Town (Onitsha Division)



Note.—"Quarters" have little political significance. They are irrelevant to a discussion on the law of property; see p. 11, *ante*.

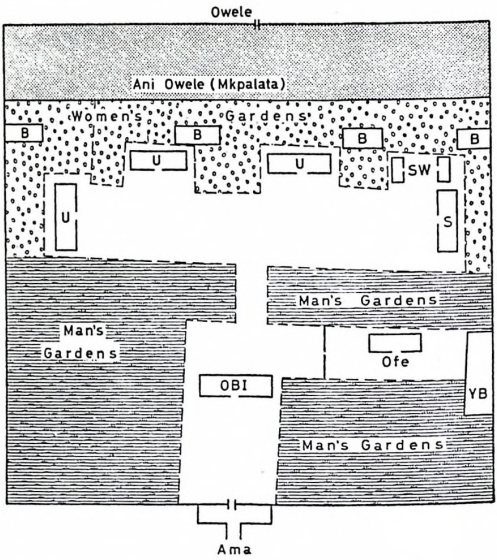
Schematic Representation of Socio-Political Organisation

B. Nsulu (Ngwa Area)



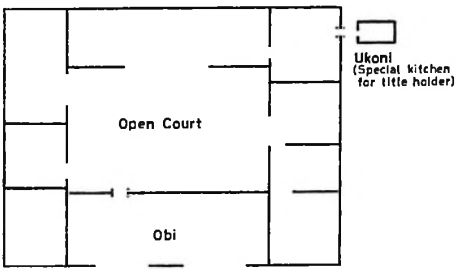
V.1 Umuosu, V.2 Umuomainta, V.3 Umuomaiukwu, V.4 Umuode, V.5 Umuezegu, V.6 Eziala, V.7 Umuakwu, V.8 Mbubo, V.9 Ikputu. U1 Umunkolo, U2 Umumkpeye, U3 Umuelemoha, U4 Umuezenta, U5 Umunewa, U6 Okpuala.

Plan of a Typical Ibo Compound (Nuclear family)

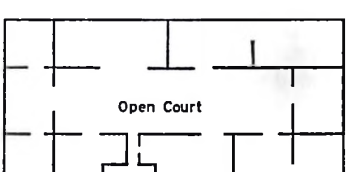


U = Wife's house (usokwu)
S = Son's house
SW = House of son's wife
Ofe = Man's sleeping quarters
OBI = Man's living house
B = Women's barn
YB = Yam barn (shared by father and son)

Typical Compounds in Riverain Societies



Compound of high ranking title holder. Houses man, wives and unmarried children only. Married sons live in adjacent compounds of their own.



Ordinary Compound. Houses man, wives and children (including married sons, their wives and children).

given socio-political group in most parts of Iboland. Thus each town has its *ọkpala*, the holder of its senior *ọfọ* (staff of office). So has each village, *umunna* and extended family (*obi*). But the rights and duties of this functionary are basically the same in each case. He is the chief priest of the group (he is the principal intermediary, i.e., between the quick and the dead, the visible and the invisible). He controls the social life of the group, at least in theory. He was the chief representative of his unit in dealings with the outside world. He had a hand in selecting portions of communal land for annual cultivation. In return, he was, and in places still is entitled to first fruits, periodic tributes in money and in kind, and the love and respect of each member of the group.

Onye nze.—This is the man who has been rich enough[5] to go through the elaborate and expensive ceremonies involved in taking the *ọzọ* title. Though there still remain a large number of people bearing this title, the *onye nze* no longer performs the duties described below; these duties are here described because it is felt they have some historical interest. In a sense too he was a priest. But his sacred office was not tied to any particular gods. His social duties were numerous and exacting, involving as they did a moral obligation to listen to all complaints and to give advice and guidance to all who came to him *at any moment of the day or night.* He had judicial powers and duties too. He settled all sorts of quarrels, domestic or otherwise, alone or with the help of any person or persons of his choice. His patience and sense of impartiality[6] were matched only by his almost crippling generosity. In return, he was entitled to gifts and tributes at specific periods of the year. In addition, he could appropriate fines imposed on recalcitrants. And on occasion, he could order that all the palm wine produced in the community be handed over to him on a given day.[7]

The priest: eze nụọ.—Every deity has its own priest who acts as its spokesman and is the caretaker of its temporal possessions. In each community the greatest priest is usually the land priest, *ezeani, ezeala.* He usually has pride of place among the local priests on ceremonial and similar occasions. But since the *ala,*

[5] Or whose parents have been so.
[6] In the traditional setting; *aliter* where employed as Native Court member.
[7] It used to be once in eight days in some places; at irregular intervals elsewhere.

anị is not usually a controversial figure, the *ezeanị* is as a rule a man of modest means, or worse.

Okwa ajụjụ[8].—This functionary, found in some parts of Iboland, is the depository of social, legal and moral "science". In all cases of doubt, he is consulted on these matters. He says what offence has been committed, or taboo broken, and prescribes the appropriate remedy for it—to placate the gods.

(2) Legal Personality

For the purposes of acquisition and enjoyment of property rights and interests, the law recognises three main categories of persons. These may be called (*a*) supernatural persons, (*b*) natural persons, and (*c*) corporations.

(*a*) *Supernatural persons*

A number of physical phenomena, psychological forces and even purely abstract conceptions are deified by the Ibo mind and accorded legal personality. Thus the sun (*anyanwụ*), thunder (*egbe igwe, amadịọha*), the earth (*anị, ala, aja anị*), running water (*idemili, kịsa, iyị*) and yellow earth (*edo*) rank among the leading deities in different parts of Iboland. These may be described as physical forces and phenomena deified. Mental health and stupidity rank among the lesser deities in many places, being known as *agwụ* and *ẹfịe* or *ẹfịọ* respectively. Among abstract ideas deified (or perhaps just personified) may be mentioned the lunar year (*arọ*), and the two aspects of fertility, viz. human fertility (*ụmụmụ* or *ekwọ*) and plant fertility (*ụfịejịọkụ* or *njọkụ*). Indeed it may be contended that the word *chi* is simply the Ibo name for fate or luck personified. For in view of the universal belief in reincarnation among the Ibo of the past, the idea of a "creator" seems superfluous. Every child was believed to have received its current life and being from a specific local deity or ancestral spirit. The Ibo speak of this process as *ọnụnọ* (animation?) not *okike* (creation). It is possible that this idea was seized upon by the early Christian missionary, who identified *chi* with God and *onuno* with creation. The result was *Chukwu* (Great God) in Onitsha Ibo, and *Chineke* (God the Creator) in Owerri Ibo. Now the expressions "*chi m kegbulu m ekegbu*" and "*chi ya kechalụ ya ekecha*" mean respectively "I am ill-fated (or unlucky)" and "he is a lucky one". The inference here is clear. But we must

[8] *Cf. prudens* in Roman law.

steer clear of Christian theology. The point we are trying to make is that the god known as *chi* is not your creator recognised but your fate personified.

It is perhaps illogical, but these physical forces and abstract ideas are not only deified but also " personified " in the sense of being given human and other tangible forms. Thus the higher deities are represented as adult men or women (hermaphrodites are not uncommon, though) and carefully dressed, housed and " fed " at intervals. The lesser gods, on the other hand, seem to be satisfied with the likeness of animals, logs of wood, mounds of earth or just bundles of fathers. Whatever their physical form, they all are accorded legal personality in that they can acquire, enjoy and transfer property rights and interests as freely and fully as natural persons. Of course, they invariably have to act through human beings. But this is no limitation on their legal personality but just an example of Ibo law of agency.

(b) Natural persons

All human beings, whether actually *in esse* or *en ventre sa mere*, have some legal capacity. All adult males who are free citizens of the community in which they live have full legal capacity, whatever their physical or mental state. The question of legal responsibility is another matter, of course. Thus, a lunatic may acquire property, can sell or lend, pledge or mortgage *his* property, at least during lucid intervals.

Women and strangers as a rule have only limited legal capacity with reference to the acquisition and enjoyment of certain categories of property rights. Indeed, a stranger is rightless in these matters unless he is allowed to do so by the appropriate political authority. Women do have certain proprietary and allied interests as of right. Indeed there are, as we shall see later, some forms of property which only women can normally own. Rights over kitchen gardens, cassava and coco-yam farms readily spring to mind. Infancy does not operate as a handicap in property matters. Even children *in utero* can and often do *own* property. But in such cases, their rights and interests seem to be inchoate until they are born and born alive.

(c) Corporate bodies

Ibo law recognises certain entities which are hardly distinguishable from corporations in English law. Some of these are of the nature of corporations aggregate. Examples of these are the

village, *umunna*, and the extended family—in their capacity as property-owning groups. Of course, there are no charters and no acts of incorporation, except by the process of law. As in the case of English corporations, only the " very ego and centre of the personality " of these groups (heads or councils) can act for the group as such. There are also institutions which may be called " corporations sole ". The *obi*, the *ọpara*, the *ogene* (and perhaps all our deities) come under this head.

(3) Law or Custom?

It is a common observation among foreign writers on African indigenous societies that though these societies have recognised customs which are faithfully observed, as a rule, yet they have no " law " in the Western acceptation of that word. This raises two distinct but related questions. What is " law " in the Western acceptation of the word? To what extent can we say that custom is law? But interesting as these lines of academic enquiry may be, they are of doubtful value. One thing is certain; and that is that the Ibo, in common with other African societies, have established procedures for the settlement of disputes over property and other rights. They certainly recognise the distinction between (*a*) purely social obligations (such as the duty to honour invitations), (*b*) duties imposed by custom only (for example, a father's duty to provide his male children with their first wives in order of seniority), and (*c*) legal duties which can be enforced against the will of the party on whom such a duty lies. A short illustration will make the last point clear.

If a dispute develops between two parties over a piece of land or other property, the person who considers that his rights have been invaded makes a complaint to the head of his family. If both parties to the dispute belong to the same family, the head draws the offending party's attention to the complaint and asks for his explanation. If the parties belong to different families, the head of the complainant's family communicates the complaint to the head of the offender's family. In each case, if a private settlement is not reached, a day is fixed by the two family heads for a trial of the issue. Each of the parties thereupon summons as many responsible relatives of his as he can. Or else, the parties agree in advance on the number of persons to be invited to the hearing. The meeting place for such proceedings

is usually the house of the *ọkpala*, or of the local senior *ọzọ* title-holder. On the day fixed for the hearing each party is invited by the *ọkpala* or *isi nzẹ* (who acts as chairman) to state their case. After the complainant has done so, the " arbitrators " may have to decide whether this is purely a case of moral (or social) obligation (in which case the parties would be asked to go back and have it settled " at home " (that is privately), with words like " *ọ bụrọ ife a ga-akpọlụ okwu* " (lit. " this is not a thing for which a case should be called", but in effect, "this is no case for legal proceedings "). If, however, the case is allowed to go on, witnesses are called, or are allowed to volunteer evidence, after the parties have each stated their case. Everyone present is then free to give an opinion on the merits of each party's case. Finally, a smaller, inner court is selected from those present. These go into a final secret session—*igba izu*. The decision of this secret session is the final decision on the case, and is usually announced by the senior *ọzọ* title-holder or *ọfọ* holder (*ọkpala*).[9]

There is always a right of " appeal " to another arbitral court.[10] Doubtful claims have to be established on oath; the parties do not testify on oath—they affirm their evidence on oath if called upon to do so. Thus where the " arbitrators " are not satisfied as to the validity of the claims put forward by the " plaintiff ", they decide who should swear the oath to the effect that the property in question is his. Refusal to swear in such cases means loss of the cause. The fact ofswearing is construed as sufficient proof of one's claims (i.e., the party's evidence is accepted because affirmed on oath). Death or other misfortune which may befall the oath-taker has no effect on the award of the court. It only shows that the party in question obtained judgment fraudulently. It is up to him or his family to have the judgment reversed by " undoing " the oath process.

It may be objected, and rightly so, that the process so far described is used indifferently for settling differences arising out of alleged breaches of both legal and merely customary duties. What then is the point of departure between customary law and custom simpliciter? In our submission, this difference lies in what the traditional courts could or could not do where the party pronounced against refuses or merely fails to give effect to the court's decision, and does not seek to prove his case to a

[9] But the task may be delegated to anyone with repute for tact and oratory.
[10] Selected from a wider political unit.

higher tribunal. If the court was satisfied that the party in the wrong was guilty of a breach of a legal duty or of an invasion of another's legal right, then the judgment of the court will have to be executed in much the same way as a judicial decision is executed in the Western world. In such a case, either masquerades or young age-grade societies are employed by the court to act as bailiffs. If on the other hand, the action was founded on a breach of a mere custom, there is no right of enforcement. The court merely apportions blame and offers suggestions. But the party who has been wronged will have to be satisfied with whatever effect public opinion may have on the other party to the case.

This brief account of "arbitral" proceedings in Iboland is, we hope, enough to show that certain rules of conduct between legal persons are considered sufficiently binding in their nature to evoke the intervention of the political authorities in their enforcement; that there are well established procedures for the enforcement of these rules, and that these rules are far more than rules of moral or social behaviour. They are not matters of individual conscience. Their breach is not just an offence against the gods or ancestors (however serious these latter offences may be in themselves) but a breach of one's duty to one's neighbour, an invasion of another's rights. Their enforcement is not left in the hands of supernatural powers, however efficient these powers may be in other spheres. The party who is injured as a result of such a breach has the right to mobilise the forces of the political society for his benefit. Once a claim is established, society, as represented by the arbitral court,[11] has no choice but to do justice, for the injured party is entitled to insist on restitution or compensation. It is true that the motive as well as the general character and background of the parties have to be investigated with each claim. But this is a matter of procedure only. The fact remains that claims are founded on established rules; decisions, too, are based on recognised principles. Above all, these rules and these principles can be enforced with the aid of the forces of the political society.

Obviously then these are much more than mere rules of morality. Some of them are enacted by a recognised organ of the

[11] Note, however, that in recent years the Customary Courts set up by the Regional legislature and backed up by the forces of the central Government have largely taken over from the traditional courts, as above described.

society. Others are passed down from generation to generation as unenacted " customary " rules. But if the difference between " law " and " custom " be that the former is enforceable in a court of law while the latter is not, there is no doubt that the rules under discussion are rules of law. Obviously they do not satisfy Austin's definition of law as the command of a political sovereign backed by a sanction. But neither do all laws in socialist or republican states, where there are no sovereigns in the English sense. On the other hand, they do satisfy the definitions of Salmond, Holmes and Kelsen. To Salmond, law is what the courts will enforce. For Holmes law is no more than a prophesy of what the courts will do. Law, as Kelsen sees it, is just a hierarchy of " oughts "—" if A, then B ought to follow ". As we have tried to show, the rules we discuss in this book are simply what the courts will apply to appropriate sets of facts. They are what " ought " to be the case in each situation. They are set patterns for the determination of disputed claims, etc. Whatever Main and Gluckman and Driberg think of the eligibility of " primitive " law for a place in " civilized " jurisprudence, we intend to use the term " law " for all those established rules which the courts (whether arbitral or otherwise) will recognise and enforce if and when called upon to do so.

(4) Ibo Classification of Property

A study of the Ibo language suggests the following (traditional) classification of property:

(*a*) Land: *anị, ala.*
(*b*) Economic trees and plants: *akụkụ, mkpụrụ.*
(*c*) Movables: *ngwa, ịfe.*

Movables or *ngwa* are in turn classified as:

(i) Household articles: *ayọ, arịa.*
(ii) Livestock: *enụnụ, akụ, ọkụ.*
(iii) Money: *ego, ikpeghe.*
(iv) Debts.

(*a*) *Land*

Among the Ibo, land has a number of aspects.

(i) In the first place, it is a deity—the source of all life, of food, and fertility, the custodian of social norms and morals. The sacred nature of land manifests itself in a variety of ways.

As already pointed out,[12] the Earth is one of the superior gods and is everywhere accorded full legal personality. The earth priest is often the senior *ọfọ* holder in each social unit. He it is who can and does remove the pollution resulting from a breach of taboo, an " abomination ", a crime.[13] Both as a god and as a legal person, some form of respect and tribute is due to Mother Earth at the commencement (and in some places, also at the end) of each year's farming season. Thus it is generally regarded as a mild form of sacrilege (at the best a culpable slight) to start the year's farm work without a public act of worship in which the priest of the Earth asks her permission to be disturbed and exploited for the good of man. Indeed, each day's work should begin with a short prayer[14] to the following effect: " *Ani mba! Ani, ọ burọkwọ ọgu na ọ bụ egwu ka anyi na-egwuso gị. Anyị ga-alụ ka ndị mbu, lua ka ndị abọ.*" (We fly to thy protection, oh land! We don't intend to attack you, merely to play with you.[15] May we farm (in peace and safety) as did the first and second generations (of our progenitors)).

(ii) The second peculiar aspect of land is its user. It is a view commonly held among foreign observers and students of African land law and tenure that it is not the land itself (i.e., the earth, the soil) but the usufruct thereof which could be called " property ".[16] This idea seems to stem from the fact first that the earth is a deity and secondly that land is not " owned " by individuals but by groups such as families, lineages, etc. This latter view may be justified in the case of " communal " land. But it would be fallacious, we submit, on the strength of this to equate the Ibo land user with the Roman usufructuary of old. The Roman usufructuary enjoyed specific interests *in re aliena*; the Ibo individual enjoys interests in the land as of right and as an integral part of the land-owning unit. The Roman usufruct normally terminated at a specified time or at the death of the usufructuary; the Ibo landholder's interests are held in perpetuity as a rule.[17]

In any case the idea of a usufructuary is totally inapplicable to individually held land. This may be land carved out by the

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[12] See p. 25, *ante*.
[13] Rattray's " sin ": *Ashanti Law and Constitution*, p. 287.
[14] Uttered by man, woman and child.
[15] A " white lie " aimed at justifying the use of the knife and hoe.
[16] See e.g. Rattray, *op. cit.*, pp. 340 *et seq.*; Meek, *Land Tenure . . .*, p. 113.
[17] On this see Elias, *Nigerian Land Law and Custom* (2nd Edn.), p. 142.

individual from a virgin forest, or acquired by outright purchase (where this is permissible), etc. This class of land, as we shall see later, is regarded by its holder as a piece of private property which could be sold or pledged, leased or given away without interference from any social or political authority.

We can safely say, therefore, that land as a piece of property has no analogy with a Roman usufruct, that the individual's interests in land are not limited to " the right of occupation ", but that different forms of rights and interests attach to different types of land—some proprietary, others merely possessory (in the sense of a defeasible right to perpetual user with no right to individual ownership).

(*b*) *Economic trees and plants*

A remarkable aspect of African customary law is the fact that " land " does not include things growing on or attached to the soil. Thus neither economic trees nor houses are part of the land on which they stand. The maxim *quicquid plantatur solo, solo cedit* (whatever is attached to the soil becomes part of it)[18] is not true of African law in general or of Ibo law in particular.[19] On the contrary, the law relating to rights and interests in economic trees is similar in many respects to that which governs rights and interests in movable property, as we shall see in due course. Nevertheless, it would be wrong to treat economic trees under the general heading of " movables ", since until they are severed from the soil they are obviously *not* movable, and after severance they cease to be trees. We are therefore constrained to regard them as a separate class of property possessing some of the characteristics of both land and movables (in much the same way as English law used to treat leaseholds as a hybrid between realty and personalty, under the name " chattels real "). This separate treatment of economic trees is in line with Ibo legal thought and practice. Finally, it must be pointed out that the term " economic trees and plants " embraces not only fruit trees such as the oil palm, the mango, the breadfruit or the kola nut tree but also timber trees such as the iroko, *ulu*, *agba*, or the

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[18] Megarry, *A Manual of the Law of Real Property* (2nd Edn.), p. 396.

[19] Coker said that the maxim is part of Yoruba law. See *Family Property Among the Yorubas* (London, 1958), p. 40. But contrary views are held by other writers on Yoruba law (see, e.g. Ajisafe, *The Laws and Customs of the Yoruba People*, pp. 9–10).

mahogany tree. It also includes those trees which are normally planted by man and those which are self-sown as a rule.

(*c*) *Movables*

These are known in Ibo by the comprehensive terms *ngwa* and *ife* (*ihe*). They include everything that can be moved and which is the subject matter of human ownership. Their catholicity of form and content can be seen from the fact that *ife* (*ihe*) is equivalent to " thing " in English. Thus when an Ibo says that *mazi X* " *nwelu ife* " (" *nwere ihe* "), he means that the man in question is " a man of substance ". Similarly, the expression, " *ife malụ X* " means that X is lucky with those things that make a man wealthy, and so is a rich man. On the face of it, therefore, *ife* would seem to include all forms of property, not excluding land. But it must be remembered that land had little commercial value in Iboland until quite recent times, with the result that the Ibo looked upon it as a different species of property from *ife*. Thus a man who had vast areas of land could still be *ogbenya* (" poor man "), because *o nweọ ife* (" he does not have ' things ' "). *Ife* in the sense of property must, therefore, be taken to exclude land among the Ibo.

Movable property includes (*a*) household articles, (*b*) livestock, (*c*) money, and (*d*) " debts " (this last approximating to what in English law is known as " choses in action ").

(i) *Household articles.*—These include such things as furniture, spears, guns, cutlasses, kitchen utensils and wearing apparel. The last (wearing apparel) are called *ife ekike* in some places and *akụlụ* in others, while the rest are known as *aya* (or its local variations such as *arịa*). Akin to " household articles " are such things as heirlooms and insignia (including clubs) of office which though not strictly wealth are nevertheless the subject matter of ownership and inheritance.

(ii) *Livestock.*—In Onitsha area these are known as *enunu* (" things reared ") or *enunu ezi* (" things reared outdoors "). They include cattle, poultry, goats, sheep, dogs and pigs—among others. In the Ngwa area of Owerri Province, they are known as *akụ*. But both here and in other parts of Iboland, this term often bears the wider meaning of " wealth ". So does the word *ọkụ* which is also loosely used for livestock in Onitsha area.

(iii) *Money.*—This has been a recognised form of property among the Ibo from time immemorial, though the precise form

of currency in actual use has, as in most societies, varied from generation to generation.

(iv) "*Debts.*"—The Ibo word for debts is *ụgwọ*. But under this heading we include all such periodic payments due to persons such as socio-political functionaries and *ọzọ* title holders by virtue of their office.

CHAPTER 2

LAND

A. Classification of Land

In *Law and Authority in a Nigerian Tribe*,[1] Meek classifies the various types of land found in Iboland as follows:

(*a*) lands which are sacred or taboo;
(*b*) virgin forest;
(*c*) farm land held in common by the members of a village, kindred, or extended-family;
(*d*) individual holdings.

He goes on to say:

> "The first class of lands includes sacred groves surrounding the shrines of public cults. . . . It also includes the taboo lands or 'evil bush' known as *aja ofia* [*ajọ ọfia*]. In both these cases the ownership is regarded as vested in deities or spirits, and no one would normally attempt, or be allowed, to use any fraction of such land for farming purposes."[2]

On this it may be pointed out that though ownership of a *sacred grove* is vested in a deity or other spirit, this is not universally (or even normally) true of a "bad bush" (*ajọ ọfia*). The latter derives its character, as a rule, not from its association with any gods or spirits[3] but from one of the following circumstances. It may be, in fact or fiction, a dumping ground for unwanted charms, poison or "bad medicine". It may be the burial place of a particularly wicked local character, or of lepers, small-pox patients and the like. Thus a sacred grove (*ọfia alusi*, *ọhia agbara*) and "bad bush" (*ajọ ọfia*) are "taboo" for very different reasons. People keep away from the former because it would be trespass to farm or otherwise exploit[4] a sacred grove without

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[1] Page 100.
[2] *Ibid.*, p. 101.
[3] Indeed, many such tracts have no spiritual connections at all.
[4] But as a rule people do go into sacred groves, e.g. to hunt, gather wild fruit, etc., without danger to health.

prior consent of its divine owner. And of course such consent will not readily be given. The sacred bush, like many other nature reserves, is jealously guarded by the gods and the elders. For they are regarded as natural defence lines, and provide shade and game. In the past, trespassing on a sacred grove was believed to be followed by divine visitation the object of which was to prompt the trespasser into contrition and an offer of amends.[5] In the case of "bad bush", on the other hand, the question of trespass need not arise. For in so far as ownership of such a "bush" was vested at all, it was vested in the relevant land-owning unit itself. People kept away from *ajọ ọfia* out of fear of physical harm—lest they be infected with leprosy, small-pox or some other terrible disease. As Meek himself says, if anyone is bold enough to clear a part of a "bad bush" and to cultivate it for two successive seasons without coming to hurt, "he becomes the owner of the land, which henceforth ceases to be regarded as taboo".[6] This boldness Meek regards as "a sign of the times", and the result of congestion and land-hunger. These causes have certainly accentuated the desire to reclaim idle pieces of land. But the Ibo have always had their "*ike na-agbọ ajọ ọfia*" (lit. "a powerful man who clears 'bad bushes'").

The remaining classes of land in Meek's scheme need no further comment here except perhaps to point out the over-lapping between (*b*) and (*c*), i.e., "virgin forest" and "farm-land held in common". Both are in fact held in common. Both may be farmland, (*c*) being actually in use while (*b*) is held in reserve.

In *Land Tenure and Land Administration in Nigeria and the Cameroons*,[7] Meek gives a two-fold classification of land among the Ibo. These are (*a*) houseland, and (*b*) farmland. These, he says, form two successive zones round the group centre, the inner zone being houseland where the people live and grow their economic trees, and the outer zone being the arable land. This description certainly gives a most accurate picture of the territorial division of land in those parts of Iboland where socio-political groups are found at considerable distances one from the other. But where the compact village principle prevails, and

[5] Today the priest or elders may take ordinary legal action before the courts.
[6] *Op. cit.*, p. 101. But see p. 57 *infra*.
[7] Page 132.

a fortiori where several villages are crowded together with often no more than the width of a single road between them,[8] the idea of zones does not apply.

Chubb, too, has a two-fold classification of land.[9] Geographically, he says, land may be classified as—

(*a*) Compound land: *anị ụnọ, alị ụlọ, anị mbụbọ*—land nearest the dwellings. This is usually used by women as gardens.

(*b*) Farm land: *anị agụ, ala ubi.*

As this classification is purely geographical, little comment is called for, beyond pointing out that compound land is used by both men and women in all those places where the " compounds " are widely spaced out within the village.

Bridges, writing in 1938, gives a third class of land. This is an intermediate class between the two classes envisaged by Chubb and is called *agụ olie.* This area, found in the less densely populated parts of Onitsha Province, he says, is the area reserved for the growing of thatching grass. It is doubtful, however, whether this is really a geographical classification. The fact seems to be that thatching grass can only grow on certain types of soil—loam or light and well drained soil. *Agụ olio* (also called *agụ ata, ọgbọ ata, ọgbọ itulu*) may thus be found as an intermediate " zone " as Bridges indicates, or far beyond the farm land.

The Ibo themselves have not got one single basis for the classification of land, which, from the point of view of academic exposition, is unfortunate. And so any attempt at selecting one such common basis is doomed to failure. We can therefore do no better than adopt the Iboman's own approach to the matter, and classify land on three different bases:

(*a*) Geographical:

(*b*) Socio-political control, and

(*c*) Method of Exploitation (or absence of it).

(*a*) *Geographical*

Geographically, land as understood by the Ibo falls into the following classes:

(1) Compound land: ani uno, ali ulo, ani mbubo, ani iruezi

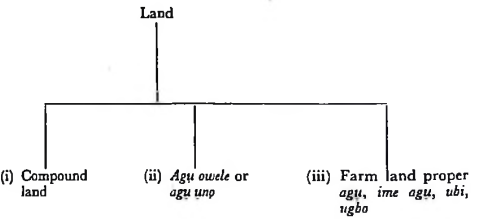
This is the land which lies nearest the houses. In some places, it is all walled in—hence the term " compound ". In other

[8] As in Ozuitem and Oguta, for instance.

[9] *Ibo Land Tenure*, paras. 21–23.

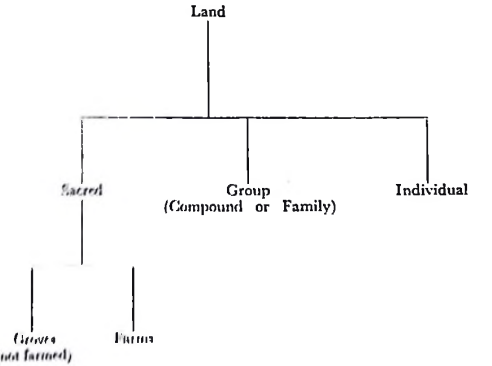
places, there are no walls or fences, but the area under discussion can be easily recognised nonetheless.

A. Geographical Classification of Land

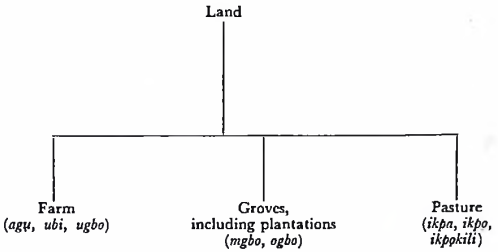


Note: " Compound land " is not found in those riverain societies (e.g., Oguta, Asaba, Onitsha) where the Compound consists of one rectangular or circular building with an open court in the middle; see diagram on p. 23, *ante*.

B. Land Classified on Basis of Control



C. Land Classified According to User



(2) Agu owele, ani owele, mkpalata, agu uno

This is the land immediately adjacent to the compound land. In some places it surrounds the former; in others, it lies mainly at the back of the compound. Hence the name *agu owele*. It is usually farm land but being so near home, it has the distinctive name of *agu uno* (lit. home farm).

(3) Farmland proper: agu, ime agu, ani ubi, ala ubi

The main distinction between this and the last class lies in their respective locations—a mere question of distance from the home. Some land in group (3) (i.e., farm land) may be as much as a full day's journey, on foot or by canoe, from the village.

It will be noticed that this classification omits the sacred grove and the " bad bush ", for these have no fixed and uniform geographical location in relation to the home or to other land. They may be in any one of the three geographical areas here indicated.

(*b*) *Socio-political control*

Taking as our basis of classification the holder of the absolute interest or control (or ownership) of the land, we have the following types of land.

(1) Sacred land

This may be either (*a*) sacred groves, which are never farmed, or (*b*) ordinary farm land owned by, and exploited on behalf of, a given deity.

(2) Communal land

By this is meant land held in common by a socio-political group such as a village or a compound family. This in turn may be either (*a*) farm land, or (*b*) forest reserves, or (*c*) " bad bush ". It will be noticed that a " bad bush " is *not* a piece of no-man's land. It is the property of the individual or the land-owning group (e.g., *umunna*) within whose territory it is situated, and will be defended by them from, e.g., a foreign trespasser.

(3) Individually held land

This again may be any kind of land (from the points of view of geography or of husbandry). In other words, a piece of land in this category may be farm land or compound land, and may be located within the village or miles away from it.

(*c*) *Exploitation*

Taking the method of exploitation as our basis, we may classify land as follows.

(1) Farm land

This, in terms of traditional Ibo husbandry, is land used for the growth of seasonal crops only, such as yams, coco-yams, cassava and the like. It is known in most places by such names as *agu*, *ubi*, or *ugbo*. As can be seen from A above,[10] this land is situated farthest away from the village as a rule. Indeed, in many places farmers have to remove to their farms for weeks (indeed for months) at a time on account of long distances.

(2) Groves: mgbo, ogbo

These, as the name implies are land on which permanent crops (e.g., palms) are grown. They too may be located in, near or far away from the village. They may be on dry land or on the banks of a river or lake.

(3) Pasture land: ikpa, ikpo, ikpokili

This is usually reserved for cattle or other livestock either because it supports particularly good pasture or else because it is so poor that its productive capacity in other spheres is very limited.

B. Rights and Interests in Land

For the purposes of this book the term " land " is used in its

[10] Page 39, *ante*.

purely secular meaning—shorn of all supernatural significance. By land is meant just the earth—from the top soil *usque ad inferos*, to use the old Latin expression. As already indicated, this does not necessarily include economic trees or buildings that stand on the land. But it does include the air space immediately above the land; for the Ibo land-holder has a recognised right to lop off tree branches spreading over his land from his neighbour's holding. (Unlike his English counterpart, he has a right to go on his neighbour's land in order to do this.) Land as herein described also includes the *right to use*, alone or in common with others, a given area of the earth's surface.

Rights and interests in land, including that maximum bundle of them to which the term ownership is applied, may attach to socio-political groups no less than to the individual. This at once raises two distinct but related questions: (*a*) what does "ownership of land" mean in the context of African law in general and Ibo law in particular? (*b*) what is the test that a group as such "owns" land in the same contexts?

(1) Meaning of ownership

What is "ownership" as applied to land? It is desirable to give an answer to this question on account of the widespread but not necessarily correct view among foreign writers on African land tenure that there could be no ownership of land. Various reasons are advanced for this view. It is said that land is a deity and so cannot be owned. The contention is founded on the fallacious assumption that a sacred object cannot be owned in traditional African society. Of course it can, witness the fact that the *ikenga* (the visible symbol of the spirit of departed ancestors), the *ọfọ ọzọ* (sacred symbol of membership and authority of the *ọzọ* title holders), and the *nkwu* (representation in wood, clay or stone of a local god or goddess) are among the most cherished possessions of individuals and groups alike. What is more, they can, for valuable consideration, be alienated sometimes symbolically, sometimes in actual fact. Here is an illustrative statement from the pen of Simon Ottenberg,

> "More than 35 major patrilineages, or about one-fifth of those in Afikpo, possess a shrine, *otosi*, which formerly gave its *owners* considerable authority. Most of these lineages came from Aro Chuku, *though some lineages purchased it from these settlers.*"[11]

[11] *Selected Papers of the Fifth International Congress of Anthropological and Ethnological Sciences* (1956; Univ. of Pennsylvania Press), p. 474.

The second reason advanced for the view that land cannot be owned is that customary law does not recognise the sale of land, and so the holder cannot be said to own what he cannot sell. This view is also fallacious because land *can* be bought or sold in parts of Africa and certainly in most parts of Iboland.[12]

It is true that in parts of Africa (as in parts of Iboland) the sale of land is unknown. But this is not the same as saying that it is prohibited by law. It may only mean that up till now there has been no economic reason for selling land. As soon as circumstances have changed, the African has not been slow to make the fullest use of his land, by sale if need be. It has also been said that there could be no ownership of land even in those societies where land may be bought or sold. This, it is said, is because there is everywhere a prohibition against the sale or other forms of outright alienation of land *to strangers*. This statement begs the question. There is no place in Africa where land cannot be alienated to strangers. Practically every society has a stranger element in its midst, to whom land has been alienated some time in the past. The fact is that customary law does not prohibit the alienation of land to strangers *per se*, but imposes it as a condition precedent that the stranger must be prepared to be absorbed into the holder's social group. This may also be true of those societies where the sale of land is a normal incident of social and economic life. There, too, strangers can purchase land, subject to conditions (if any) imposed by local law. One of these conditions may be that the prospective purchaser must take up residence within the holder's group. But this is not the same as saying that land is not sold to strangers.

We find, therefore, that the sacred character of an object (including land) is no barrier to its being owned. Nor does restriction of a landholder's right to sell, or the absence of sale where there is no economic necessity for it, *ipso facto* imply the absence of ownership. English law prohibits the acquisition and ownership of land (beyond certain narrowly defined limits) by charitable organisations. Planning laws restrict the individual's right of user over his land. One or two European countries have made illegal the alienation of land to strangers. Should we therefore say that there could be no ownership of land in these countries?

The truth is that every legal system allows to individuals and

[12] See Chubb, *Ibo Land Tenure*, paras. 42–58.

groups certain rights and interests in and over various forms of property. The quantum of these rights and interests varies with the nature of the subject matter. All these rights and interests may vest in one and the same person or group of persons, or they may attach to various persons or groups. Where the maximum bundle of rights and interests allowed by the law is in the hands of the same individual or body, that person or body is said to " own " the subject matter in question. What this bundle consists of is determined by the local law. There is no absolute or universal standard for all subject matters under different legal systems. Thus " ownership ", like " freedom " must be construed within the context of the law of the land. Accordingly, to the question whether there is " ownership " of land in Ibo law, the answer is in the affirmative, if by this question is meant whether the totality of rights and interests in land which the law permits can vest in a given individual or group.

(2) The test of group ownership

What is the test that a group as such *owns* land in the context of Ibo law? In terms of our definition of ownership, this means: can a socio-political group *per se* be vested with the maximum permissible rights and interests in land? In other words, are the rights and interests of the group different from or the same as the sum total of those possessed by its individual members in the subject matter? All this is the same as saying, is there any difference between " communal land " and " individual land "? Let us begin with a list of rights and interests to which an individual can be entitled in respect of land. These may include the right to build on the land, the right to grow any crops or trees of his choice (within limits prescribed by the law of the land), the right to sell or otherwise alienate the land at will (also within prescribed limits), the right to extract minerals from the earth, and above all, the right to keep everyone else away from the land in question. There are plots of land in every part of Iboland over which the individual can exercise all these rights under customary law. These plots are called " individual land ".

On the other hand, there are other tracts of land in practically every Ibo society over which the individual shares each of the rights named above (as well as others not mentioned) with other members of his socio-political group. The result is that strictly none of these rights or interests can be exercised or enjoyed by the individual without the consent of everyone else

in the group. In practice, the group always works out an agreed method of obtaining this consent—usually through the head of the group or its land authority. It is the group alone as a body which can exercise, or permit the exercise of, all the rights, etc., allowed by the law. In other words, the maximum bundle of rights and interests is in the hands of the group as a group. To land of this kind we give the name "communal land". The group concerned may be anything from *umunna* to the town, and as we have said, it may act through an *ọkpala*, *obi*, *eze ani* or other individuals. It may act through a Council of Elders, age-grades, or *ọzọ* title holders. But these are merely agents and have no proprietary or other rights over the land, which other members do not have. It is the group alone as a corporate body which can determine the use to which the land is to be put. No alienation is valid unless authorised by it. The group can keep everyone out, including its members, as happens when a piece of farmland is declared a reserve, or converted into little plots henceforth only to be "shown" (i.e., let) to strangers, minority protests notwithstanding. It is therefore the group which "owns" the land.

We now turn to a more detailed examination of those rights and interests which the individual or group could exercise or enjoy over land. This examination falls naturally into two parts, viz. (*a*) the rights and interests of socio-political units as units, including a discussion of what rights, if any, the individual member has in communal land; and (*b*) the rights and interests in land individually held, including an inquiry into what rights, if any, the group has in such land. The rights and interests of the individual in communal land will be discussed in greater detail later and so will be only slightly touched upon here.

(a) Socio-political groups and rights and interests in land

We suggested earlier[13] a classification of Ibo society into four groups: (1) the town, (2) the village, (3) *umunna*, (4) the extended family (and the nuclear family). We shall now take each of these in turn and look into its rights and interests in land. As indicated in the last paragraph above this will include an inquiry into the interaction between the claims of the individual member and those of the group considered as an entity.

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[13] See p. 11, *ante*.

(1) The town (obodo, ala, mba)

Though this unit is found in every part of Iboland, it is only in a few exceptional cases that the town as such can be said to have any rights or interests in land. In other words, there are not many places where the land-owning group is the town itself as distinct from its component villages and other smaller subdivisions. However, there do exist in such places as Atani and Oguta tracts of land which are owned by the town as a unit. No individual citizen, not even the *obi* or the *ọkpala*, has any private claims thereto. For the rights and interests of the town are of the fullest kind: ownership of the land resides in the town *qua* town.

In these cases, the land in question is usually held in reserve. In other words, it is land which has not yet been apportioned to the various units that together constitute the town. In the past such land was reserved as a source of firewood, game and building materials. For these purposes anybody was at liberty to help himself to his heart's content without first seeking permission from the land authority, and with no interference from him[14]—provided, of course, that he was a member of the town in question. But for other purposes such as cultivating the land, building on it, or growing economic crops thereon, prior consent of the land authority was necessary. The same rule applied to all outsiders seeking to use the land for any purposes whatever. Today, these town lands are given out in little plots on lease to strangers who wish to farm on them or to tap the palms thereon for wine or for nuts. The proceeds of these leases—token tributes in kind in the past, money today—are the property of the town. They may be spent on collective acts of worship, on road or bridge construction, or on the preparation of masquerades (*iti mmụọ*). Failing such collective spending, the proceeds are shared out among the villages that make up the town; each village in turn shares out between its various *ụmụnna*, and so on down the line to the individual.

There is a growing practice among chiefs and similar political heads to demand rents or purchase money for these town lands where they are acquired for instance, by the central government, and to appropriate the same for their own use either in whole or in (substantial) part.[15] The argument put forward in these circumstances differs little from an outright claim of ownership.

[14] Or them.

[15] See Rowling, *op. cit.*, para. 88.

As political heads, it is contended, these *obi* are, by customary law, the embodiment of the political society itself. As such they have a rightful claim to any income or benefit accruing to the society as an entity. There is no doubt, however, that neither legal theory nor ancient practice supports any such claim. In most towns the political head has one or more plots of land attached to his office and descending with it. This is the limit of his claims as a political functionary. Any other proprietary or similar interests he may have are founded on his position as a free-born member of a land-owning group.

If a town decides to cultivate or otherwise exploit its reserve ("communal") land, its first step is to partition the land between its constituent villages. Any one of the villages may decide to retain its portion as communal reserve land, or else to apportion it between the *ụmụnna*. Thus though land may be owned by the larger corporate society, its user is often a matter for local concern.

(2) The village (ebo, aba)

In most parts of Iboland the village is the largest land-owning unit, in two senses. In the first place there is often no larger political unit with any proprietary rights in land. For, as already indicated, the town which is the next higher unit in the hierarchy of political groups is in general not a land-owning unit. In the second place, the quantum of land actually held by the village is usually the largest within a given town.

The rights and interests of the village with regard to land may be summarised as follows.

(*a*) *Control of vacant land*

After parcels of land have been allocated to the various subgroups (*ụmụnna*) according to need, the village retains full rights of ownership over the rest of its territory, which is then held in reserve to meet future demands arising from an increase in population, exhaustion of the lands in use, or the needs of immigrants. No one may farm on or build upon this reserve land (often called "virgin forest", *oke ọfịa*, or *ịkpa*) without the consent of the political authority. But this does not apply to the cutting of firewood, ropes or building materials generally. Anybody can please himself with these important but usually abundant fruits of the forest.

(*b*) *Rents and tributes*

Where strangers are given a lease of parts of the village's land,

they have to pay the agreed rents or other dues (in kind or in money) to the village land authority through its appointed land agents. These agents are known in many places as *ndị ọwa ọfịa* (lit. " those who break the bush "). Their duties include keeping a look out for unauthorised strangers going into the land, cutting out plots of land for the use of authorised persons such as lessees and pledgees, and collecting rents due from lessees. In societies where bush burning is practised as a means of keeping down pests and unwanted vegetation, it is these *ndị ọwa ọfịa* who choose the time and method of burning. As in the case of the town, the proceeds of land leases are shared out among the component member groups of the village, after sums required for the business of the village as a whole have been deducted. Even if no rents are agreed upon lessees are expected to pay the customary tributes at the appropriate time.

(*c*) *Right of sale*

In addition to the right to give out plots of land on lease or pledge, the village has the right to sell any piece of land of which it is owner. In the past, these sales were normally to strangers (especially other political societies). The *quid pro quo* was either another piece of land or a fishing pond, stream or river. Occasionally, however, land was given out as compensation for murder, theft or act of war committed by members of one village against those of another. Today, land is often sold for money to such persons and bodies as farmers, missionaries and governments, local or central.[16]

(*d*) *Individual rights in village land*

There are no valid individual proprietary claims to any rights or interests in village communal lands. Thus no individual member of a village can claim any part of such land as his in the absence of partition. This is true of the *obi*, the *ọkpala*, and the *eze ani*. But the individual member does have the *right* to hunt, to depasture his cattle, to collect firewood or wild fruit or building material of any type from such land without anybody's consent. Strictly he has no right to be given a plot for farming or building even if he can prove genuine shortage of suitable land in his family. For allocation is not to individuals but to political groups. Thus where the individual proves a case of need, the village has to choose between carving up its virgin land or a part

[16] The *town* has a right to prevent or subsequently upset undesirable land transactions by its member-groups. See further, p. 48, *post*.

of it and distributing shares thereof to the *umunna* on the one hand, and, on the other hand, brushing aside all questions of legal rights and duties and doing the individual the favour of letting him have a plot of land. The latter course is more frequent in places where population pressure is not great.

But the individual does have *some* rights and interests in village land. He has a *right* to be consulted (either directly or through his family head) *before* any transaction affecting such land can be entered into with strangers, or before a decision to partition can be taken. Parties not consulted can upset the decision thus improperly arrived at by taking legal action against those responsible for it. In the past an arbitral court would be set up to look into the complaint, its members being village heads and other leaders of social thought drawn from two or more villages. Today action lies in the "Native" (now Customary) Courts.

(3) The umunna

The *umunna* has practically the same rights and interests in all un-allocated land within its territory as has the village in village land. Thus the *umunna* can sell or lease its land at will and without the consent of any higher political authority. In the case of sale, however, there is a limitation on its powers where the proposed purchaser is a stranger from outside the town concerned. Here the village, indeed the town, has a legal right to intervene to prevent the transaction and thus preserve the social integrity of the group.[17] In addition to the right to sell, lease or pledge, the *umunna* has a reversionary interest in family or individual holdings. Thus should a family die out, its land reverts to the *umunna*. The position is the same where a family migrates to another village or town, for example, as a result of political oppression or as fugitives from justice.

In some parts of Iboland, exploitation of *umunna* land is unorganised. The individual is free to help himself. He can farm on as much land as he can bring under the hoe. But his rights over such a farm automatically terminate with the completion of harvest; he pays nothing for the right to farm the land; and, while his crops are standing thereon, he has exclusive right of *possession* over the plot. Thus it would be actionable trespass on the part of unauthorised persons to enter upon such land for

[17] This is true also of undesirable transactions in land proposed by the village.

purposes of collecting firewood, yam stakes[18] or palm nuts at any time between the clearing of the bush and the harvesting of the last crops of the season.

In other places it is the duty and privilege of the political authority[19] to decide in consultation with all the family heads what portions of the communal holdings shall be cultivated during the current season, and what crops shall be planted on each set of plots. The local "land agents" (*ndị ọ̀wa ọ̀fịa*) are then acquainted with the decisions taken. They cut up the land into plots of equal value, making up in size what a given plot lacks in fertility. People then make their choice of plots. In some groups there is little choice in fact. The eldest members together decide which end of the farmland is the most fertile, and this is declared to be *isi anị* (the cream of the land: lit. "head of the land"). The very oldest member then takes Plot No. 1. All the others come after him in order of seniority of age so that the oldest but one has Plot No. 2 and so on.[20] But in other societies each person is free to make his choice from any part of the land thus cut out. Thus while the oldest member may plump for Plot No. 50, the next in order of seniority may settle for Plot No. 3. In all societies, however, the choice of plot is made in order of seniority of age. Herein is another example of the Ibo love of democratic practice in almost all spheres of life. For the most powerful *ọ̀zọ̀* title-holder is obliged to make his choice after the humblest member who happens to be older than he is. Similarly the *ọ̀kpala* may find himself low down in the queue in those societies where that status is hereditary and so may pass to a comparative youngster.

In all places these plots are held only for the duration of the farming season, at the end of which they all revert to the *ụmụnna* as owner in possession.[21]

As in the case of farming, very different systems are found in Iboland in connection with the enjoyment of the natural[22] fruits of communal land. In some places *ụmụnna* members are free to

[18] As a rule, this ban covers only firewood and yam stakes actually gathered into heaps by the farmer.

[19] In its capacity as the land authority. Note that political and land authorities need not be one and the same person or body.

[20] Note that annual allocation of *ụmụnna* land is not to the extended families but direct to individuals. It is otherwise with permanent partitioning of the land.

[21] Meek: *Land Law . . . in the Colonies*, p. 158, with reference to Ozuitem.

[22] No-one may plant economic trees on such land without the prior consent of the land authority or political authority.

harvest palm nuts and other wild fruit at will. In other places people are free to help themselves but only on pre-appointed days and only in daylight hours. In yet other places all young men and women have to meet on the land at appointed dates to gather the fruit of the land. At the end of the day (or other fixed period) all the fruit and nuts are pooled together and shared out equally among all the members of the *umunna*. In such cases, it is immaterial that this person or that absented himself from the collective labour. But, of course, every case of culpable absence renders the absentee liable to a fine, which is appropriated to the use of those actually taking part in the work.

(4) The extended family

Like the other political units already discussed, the extended family (*obi*, *oluama*) may have—and usually does have—one or two pieces of land in its exclusive control as a legal entity. Its rights and interests in such land include the right of sale (within the usual limits), pledge, loan, leasing (including "showing") and gift. The only restriction on its rights consists in the fact that it may not sell any part of its holdings to non-resident strangers without the consent of the town. But like every other political unit, it has the right to sell to strangers provided they are prepared to immigrate and take up residence permanently within the territorial limits of the group. These immigrants may, if they come in a body, choose to retain their identity as a family group. In this case there is a loose "federation" between the two groups. Certain religious rites are performed together. What remains of the family communal land becomes the common property of all. But such social institutions as family heads, the totem and the *ọfọ ọzọ* (the staff which represents the family's right to take the *ọzọ* title) remain distinct. In most cases the newcomers retain a faint allegiance to their former family head and may continue to pay him annual visits and even tributes. But their *land*[23] rights in their former home entirely cease to exist. Alternatively, the newcomers may integrate completely with their hosts, in which case the legal effect of their immigration is the same as if new children were born to the extended family.

Apart from the rights and interests of an extended family in its own un-apportioned land, this unit exercises considerable influence over the land rights of both the nuclear family and the

[23] *Aliter* rights over economic trees and plants which they grew by their own or hired labour.

individual. Thus the *obi*, or *oluama*, through its *ọkpala* and council of elders can forbid the planting of particular trees or seeds, or the cultivation of a particular piece of land in a given season (for religious reasons), or the cultivation of the soil in a particular way. Thus, many an *obi* (*oluama*) often prohibits the making of ridges on farmlands on the ground that it encourages soil erosion. Others ban such trees as the bamboo (*ọtọsi*, *oke achala*) and the roofing grass (*ata* or *itulu*) on the ground that they both impoverish the soil and make it too hard to hoe. On the other hand, the *obi* (*oluama*) may suggest (or indeed order) the planting of *araba* (*ahaba*) trees as a good source of manure.

Finally, the extended family has the right to take over land abandoned by a nuclear family, which chose to emigrate to another village or town, or which was driven away on account of the criminal propensities of its members. Land thus taken over becomes communal land for the rest of the group. It must be emphasised that in the past, extended families did have the right and the power to drive away an errant nuclear family. Many victims of this kind of treatment are still encountered in various parts of Iboland. But there was no right to deprive a nuclear family of any part of its holdings (without its consent) so long as it remained part of the larger group.

As already indicated, the nuclear family unit is almost the same as the English family. But there is this difference that in *traditional* Ibo society a man's family does not break up in his life time. Thus even if his sons grow up, marry and raise their own individual families, they nevertheless continue to be part of their father's family as if they were still infants. It is he, for instance, who represents them in litigation with third parties and (in theory at least) pays compensation for their tortious acts. It is his duty to provide them with money wherewith to pay the marriage consideration (bride price) for their first wives. He has to allocate building sites to them for their first houses, and help with the actual construction. Wherever possible, sons are to be allotted such building sites within their father's individual compound (as opposed to the larger compound which holds together the members of the extended family).

A man's farmland may be said to pass through a number of phases in its history. To begin with it is his exclusive property (in the sense that he has the maximum bundle of rights and interests which the law permits in relation to land of that kind). As a married man his bundle of rights and interests is diminished

in favour of his wife or wives. He now has to meet their land needs as well as his. It is elementary knowledge in Ibo peasant society that cool, shaded land is best suited for the growth of coco-yams, while loose and well drained loam soil is best for cassava. In between these we find types of soil best suited for yams. Now a husband must either turn over the use of his coco-yam and cassava land to his wives (these crops being women's prerogatives *vis-à-vis* their husbands), or else find them other suitable land. So long as they help him in his farm work and provide the usual breakfast and supper (he provides the lunch), they are entitled to land for their own crops—from him. They also have a right to inter-plant their own crops among his yams in accordance with locally recognised practice of husbandry. Thus they may sow their okro, melon, cucumber, pumpkin, black-eyed beans and runner beans among his yams without first asking for his consent. That is their right as wives. An infringement of this right makes him liable at their suit before a traditional court of elders.

Finally, when a man's sons grow up, he has to share his farm-land with them or else provide them with land acquired from third parties. They must, it is true, consult him before clearing any piece of his land for cultivation, as he is the family head. But he has no right to refuse their reasonable request for farmland provided first that he has some of his own to " show " them or is financially able to procure some from third parties, and secondly that they behave reasonably well towards him as their father and family head. For their part, they owe him an annual tribute in kind at harvest, and the first fruit of their economic trees wherever grown, including the first day's produce of any palm that they tap for wine (*ụfị nkwụ, ụhị mmịa*). These periodic tributes are referred to as *ịtụ nru* (*ịtụ nhụ*). It will thus be seen that while as against the rest of the world outside his family the Ibo individual land holder is still a sole owner, yet the quantum of rights and interests which he can actually enjoy as an individual is very much depleted first by the advent of wives and secondly by the coming of age of his own sons.

(*b*) *The Land and the Individual*

(1) Acquisition of rights and interests in land

The individual may acquire private land in one of the following ways:

(*a*) by succession;

(*b*) by purchase, where this is permitted by the law;
(*c*) by pledge or by loan;
(*d*) by clearing a portion of the virgin forest;
(*e*) as a gift *inter vivos*, or as *donatio mortis causa*;
(*f*) by apportionment of family (or other communal) land;
(*g*) by " Prescription " (long possession).

(*a*) *Succession*

As will appear later, a person can succeed to all or to part of the land held by his deceased father, brother, uncle, mother or other relatives. He may be sole heir, as in societies where there is primo- or ultimo-geniture. Or he may be a joint heir, in which case he becomes individual owner on apportionment. As a rule a successor acquires the same rights and interests as his predecessor had in the land, at all events if he is a sole successor. Even if he is a joint successor, his rights and interests, after partition, are the same in kind as those of the original holder. The difference lies only in the quantum of the physical area to which he is entitled. Thus if the deceased was an absolute owner (in the sense that nobody else had proprietary or beneficial interests in the piece of land in question), his successor, if a sole heir, acquires absolute rights and interests. If there are several heirs, they together constitute the " owner " in respect of the land as a whole. On partition, each heir becomes an absolute owner of his separate portion. Similarly a successor to mere rights and interests short of ownership such as a pledgee, inherits no more than his predecessor was entitled to.

(*b*) *Purchase*[24]

The sale of land is a recognised transaction in practically all parts of Iboland, and so purchase is quite a common method of acquiring rights and interests in land. But one must hasten to add that outright sale to a stranger who intends to remain so after the sale, is not recognised by Ibo customary law, except in a few urban areas—a modern development.

There are two opposing views regarding the sale of land.[25] One is that there is nothing like *absolute* sale, not even to kinsmen. In every case of what appears to be outright sale, there

[24] Chubb, *Ibo Land Tenure*, paras. 42–58.
[25] We shall see later that neither view is quite correct. See pp. 128–131, *post*.

is a *tacit* reservation to the effect that the land shall be redeemable by the vendor or his heirs for ever. Chubb says that this rule is subject to exceptions in the case of small building plots, two acres at the most.[1] The original owner has no right to redeem while the purchaser or his successor retains his house on the site and continues to live there or to keep it in good repair. But as soon as the purchaser moves away from the house and shows no intention of returning to it, the original owner's right of redemption reappears. In some parts of Nnewi District the redemption rate is twice the price which the vendor received for the land initially.[2] In other places, only the original purchase price is repayable.

The second view is that land once sold cannot be redeemed. That is, the vendor has no *right* to redeem. This rule is said to be found in Ogba in Ahoada Division, Ndoki in Aba Division, and Ibeku in Bende Division. In such places the law is said to attach the greatest importance to the distinction between a sale and a pledge, a distinction blurred almost to the point of extinction in the societies discussed in the last paragraph above. The purchaser provides a hen, cock, kola nuts, goat, dog or tortoise (according to locality) for a special ceremony. The animal or kola, as the case may be, is sacrificed to the Earth deity and then consumed by all present. This serves the double purpose of appeasing the outraged ancestors (whose land is being alienated) and providing evidence of sale as opposed to pledge. A transaction thus sealed cannot be reopened by either party to it.

This "sealing" ceremony must be distinguished from a similar ceremony found in some of those places where the vendor's "equity" of redemption is perpetual. In the latter areas there is a similar sacrifice (to the Earth deity) called *ịkpọba anị*. Literally it means "to set up the land" and is so called because the rite is restricted to sales of residential plots. The prayers offered are not propitiatory in any way; they take the form of an appeal to the Earth deity to "cool the land" (i.e., remove sickness and accidents and death from the site) and so make the place a happy dwelling place.[3] Failure to observe this rite is believed to result in sudden deaths and

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[1] *Ibid.*, para. 43.
[2] *Ibid.*, para. 46.
[3] See also M. M. Green, *Land Tenure in an Ibo Village*, p. 32.

accidents among the *new* residents, the land being too " hot " to live on. Failure to appease the ancestors in the case of outright sale, on the other hand, is believed to result in sickness and deaths among members of the *vendor's* family. From this it would appear that in the case of an outright sale of a residential site there must be two ceremonies: one to placate ancestors, the other to " cool " the land, and provide evidence of absolute alienation.

(c) Pledge and " loan "

Pledge is a recognised method of transferring and acquiring interests in land everywhere in Iboland. A piece of land may be pledged as security for a loan, or for other financial obligations such as marriage consideration (" bride price ") and services rendered. What rights and interests the pledgee acquires in the land concerned depend, of course, on the terms of the particular transaction. But as a general rule, and in the absence of express agreement to the contrary, he is restricted to sowing the soil with seasonal crops such as yams, coco-yams and vegetables. He may not plant permanent economic trees,[4] nor can he build on the land. Land held on pledge is regarded as the individual property of the pledgee,[5] so that the larger family of which he is a member (apart from his heirs) have no claim to it. But his rights and interests therein do survive him and pass down to his heirs.

Not only land in the sense of a physical area of the earth's surface but also " land " in the sense of the sum total of rights and interests in a piece of land can be pledged. Thus a person can pledge his interests in family land[6] even in the absence of partition. (Consent of the family, though not always sought, is essential here.) In such a case the pledgee simply steps into the pledgor's shoes. Thereafter he is entitled to be consulted before the land can be disposed of or otherwise dealt with. He must be given a plot, in common with the family members, when it comes round to cultivate the land in question. In this latter case, too, money raised by pledging one's interest in family land belongs to him personally. This is because what he pledges is not the land itself (which belongs to the family) but merely his beneficial interests therein.

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[4] Chubb, *op. cit.*, para. 60.
[5] *Ibid.*, para. 64.
[6] *Cf. ibid.*, para. 61.

Land can also be obtained on " loan " from friends or kinsmen. In such a case no consideration passes. The borrower simply makes a gift of a pot of wine or kola nuts or *ụgba* or a combination of these,[7] and asks for a " loan " of a piece of land. He is then " shown " a plot. If, as is usually the case, the land is required for farming purposes, the borrower has to pay a small tribute in kind, to the landholder at the end of the harvest season. This is known as *ịtụ nru* and is a traditional method of expressing recognition for a legal or social superior.

Akin to this loan of land (*izi ala* or *iziko anị*) is the practice known as *ịwayị ala* or *ịwanye anị*, which literally means " cutting out the land " or " giving a cut of the land ". The process is the same in both cases—a gift of wine or Kola, request, and " showing " of land. The difference lies in the expected duration of the loan. In the one case—*izi ala*—the loan is by tacit agreement for one farming season. In the other—*ịwanye anị*—the land is understood as being required for residential or other more permanent purposes, and so the loan comes to an end if, but only if, the borrower or his successor vacates the site.

(d) Clearing virgin forest

This was, in the past, and to some extent still is, an important method of acquiring land. Ibo folklore is full of stories of pioneer ancestors wandering from one part of the world to another, clearing stretches of forest and setting up home. In more recent times there have been instances of villages or other socio-political units declaring a given portion of their communal land a residential area. Any member could then carve out as much space as he cared to clear. A mud wall or fence around it, and a hut or two in the middle, and his claim to it is full and complete. The present writer has seen this process take place on several occasions.

In the more thickly populated parts of Iboland the practice is growing of individuals clearing portions or indeed whole stretches of " bad bush " (*ajọ ọfịa, ọhịa ọjọ*) for farming. According to Meek,[8] anyone who does this for two farming seasons acquires exclusive ownership of the land in question. But here

[7] These are not payments in the economic sense since he is not asked to produce them and their production creates no legal obligations.

[8] *Land Law and Custom in the Colonies*, p. 20; *Law and Authority in a Nigerian Tribe*, p. 101.

a word of warning is necessary. It is not *any* land-hungry man that can thus acquire rights over " bad bush ". The right to do so is confined to the members of the land-owning unit in whose area of influence the " bush " stands. For, as already pointed out, a " bad bush " is not a piece of no-man's land. It belongs to the family, village or town in whose territory the land is situated. Any member of this group can become the private owner of the bush or a part of it by clearing it and cultivating it for two seasons (i.e., *ịkọ mmakpọ*). Strangers cannot do this; they can only be employed (or talk others into employing them) as agents. The general, almost universal, rule in such cases is as follows. The stranger is asked, or allowed, to clear the bush and to sow it with his own crops for two seasons. He pays no rent for this use of the land. On the other hand, he charges nothing for the task of clearing so thick a forest and the risk of infection or death. The abnormal fertility of such land is its own reward. The two seasons over, possession of the land goes over to the person who in the first place employed or permitted the stranger to clear the " bush ".

Land carved out of virgin forest is always regarded as individual property.[9] Forde, summarising data collected by J. S. Harris, says that if such forest is cleared by communal labour, the commune remains owner.[10] But as Chubb rightly points out,[11] the " commune " never farms as a unit—at least not today or within Ibo legal memory. It can, therefore, safely be asserted that the job of clearing virgin forest is individually done, and that land thus reclaimed is individually owned. At the owner's death, it passes with his other private land, if any, to his heir or heirs.

(e) Gift

A common method of acquiring land is by gift. Thus a son may receive a gift of land from his father or mother either *inter vivos* or by way of *donatio mortis causa*. Industrious sons are often rewarded in this way, especially where there are many joint heirs apparent to a man's land. All that is required to prove such a gift (the effect of which is to disinherit other children in

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[9] Chubb, *op. cit.*, para. 27; Forde and Scott, *Native Economies of Nigeria*, pp. 64–65.

[10] Forde and Scott, *op. cit.*, pp. 64–65.

[11] Chubb, *op. cit.*, para. 31.

whole or in part) is a trustworthy witness. The latter need not be present at the time the gift is made. It is enough that the father or other donor declares the fact to one or more witnesses. (It is extremely rare, but quite lawful for a person to give away his land to strangers so as to disinherit his own children or kinsmen.) The onus of proving such a gift is always on the donee, of course.

In the matrilineal societies of Afikpo and Bende, fathers not unnaturally evade the rules of intestate succession by making a gift of a plot of land to their own children in their life time. Thus a father would reward a son who accomplished the herculean task of planting 400 yams (*nnụ ji*) in a single day's operation with a gift of land.[12] A special ceremony, performed before witnesses, is required to validate this gift. Similarly a father often makes a gift of land to his daughter[13] as a reward for a particularly brilliant performance at the *omume* title-taking dance[12] In each case the land thus acquired is the individual property of the donee.

(f) Apportionment

The individual acquires exclusive ownership when family land is apportioned. Of course, this, like every other individually owned land, retains its individual character only for the duration of the life of the person who received it on apportionment. On his death, it becomes joint property for his own children. Failing children it becomes common property for his joint heirs, which in extreme cases may be the *ụmụnna* as a whole.[14]

(g) Long possession

Ibo customary land law knows nothing of the doctrine of prescription. The rule may be simply stated as " once an owner always an owner ". The grantee of land normally pays annual tributes to the grantor by way of acknowledgment of the latter's superior title. This takes various forms in different societies—yams, kola-nuts, oil-bean nuts, fowls, palm wine, palm oil, or fish. But failure on the part of the grantor to collect tributes due to him, or even open refusal by the grantee to pay on demand for years on end, will not *ipso facto* act as a bar to the grantor's

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[12] Chubb, *op. cit.*, para. 41.

[13] Daughters hold land here.

[14] Cases are numerous of families who have died out, their land reverting to the *ụmụnna* as *anị ụmụnna*.

reversionary interests. Obviously the grantor's task of proving original title becomes more difficult with the passage of time in these circumstances. But he retains his *right to prove* his superior title at any time he feels like it. In other words, the title remains and can always be proved. For receipt of rents and tributes is only one of several ways of proving superior title. Local repute and the swearing of oaths (juju) are some of the others. Thus an alleged grantor or his successors can establish ownership against an adverse possessor or his descendants by calling as witnesses owners of plots adjacent to the one in dispute. If these assert an oath (not the English-type judicial oath which is reputed to be thoroughly harmless) that the land in question is generally believed to be the property of the alleged grantor, judgment must be entered for the latter. Similarly he may offer, or be made, to swear by oaths of the other party's choice that the land in question was his ancestor's originally. These oaths ("*juju*", *iyi*, *agbara*) are usually placed upon the land in dispute by one party and are removed therefrom by the other party. This done, title is established, any length of adverse possession notwithstanding.

In *Epelle* v. *Ojo*,[15] the grantee of a piece of land sought a declaration of title in his favour on the grounds that the land in question had been sold to him some twenty years previously and that, in any case, he had been in possession with the grantor's knowledge and acquiescence for those many years. This land was situate in Aba Division. It was held by the Divisional Court of Calabar that the plaintiff's long possession did not create any proprietary rights in the land in his favour, and did not bar the defendant's claim to ownership. It was further held that the defendant had not been guilty of any laches so that the equitable doctrine of *vigilantibus non dormientibus curat lex* did not help the plaintiff. The court thus refused to make a declaration of title in favour of the possessor, and this in spite of the fact that the defendant admitted having made a grant of the land to the plaintiff in *perpetuity*.[16]

In *Land Tenure in an Ibo Village*, Miss Green states that even land granted to third parties for building purposes in Umueke Agbaja reverts to the grantor (or to his successors) when the

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[15] (1926), 7 N.L.R. 96.

[16] Thus supporting the argument that land alienated is always recoverable under customary law.

grantee no longer requires it for those purposes.[17] It makes no difference in such cases that the grantee and his successors have been in continual possession for generations. This, it is submitted, is the universal rule in Iboland.[18]

2. Enjoyment of rights and interests in land by the individual

This topic falls naturally into two parts, viz.: (*a*) what rights and interests the individual can enjoy in land owned by the group of which he is a member; (*b*) what rights the individual can exercise over his individual land, free from any control by the political group to which he belongs.

(a) The individual's rights in community land

As Miss Green has rightly pointed out in connection with Umuike Agbaja, though land is often owned by kinship groups, the members of these groups " do not form a common economic unit for the farming or working of it ".[19] The group, as a socio-political land-owning unit, is mainly concerned with the control and administration of farming and other activities of its members, as individuals, on the communal land. It is true that the group as such can and often does " show " plots of its land to strangers in return for economic rents, or otherwise make use of the land for the common good.[20] But by and large, the political unit acts in effect as a mere administrative machinery for the efficient and equitable exploitation of its land by the individual member.

The latter, as we have seen elsewhere, has certain definite rights in communal land. He has no claim to any specific plots thereof. But he is entitled to be given a portion of it for farming or for building purposes—free of charge—if he proves genuine need. He may not demand to be given a plot to let out to strangers at a rent. But he can demand to be allotted as much land of a given description[1] as the number and type of his annual crops require, always assuming that there is enough land to go

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[17] Pp. 32–33.

[18] Complications arise in regard to permanent economic trees (see p. 92, *post*).

[19] *Op. cit.*, p. 8.

[20] After all, the group as a corporate person *is* the owner of what is called communal land.

[1] Each type of crop requires a particular type of soil. Thus the prospective cultivator asks for *anị ji* (yam land), *anị akpụ* (cassava land), etc.

round. We use the word *annual* advisedly because no one has a *right* to demand plots for the setting up, for example, of a palm or cocoa plantation. A request of the latter kind may be granted or refused entirely at the discretion of the land-owning group. But not so a demand for the sowing of such annual crops as yams, coco-yams, *ugu*, or cassava. And not so a demand for a residential site, provided this is not intended for a commercial building.

Similarly, the individual is entitled to a share of farming or residential plots if and when the group decides to make permanent allocations. Moreover he has a right to be consulted *before* such an apportionment of plots is made. In the case of large land-owning groups such as the town or the village, it will be enough if family heads are consulted. But in the case of family holdings, every adult male member thereof is entitled to consultation.

As a rule, the individual has a *right* to help himself to roofing straw, sticks for fencing, yam stakes and building timber, from a communal holding. He need not consult anyone provided he needs them for his own use. It is otherwise where he intends to sell them. Then the prior consent of the group, or its ruling body, is required. In some places, too, a similar consent is required if a member wishes to allow a friend, an " in-law " or a stranger-relative of his the use of a piece of communal forest for any purposes whatever. Where consent is not likely to be forthcoming, there is a convenient expedient available. It is a universal principle of Ibo property law that a man is absolutely entitled to whatever harvest he reaps from a communal holding with his own or hired labour.This being so, a member of a given community can circumvent the need for obtaining the necessary permission by himself collecting the desired building or other materials from the holding and then making them over to his intended beneficiary. This is perfectly lawful—provided, that is, that there is no standing regulation to the contrary.

Every adult male member of a land-holding group is entitled to harvest palm nuts and to tap wine palms standing on communal land—at any time and without consulting anyone,[2] provided there is no local regulation to the contrary. This freedom of action also applies to raffia palms,[3] and to fishing

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[2] J. G. G. Allen, *Ngwa Customs* (1933), cited by Chubb, *op. cit.*, para. 103; Green, *op. cit.*, p. 21.
[3] Chubb, *op. cit.*, para. 112.

rights in rivers,[4] lakes and pools[5] which are in communal ownership. The hunting of game, too, is open to all members who may hunt or trap at will, singly or in groups.[6] All these rights are, as already indicated, subject to local regulations and taboo.[7]

(*b*) *Extent of the individual's rights over his private property*

Chubb defines " personal land " as " land which an individual has inherited or otherwise acquired, and which is at his personal disposal and not subject to family sanction ", less land held by him on pledge or under tenancy.[8] This definition calls for two minor reservations. In the first place " personal disposal " must not be construed as necessarily including the right to alienate permanently to strangers. For as he himself says under the title " Freehold Land ", the Ibo have no traditional conception of a fee simple carrying with it the right to sell outright to any applicant.[9] Land, he says, may be sold outright by individuals or families but not to strangers, the latter being defined as persons from other towns or even other villages.[10] Indeed " disposal " may not include the right to *sell* at all—even to relatives. The other reservation is that the presence of " family sanction " does not of necessity exclude a holding from the category of " personal " (or individual) land. It is doubtful whether any piece of land is entirely free from some form of local control as we shall see later.[11]

The rights of an individual over his personal land as above defined include the right to build or farm on it, the right to sell (within limits) or pledge, lease or mortgage, abandon or exchange " show " to a stranger or bequeath it to his children. In these matters the landholder is quite free to act without let or hindrance from his family. The only exception to this virtually absolute freedom is that, urban land apart, there can be no alienation of a permanent character to a stranger who intends to remain so after the transaction.[12]

[4] *Ibid.*, para. 117.
[5] *Ibid.*, para. 118.
[6] Chubb, *op. cit.*, para. 121.
[7] As in Ngwa area. See further pp. 49–50, *ante*.
[8] *Op. cit.*, para. 36.
[9] Onitsha urban area apart; " any " is the operative word here.
[10] *Op. cit.*, para. 42.
[11] Pages 135–136, *post*.
[12] Where building plots are sold or " shown " to strangers who intend to reside there permanently and to observe local laws, customs and taboos, this is not a true case of alienation to strangers for they cease to be so as a result, *pace* Chubb. (See his implied statement in para. 42 of his *Ibo Land Tenure*.)

It must be added that individually held land often ceases to be so at the death of its holder. It may then pass to a principal heir, as where there is primo- or ultimo-geniture. But even here the heir's obligations towards the junior members of the deceased's family are such that the land practically becomes family land. For his duty includes the provision of enough farm and residential land for his wards. Where there are joint heirs, the erstwhile private land obviously becomes communal.

(c) Involuntary termination of interests in land

Under this heading we shall discuss the loss of proprietary or other interests in land other than by disposition *inter vivos* or by death. Such loss occurs where the individual—

(*a*) emigrates from one community to another, in the case of communal lands;
(*b*) abandons his individual holding;
(*c*) forfeits his membership of a political group as a result of some criminal or " sinful " conduct; or
(*d*) is called upon to surrender personal rights in land in favour of the community.

(*a*) *Emigration*

Where a person emigrates from one town to another, the general rule is that he loses all his rights and interests in any communal land situated in the former town. Since in the absence of partition the individual's interests in such land are rather like those of a joint tenant under English law, the net result is an increase in the quantum of prospective shares of the other members. The emigrant loses all rights and claims not only to the land as such but also to self-sown economic and timber trees growing thereon.[13] A mere temporary absence from home—even if extending over several years—is not enough to constitute emigration. The person concerned must show sufficient intention to leave the old home for good and to attach himself to the new. In most areas, taking a title (e.g., the *ọzọ* title) in and according to the customs of the new town is construed as sufficient manifestation of such intention.

The position becomes more difficult where the emigrant divides his loyalty between the old home and the new. For

[13] Contrary to the rule concerning rignts over economic trees that are planted by human labour.

instance, cases are known where a man left town A, set up a permanent home in town B, and expressed an intention never again to live in A. At the same time he kept alive his allegiance to town A by paying annual tributes (*ịfe nru*) to the *ọkpala* of his former extended family. In two societies, viz. Ogbunike and Umunya, several emigrants are known to have gone a step further and retained their membership of the *ọzọ* society in their former groups. The effect, in all cases so far studied, of this "limping citizenship" has been the same—full civic (including property) rights in the adoptive group, and much more limited rights in the old group. The persons concerned were allowed to retain full rights of ownership and user over what used to be their residential sites (*anị obi*) and over all permanent economic trees on them. But they lost their rights and interests in all other pieces of land in the old group, including what used to be their individual land. It must be added, however, that in each case studied the emigrants went to live with their mothers' people (*ikwu nne*). Now a person is always held in high esteem in his mother's village, and this may account for the generous treatment accorded to the immigrants under discussion, namely their being given full rights of citizenship in spite of the fact that they kept up their link with the old home. But it certainly does not explain the (limited) property rights reserved to them in the latter society in breach of the normal rule that an emigrant loses these rights on being absorbed into a new group. However, the number of people in this peculiar position is too small to affect the general rule.

(*b*) *Abandonment of individual land*

At least three separate questions call for discussion under this head: (i) what constitutes abandonment, and what is the legal position of abandoned land? (ii) has the group (e.g., *ụmụnna*, village, etc.) any right to re-allocate such land? (iii) can the original owner lawfully claim a piece of land back from a squatter who moved in after the abandonment?

(i) *What constitutes abandonment?*—Perhaps the most obvious case of abandonment of individual land is emigration. But the fact that a man leaves his native village or town for another and takes his wife and children with him does not *ipso facto* constitute abandonment. There must be an intention, express or by necessary implication, never to return. If this is manifest the person concerned must be taken to have abandoned all his land.

Another obvious example is an express intention never more to use a given plot. This happens quite often. For example, a series of unaccountable deaths in the family, repeated damage by lightning, persistent bad harvests, or soil erosion may compel a man or indeed an entire extended family to abandon home or a particular farm land. Protracted non-user, too, may constitute abandonment. The question here is, how protracted must the "protracted non-user" be? Various suggestions have been made. In particular, the period of three years has been mentioned by Nadel[14] and Ward Price[15] in connection with Nupe and Yorubaland respectively. But it is quite certain that so short a period of non-user would not be long enough among the acephalous Ibo societies. There is finally what may be described as constructive abandonment. This occurs where a landholder makes an outright alienation (by way of sale or gift) to a stranger who intends to remain so after the transfer. The socio-political authority has then the right to step in and take over the land.

(ii) *Legal position of abandoned land.*—Assuming now that a piece of land has been abandoned in one of the ways outlined above, what is its legal position? Does it become "no-man's land" (or *res nullius*) so that *anyone* is free to occupy it? Or does ownership of it pass to the socio-political group of which the late owner was a member? In view of the principle of socio-political solidarity, the first alternative is unthinkable in the context of Ibo law. For it would mean that even an enemy "alien" could move on to, or otherwise make use of, the land. The rule is that where a private owner abandons his land, the normal principle of intestate succession comes into play.[16] His nearest male[17] relative (if there are more than one of them, then the eldest) steps into his shoes and becomes private owner. If an entire land-owning group abandons its holding, ownership passes automatically to the next higher political unit in the hierarchy. Thus, if an extended-family abandons, the *umunna* takes over; if the latter abandons, the village assumes ownership.

(iii) *Legal position of a squatter on abandoned land.*—The answer to this question depends on the relative position of the squatter himself. If he is a complete stranger to the community, then he

[14] S. F. Nadel: *A Black Byzantium* (Bida, 1942), p. 186.
[15] H. L. Ward Price: *With the Prince to West Africa* (1925), p. 86 and *passim*.
[16] As if he died leaving no male child. For his acts bind his children during his life time and cannot be upset by them after his death.
[17] *Mutatis mutandis* for matrilineal societies.

has no *locus standi* at all and may be ejected at any time by those entitled to the land as sketched in the last paragraph above. If he is not a stranger, then his fate will vary with the locality. In some places, especially in the more sparsely populated areas of northern Iboland, he cannot be evicted by anyone. For in these areas, effective occupation or user of uncultivated land vests the occupier with absolute title.[18] In the more densely populated places the individual has usually no right to occupy or cultivate any piece of land other than his individual holdings, or that allotted to him by the political authority at the appropriate season.[19] In these areas, therefore, the new owner has a right to evict a squatter at any time. It remains to be added that, as already stated elsewhere, Ibo land law knows nothing of prescription or of periods of limitation. No length of occupation or user can therefore be of any assistance to the unlawful squatter. But while this is the strict letter of the law, it is very seldom that a kinsman who has set up his home on a piece of land is asked to leave it against his will. Provided, that is, that he is not a stranger, the new legal owner will let him stay on like a tenant on sufferance. Nevertheless, the legal right of eviction is there, and may be used where necessary. If he does let the squatter stay on, the new legal owner would merely resume radical (or reversionary) title, while the squatter continues in possession.

(c) Forfeiture of individual land

In the olden days individuals often forfeited their land either to the political group or to other individuals. Thus where a man killed a fellow member of his immediate social group (*igbu ọchụ ụnọ*), or committed incest, viciously destroyed growing yams (*ighe ụfiejiọkụ*), or was guilty of any other " abomination " (*alụ*), he was either executed or sold into slavery or else simply driven away from the community. His land was forfeited to the political group of which he was a member. If the offence was committed against a semi-stranger such as a member of another *ụmụnna* within the same village, the offender would forfeit his land (and other property maybe) to the injured party. Nowhere, even among the Western Ibo, was land ever forfeited to the chief or the *ọkpala* as such.[20]

[18] Meek, *Law and Authority*, p. 103; Chubb, *op. cit.*, para. 31.
[19] Harris, " Papers on the Economic Aspect of Life among the Ozuitem Ibo " (1943), 4 *Africa*, pp. 12–23. But see pp. 56–57, *ante*.
[20] *Cf.* Rowling, *op. cit.*, para. 83.

(*d*) " *Requisitioning* " *for public use*

A person may lose his land because it is required by the community for public purposes. Thus a piece of land may be " requisitioned " and turned into a public square; a well may be sunk on it, or it may be converted into a place of public worship. In more recent times individual land has often been acquired by villages or towns for the building of schools and colleges, churches and hospitals. In some places, the person or persons thus deprived will be given an alternative plot in exchange. In others a cash payment is made. In yet other places no compensation of any kind is made. The law is that the political group has the right to appropriate any piece of land within its area of influence on payment of adequate compensation. But some societies agree to dispense with any compensation.

Where private land is acquired for public use which is later abandoned, the law seems to vary from place to place. In some places the land reverts to its original owner. In others only its user reverts to him while ownership remains with the community. And at any time in the future the latter can once more take over the land. In one case[21] several adjacent pieces of land were taken over from their owners by a village and turned into a public square. This was about 1910. Sometime in the 1920's it was decided that the square was too big for the village, and about two-thirds of it was handed back to its original owners. These continued to cultivate it till 1956. In that year the village decided to build a new school, and the same land was chosen as its site. The occupiers protested, but the only answer was that the plot in question was communal land (*ani ọra*). There are now two schools on that site.

[21] In Ogidi.

CHAPTER 3

RIGHTS AND INTERESTS OF PERSONS UNDER LEGAL DISABILITY

I. CLASSES OF DISABILITY

As far as the acquisition and enjoyment of rights and interests in land are concerned, the following categories of persons can be said to be under legal disability:

A. Women,
B. Infants,
C. " Slaves ",
D. *Osu*,
E. " Strangers ",
F. Aliens and Companies.

A. Women

In the seven " matrilineal " societies in and around Afikpo and Ohafia, women have full legal capacity to own land (in so far as land can be owned by anyone in these areas), and to transmit their rights and interests to others either *inter vivos* or at death.[1] The discussion which follows must, therefore, be understood as relating exclusively to the patrilineal societies which in fact constitute the bulk of Iboland.

Women's rights and interests in land may be said to fall into two separate classes, viz. (*a*) direct and (*b*) derivative. By "direct rights and interests " here we mean those which a woman acquires and enjoys as of right and independently of her social or legal relationship with any one person such as her husband or parent. " Derivative interests " are those which a woman acquires or enjoys by virtue of her status as a wife or a ward.

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[1] Chubb, *op. cit.*, paras. 40–41.

(*a*) *A woman's direct rights and interests in land*

It is a popular opinion among foreign writers on Ibo land tenure that women have no proprietary rights or interests in land. Thus, writing about the little village of Umucke, Bende Division, Miss Green says simply, " Women do not own land ".[2] She goes on to say " The village is an exogamous unit and a woman after marriage lives in her husband's village." This may be a true and complete picture of a woman's legal position in the not very complex society of Umucke, some of whose legal rules and social practices appear a little curious anyway.[3] But one suspects that here is an echo of the pet maxim of African land tenure, viz. that all land rights are founded on and sustained by the fact of one's being *born* into a given socio-political group. Now while this is generally true of rights and interests in communal land, it is obviously an over-simplification. Land can be acquired in a multiplicity of ways—by purchase, lease, pledge, loan, gift or inheritance. Some of these means of acquisition are independent of the place of birth of the acquirer.[4] As we shall see presently, some of these means of acquiring land are open to women as well as to men.

In their penetrating study, *Native Economies of Nigeria*, Forde and Scott say that " in principle ", the Ibo woman has no *direct* rights in land.[5] But the force of this statement is more than a little weakened by these further observations by the authors. A woman, they say, may secure personal control over land by providing the money to purchase or obtain a pledge of a piece of land, through a male proxy. " She is then by custom allowed full control of the rights secured." Women, they go on, may also rent land directly. Land held by a woman in these ways—purchase, pledge or lease—passes at her death into her husband's control, " but he is regarded as a trustee for their sons, and succession is restricted to male descendants of those sons."[6] This all sounds like a complicated way of saying that the land in question belongs to the woman, and that succession to it is restricted to *her* sons and their sons.

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[2] *Ibo Land Tenure*, p. 7.
[3] See M. M. Green, *Ibo Village Affairs*, *passim*.
[4] See pp. 53–60, *ante*.
[5] At p. 66.
[6] *Ibid.*, pp. 66–67.

Rowling[7] expresses the opinion that it is perhaps only as an *idegbe* that a woman can inherit land, *an idegbe* being a woman who remains unmarried in her father's house so as to raise issue who would succeed to her father's land. The implications here seem to be that no other women can hold land, and that even the *idegbe* must be looked upon as a mere custodian of her father's land pending the birth, by her, of sons who will then take over. This would only be so if, for example, she could not during her life time dispose of any part of this land as definitively as a single male heir could. Unfortunately, the book is silent on this point.

Meek, on the other hand, seems to be in no doubt whatever as to a woman's legal capacity to acquire and enjoy rights and interests in land—as of right. He says:

> "A woman may *own* land *in her own right*—land which she had acquired before marriage by her own money, or by inheritance or gift."[8]

This passage, it is admitted, occurs as a general statement of women's land rights in Nigeria and the Cameroons, and was not intended to refer specifically to Ibo society. But it is our submission that it does express the legal position of the Ibo woman on the matter, subject to two reservations, viz. that women only *inherit* land in special circumstances,[9] and that they can acquire land by the other means during coverture as well as before marriage.

(1) Ante-nuptial property

Before marriage, a woman can purchase land in her own name. She can also take a lease of a plot at a rent, take a pledge or have a piece of land "shown" to her. As Forde and Scott have said,[10] she normally acts through a male agent. But there is nothing in Ibo law[11] to prevent her conducting any of these transactions in person. The rights and interests thus secured are hers personally in both legal theory and actual practice. Thus if a woman buys a piece of land with her own money

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[7] *Notes on Land Tenure in Benin, Kuruku, Ishan and Asaba Divisions of Benin Province*, section on Agbor, para. 99.

[8] *Land Tenure and Land Administration in Nigeria and the Cameroons* (1957), p. 186; italics supplied.

[9] See p. 185, *post*.

[10] *Op. cit.*, p. 66.

[11] As distinct from feminine modesty.

before marriage, it is her individual property and she can dispose of it in any way she pleases, subject only to the rule against alienation to strangers. On her marriage, she would normally sell it or give it away to a kinsman of hers. Alternatively, she may lease or " show " it to anyone of her choice either for an economic rent or on what has come to be called " kola tenancy ". In this case she reserves her reversionary rights and interests as superior " landlord ". If it is farmland, she may, on being married, and often does, let her husband plant his crops on it during her life time, and this in spite of the fact that he belongs to another village or town wherein he lives (with her). On the other hand, she may decide to cultivate this land with her own crops such as cassava, coco-yams and vegetables. If the land was not disposed of in her life time, it passes at her death to her sons, if any. Should they be infants at the time, their father or, if he is dead, an uncle holds the land as trustee-cum-executor for them. Thus this type of ante-nuptial property never belongs to her husband, and never descends to him as of right, having never been *brought* to his house by the wife. It must be pointed out, however, that the sort of woman who would like to acquire heritable rights and interests in land and who could find the necessary purchase money[12] is often neither young nor likely thereafter to get married. But this consideration does not affect the legal position so far outlined.

(2) Post-nuptial property

A married woman can own land personally, and this in her husband's life-time. This is a common phenomenon among elderly women with grown-up children and among younger but childless wives. These cases are most common where the spirit of co-operation between man and wife is not at its highest. In any case, and whoever actually makes use of the land, ownership is in the woman who purchased it or obtained it on pledge, lease, etc. Her husband has no right to its use.[13] Nor can he claim any part of its fruit by virtue only of his position as the husband of the landowner. At the woman's death, the land descends to her sons if any. Failing sons, the husband inherits; if he is dead, *his* nearest male relative succeeds. Thus the post-nuptial " real property " of a woman, unlike her ante-nuptial real property, never goes to her own people, but to her husband's people.

[12] Or loan.
[13] Without her consent.

(b) A woman's derivative rights and interests in land

Under this head come first the rights and interests of an unmarried woman in the land of her people, secondly those of a married woman in her husband's land, and thirdly those of a widow in the land which was once her husband's.

(1) Farm land rights

Unmarried women and ụmụada

An unmarried woman living with her father or guardian is in the same position as regards land rights as an adolescent male child or ward.[14] As Miss Green has said, women born in a given village have no rights over communal land in it.[15] Even so, they are invariably given land enough for their farming needs either by the community as a whole—out of communal land—or by individual kinsmen. Rents are neither demanded nor paid. But a gift of food and kola nuts at the close of the harvest season is both expected and made.[16] Farming land may be given to such women annually—a different piece each season—or once and for all; that is, one or more plots are "shown" to the applicant to be used as required. Not only unmarried women but also married daughters of a given landowning community[17] living with their husbands elsewhere are frequently "shown" farm plots by their own people. The latter, too, are expected to make seasonal gifts of food and kola.

Wives during coverture

A wife living in her husband's place and co-operating with him in his farm work is entitled to be shown enough land (by him) for her own annual crops such as her cassava, coco-yams, etc. She is also entitled to plant her own crops among her husband's yams and corn in accordance with established methods of inter-planting of crops.[18] Miss Green says that at each wife's death, her sons have a right to use the land on which she used to sow her cassava, etc., among her husband's yams.[19] But this presumes that each wife always plants (or rather inter-plants)

[14] This discussion excludes her rights, etc., in her personal land. See above.
[15] *Land Tenure*, p. 33.
[16] This liability, however, is not a reflection on women's legal status, as every person who has been "shown" land gratis is under the same obligation to his benefactor in similar circumstances.
[17] *Ụmụ ada, ụmụ ọkpụ.*
[18] Green, *op. cit.*, p. 33.
[19] Green, *op. cit.*, p. 34.

her crops on one and the same plot of land. This, however, is not the general practice among Ibo farmers. As is well known different plots of land are farmed in rotation from year to year. And each plot is divided afresh for the season among the wives. The head wife has the first choice, and often picks a different piece each year. Indeed, it is the duty and privilege of the most junior wife to decide whether to carve up the farm lengthwise or crossways or in any other way. She is not under any obligation, legal or customary, to follow the same line of demarcation year after year. The point we are trying to make is that no wife has a claim to any particular portion of her husband's farm for more than one season at a time. If so, there could hardly be any question of the sons of a given wife being entitled to the use of those plots over which their mother used to interplant her own crops among her husband's yams.

Widows

A widow living among her late husband's people has two possible types of derivative rights and interests in land, depending on whether or not she has male children living. If she has, she " lives for " them and continues to enjoy the same rights and interests over her husband's personal land as she did in his life time. She is also entitled to a share of communal land, according to her needs and the quantity available, " in the name " of her children, however young they may be. As a rule, she is given a farm plot during the annual distribution of plots, as if she represented her husband. Thus even if she had two or more sons, she would still be entitled to just one plot " for her children " *en bloc*. It is otherwise, of course, when the children grow up and become entitled each to his own share. At this stage, the widow is normally content to receive little plots from her own sons. But if these are not enough for her needs, or the children fail to oblige, then she falls back on the community[20] who give her some land in her late husband's name.

The widow's second type of derivative interest arises where she is childless. In principle, a childless widow has no right to any land of her late husband's village or family. But, unless she is of a particularly bad character, she is invariably given land enough for her seasonal needs. This is really a case of strict legality yielding place to humanity.

[20] Always assuming that there *is* community land available.

(2) Interests in houses

(*a*) *Direct interests*

So far we have only dealt with rights and interests in farm land. But the same principles also govern a woman's rights and interests in family houses,[21] her personally acquired house and a house owned jointly by her late husband and other members of his family.

(i) *Femes sole.*—Thus an unmarried woman can own a house exclusively. She may have one built for her by hired labour or, in days past and to some extent today, by kinsmen working for other than valuable consideration. A father, brother or uncle can and often does build a house expressly for a middle-aged spinster. Or she may buy a house, a flat or a room with her own money. In these and similar cases, the woman is the legal owner of the house, flat or room as the case may be. She can dispose of it at will and to the same extent as a man. If while remaining unmarried—as what the Western Ibo call an *idegbe*—she bears children in her native family, they are entitled to possession and occupation of the house, etc., at her death. If they are male, they are entitled to succeed.[22]

(ii) *Married women.*—A married woman, too, can acquire and own a house, flat or room during coverture. This she can do by purchase, gift, or hired labour. If the acquisition was done during a period of separation from her husband, the position is simple and straightforward. During her life time, her husband has no rights or interests whatsoever in the property, provided of course that the woman made exclusive use of her own money—money collected by her own efforts and in her spare time, or else money given her by her friends or kinsmen for her own exclusive use. Should any part of the purchase money belong to the husband, he is entitled to a share in the property. In such cases, the " Native " (i.e., Customary) Courts usually rule that the house belongs to the man if the wife's fault had led to the separation. If the man was at fault, the usual order is for a partition—share and share alike, irrespective of each party's " contribution " to the purchase or building of the house. But the Administrative Officers in their capacity as Review Officers normally order apportionment in all cases where a mixed fund has gone into house purchase in these circumstances,

[21] " Family " here refers to her place of birth, as well as her husband's place.

[22] On the position of such children if female only, see chapter on Succession, p. 185, *post.*

whoever was responsible for the matrimonal separation. This is an obvious application of English Law on the subject of mixed funds and joint ventures by spouses.

Where, however, a wife acquires a house, flat or room while cohabiting with her husband, the law is not entirely free from doubts and difficulties. This is perhaps due to the fact that the idea of a woman living with her husband buying a house is a novel one. The law on the subject is therefore in a transitional phase. The position, however, appears to be as follows. If the woman intended the house to be her exclusive property at the time she acquired it, then she has only to prove that the purchase money was hers, having been made in her own time by her own efforts or else given her for her exclusive use. This done, she has established absolute title to the property.[1]

In both cases (i.e., whether the wife bought or built the house while living with her husband or while separated from him), it is the wife's sons only, if any, who succeed to such property. Other sons of the husband by another wife have no right to share. As we shall see under "Succession", it makes no difference in such cases that the husband was not the natural father of the sons born to his land-owning wife, provided that they were born (or conceived) before the "marriage consideration" (bride price) was refunded. Failing such sons, the husband succeeds. If he is dead, any other sons of his inherit. In the absence of any sons at all, the *husband's* nearest male relative succeeds.

(*b*) *Derivative interests*

A woman's "derivative" rights and interests in houses, too, are on all fours with her rights and interests in land *simpliciter*. Before marriage she has a "right" to live in her father's or guardian's house. But this "right" is more like the English tenancy at sufferance than anything else. She simply has a right to be housed, and has no right to demand any particular house or room. However, so long as she is in actual possession of a given house or room, she cannot be turned out of it unless and until alternative accommodation is provided for her. Thus, like the tenant at sufferance, the unmarried woman can be turned out of her lodgings. But unlike the former, she is entitled to alternative lodgings before she can be asked to quit. Again,

[1] If, however, she had acquired it as a family house, her husband is entitled to live there, even after her death or desertion; but divorce will terminate his right.

she may not dispose of the house or any part of it without the consent of her father or guardian.

A widow, too, has in practice a right to be housed in her late husband's house or by his people. In strict legal theory, though, she has no such right unless she has sons living. But except in extreme cases no one will ever think of turning a late kinsman's wife into the street. Thus even if the widow is now past child-bearing age so that no form of marriage[2] is intended to subsist, or re-marriage within the family expected, she retains her right to be housed by her late husband's heir so long as she intends to reside among his people.

Finally, a note of warning. Throughout the above discussion we have spoken of women being entitled to be housed or given land enough for their needs. These "needs" must be judged with reference to their basic requirements of food, clothing, housing and a little surplus. No one—not even the *ọkpala qua ọkpala*—has a right to demand land for other than these basic needs, e.g., for such things as palm or cocoa plantations, commercial estates, or large cattle runs. As Meek says, if anyone wants land for these and similar purposes, he is liable to be treated as a stranger, so that his request may freely be refused. Or else he may be charged an economic rent for any land assigned to him in excess of his subsistence needs.

B. Infants

The duration of infancy varies in different parts of Iboland. In some places a boy is an "infant" (*nwata, nwantakịrị*) till he is initiated into the *mụọ* society (by *ikpu anị*). In other places, infancy continues until the child is old enough to come under assessment for periodic money contributions levied for the benefit of the community. (Today liability to taxation is gradually taking the place of this *ụtụ obodo*.) In yet other places there is an annual proclamation by the ruling age grade or the council of elders to the effect that a given age grade is now of age. But whatever the particular formula adopted, there is always an element of publicity and something of a rite involved.

Rights and interests of infants may conveniently be discussed under the following heads:

(*a*) rights and interests of boys in communal land;
(*b*) boys' proprietary rights in personal land;
(*c*) land rights of girls.

[2] "Ghost" or otherwise.

(a) Boys and Communal Land

In strict legal theory minors have no rights or interests in communal land. Or perhaps more accurately, they have no *vested* interests in such land; all they have is an expectation, a defeasible interest *in futuro*. As members of a given landowning group they have the expectation of one day becoming joint owners of all the communal land of the group. This expectation will become a certainty—a vested interest—on their being initiated into the adult world. Till then, their interest is so nebulous that it has no economic value. Thus, unlike the English owner of a future interest clumsily described as "vested in interest", the Ibo minor cannot sell or pledge his expectation in communal land "for what it is worth", for it is worth nothing. In practical terms this means that a child has no right to demand a share of communal land for any purposes whatever. His land requirements should be satisfied by his father or guardian. If he wants a piece of communal land, say for farming (or his widowed mother wants it on his behalf), he has to make a formal application to the land authority of the landowning group. His request is treated as if he were a stranger with this difference that he would have more sympathisers at the necessary deliberations than the average stranger.

At this point it may be instructive to record a rather interesting case that once came to the present writer's notice. In accordance with the usual practice in Eastern Nigeria, the tax authority imposed a lump tax assessment of so-many pounds for the year on a given village. This was unusually heavy on the adult male population of the village. So they decided to tax widows who "ate" (i.e., succeeded to) their husband's land on behalf of their infant sons. After much argument the widows paid up. The following farming season, these widows came up with a demand for a share in the communal land of the village on the ground that as tax payers their eldest sons were entitled thereto. This created a legal dilemma. To meet this demand would be to set up a dangerous precedent so that widows with babies in arms could thereafter demand a share of village land by the simple expedient of paying a few shillings tax. The result would, of course, be a dimunition in the quantum of annual share of land available to each, as the normal process of replacing deceased members by new ones is disturbed. On the other hand, to reject the claim would be to deny tax payers rights which for generations have been associated with liability for taxation.

The villagers decided to reject the claim, and did so. This was in 1944. But the parties involved still complain about the injustice of that decision.

It must be added, however, that the strict letter of the law as outlined above is not always observed, and that both children and youths are often given land enough for their seasonal needs. They are not expected to, and do not, make any payments for the use of such land either in money or in kind.

(*b*) *Boys' Proprietary Rights in Personal Land*

A boy can own land in his own right, irrespective of his age. He can acquire this land in one of several ways. He can inherit it; his mother or guardian may purchase a piece of land for him; a pledge or a lease can be taken on his behalf. In each case ownership resides in the infant while possession is in his guardian. The land cannot be sold without his consent (if old enough to give this) or that of his closest friend—usually his maternal uncle. (It is true that he cannot, during his minority, dispose of the land to a stranger without the approval of his guardian. But this is a question of his legal capacity to enter into a binding contract, not his capacity to own property.) As a rule, a contract for the disposition of such land which is not made with his approval (direct or by proxy) and indeed in his presence is quite nugatory.

(*c*) *Land Rights of Girls*

So far all inquiries into traditional land rights and interests of infant girls in patrilineal societies have been practically fruitless.[3] What is certain, however, is that neither infant girls nor unmarried adult women have any rights or interests in the communal land of their people. Any land required by them or for their benefit must be obtained as an act of grace from the landowning group.

As to individual land, it may be said that customary law knew nothing of an infant girl's title to this until quite recently. But there is a growing practice of purchasing freeholds and leaseholds in both towns and townships in the name of infant daughters. Presumably the new Customary Courts will hold such children

[3] This is partly because there is no need to acquire land on behalf of an infant girl who would soon marry out of the village anyway, and partly because her guardian, in consideration of his right to her "bride price", is bound to cater for all her needs.

entitled to the ownership of the land. And there is little doubt that even the domestic or arbitral courts will come to the same decision. This is the more likely since such purchases are evidenced by writing in practically all cases. And the adaptable Ibo mind tends in such cases to come to the same conclusion on a given set of facts as an " English court " would be expected to do on similar facts, where writing is involved.

According to Chubb,[4] in the matrilineal societies a man can make an *inter vivos* gift of his individual land to any of his children, male or female. The land thereafter belongs to the donee personally. Presumably,[5] such a gift may be made to infant as well as to adult children.

C. Slaves (Oru, Ohu)

" In pre-British days," says Meek,[6] " there was a general rule that only the freeborn could inherit or deal in land." This sums up the legal position of the slave as far as land rights and interests were concerned. There was no piece of land he could call his own. He had no rights or interests in the communal land of the group to which his owner belonged. He had none in the family or the individual land of his master. He was, however, usually given the use of land enough for his needs—by his master. But he could not sell or mortgage any part of it. A slave quite often obtained a pledge or lease of land. He even made outright purchases at times. But he was always liable to be dispossessed by his master.[7] For the law only recognised a possessory interest in his favour, while ownership always lay in the master.

All this is now of no more than academic interest. For, though socially there are still numerous *oru* (*ohu*) in Iboland in spite of the Act of Emancipation and the Abolition of Osu Law, these can now own land as freely as anybody else. The social stigma remains, but as far as land rights are concerned practically every trace of legal disability is gone. An *oru* may not marry a freeborn, but he can purchase, lease or take a pledge of land from anyone within the village or town. Only one legal disability still persists. An *oru* cannot be an *ọkpala* or a land-priest. And so he cannot have any rights or interests in *anị isi* (*ala ishi*) or in

[4] *Op. cit.*, para. 41.
[5] Though Chubb is silent on the point.
[6] *Land Tenure in Nigeria and the Cameroons*, p. 170.
[7] Meek, *loc. cit.*

anị obi (*ala obi*), as these plots of land are intimately bound up with those two offices.

D. The Osu[8]

The *osu* is a species of slave, the difference being that he is the slave of a god or deity. There are two classes of *osu*. There is the class of persons who were either captured in war or purchased from their people, and then dedicated to a god. There is also the class of persons who of their own accord sought refuge within the portals of a god (*ịgbana n'osu*). People did this (and still do) for a variety of reasons: domestic oppression, flight from justice (after murder, for instance), escape from persistent harassing by creditors, or husband's cruelty. The idea is, of course, that there is complete security under the protective canopy of the gods.

The *osu* had no individual rights or interests in any land.[9] Whether he became so by force or by choice, he lost all rights and claims in any land which he possessed either individually or jointly or merely by virtue of his membership of a landowning group. And, since in the past he was never absorbed into the new society in which he found himself, he had no lot or share in any land therein.

The *osu* had, therefore, to depend on his owner—the deity acting through its priest—for both farming and residential land. Sacred plots and groves were primarily used for this purpose. Indeed, as "sons" and "daughters" of the deity in question, the *osu* had the freedom of its landed property. Not even the priest could restrict their activities in this sphere, for they were creatures at once "both despised and feared".[10] In some places and especially where sacred land was not enough for the needs of the *osu* population, these were assigned farming or residential plots either from communal land[11] or from individual holdings.[12]

Like the ordinary *oru*, the *osu* could purchase land or receive it on pledge. But unlike the former, he could not be dispossessed

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[8] The Eastern Regional Government has made another attempt to abolish the status of *osu* and *oru* in the Region. *Vide* Abolition of the *Osu* System, 1956. But this seems to have led to little practical result, socially.

[9] Chubb, *op. cit.*, para. 33.

[10] Meek, *Land Tenure and Land Administration in Nigeria and the Cameroons*, p. 170.

[11] Green's *ala ozuzu ọha: op. cit.*, p. 15.

[12] Meek, *ibid.*, p. 170.

by his owner. And whereas the *oru* was formerly succeeded by his master (not by his children), the *osu* has always been succeeded by his children. Only in the case of failure of sons did the master inherit.

Today the position is quite different. There are no first generation *osu* of the buy-and-dedicate type any more. And though their descendants are still called by that dreadful name, though inter-marriage between *osu* and freeborn is still anathema, an *osu* of this class can and does own land individually. Indeed there are societies in which they have been integrated to the extent that they now share with the freeborn inhabitants in all communal land.[13]

The legal position of the *osu* of the voluntary type remains substantially the same probably due to the fact that this status is merely a transitory one. (The *osu* of this class are expected to, and usually do, purchase their freedom in their life time. Should they fail to do this, they are " redeemed " by their people at death.) Thus it is that this class of *osu* still rely on their divine owner and its human representative for their land needs. They may now acquire land of their own, however, and are allowed to hold it both during and at the termination of their servitude.

E. Strangers

Ibo law in effect classifies strangers into:
(*a*) integrated or domiciled strangers;
(*b*) non-integrated strangers; and
(*c*) non-resident strangers.

(*a*) *Domiciled Strangers*

The idea of an " integrated stranger " sounds contradictory in terms. But it is nonetheless apt to designate the class of strangers who have made their *permanent* home in a given socio-political group to which historically their ancestors did not belong. For Ibo thought is incurably given to the habit of associating people with the social group of their original ancestors. A stranger declares his intention of being domiciled in a given society by approaching its members and asking to be " shown " land on which to live permanently (*anị obi*). If he is approved, he goes through an oath of goodwill and mutual protection with his

[13] But most societies still make the exception of *anị isi* and *anị obi*.

hosts.[14] He is then allocated a piece of residential land. (Not only individuals but also groups of kinsmen can thus be absorbed into the social fabric.) After such virtual integration, the land rights and interests of the strangers become so like those of the original inhabitants that we need not describe them here. The only point of distinction is that " strangers " have no claims to village headship or to priesthood and so have no share in *ani isi, ani obi* or *ani mụọ* (*ala agbara*). The Ibo maxim is *Mbịa mbịa ada-ebu anị isi* (lit. " an immigrant does not ' carry ' the head land ").

(b) Non-integrated Strangers

These are persons who take up residence on the land of another social group, again with their consent. The difference between them and what we have called " domiciled strangers " lies in the fact that here there is not that reception ceremony which culminates in oaths of goodwill (*ịgba ndụ*).

The legal position of this class of strangers is as follows. They have no rights or interests in any communal or individual land in their adopted society.[15] They are normally " shown " enough land for their farming and residential needs. But however long they or their descendants remain on the land, they never cease to be tenants. And as already indicated, no period of occupation can, in law, bar the original owner's right to evict them. As Meek says, " Strangers who have been given a grant of land are liable to eviction if they subsequently attempt to alienate the land."[16] But though some unlawful conduct by the grantee is always necessary to start the original owners on the path to eviction proceedings, attempted alienation is not the only ground. Thus in *Chief Uwani* v. *Nwosu Okom*,[17] the Ukpom people of Bende sought to evict their Aro settlers from land which they had occupied for an unbroken period of 50 years. It was *held* by the Supreme Court that ownership of the land remained in the original owner-grantors. (But it was also held, however, that it would be *inequitable* to evict the settlers in the circumstances.)

At the death of a settler-grantee, his sons have to re-apply to the landlords for a continuation of the grant.[18] Moreover, if squatters of this category are strangers to the town in addition

[14] Green, *op. cit.*, p. 16.
[15] Except as a grant.
[16] *Land Tenure and Land Administration*, p. 189.
[17] (1928), 8 N.L.R. 19.
[18] Meek, *op. cit.*, p. 189 and footnote.

to being strangers in the particular locality of their choice, they cannot acquire permanent rights and interests over any land within the town. In other words they are treated for these purposes as non-resident strangers.

(*c*) *Non-resident Strangers*

The limits of land rights and interests of these are on many points the same as those of class (*b*), *supra*, strangers. The main difference is that non-resident strangers cannot acquire building sites.[19] According to both Chubb[20] and Meek there are numerous cases of outright sale of land to strangers of this class. But all the cases cited in support of the theory that land *can* be sold outright *to strangers* in *some* places refer to transactions which took place within living memory. In any case, there is no strong evidence that these are not, in fact, cases of redeemable sale.

F. Aliens and Companies

In addition to the restrictions imposed by Ibo customary law on the acquisition of rights and interests in land by strangers as outlined in the foregoing sections, there are statutory provisions governing the legal position (on this point) of those strangers who come under the category of "aliens" as defined by the general law of Eastern Nigeria. The Acquisition of Land by Aliens Law, 1958, s. 4,[1] provides as follows:

> "No alien may acquire any interest or right in or over any land from a Nigerian unless such alien is approved in writing by the Minister in charge of Land, and then only under an instrument similarly approved."[2]

Section 2[3] defines an "alien" as a non-Nigerian, or a company or an association whether corporate or unincorporated—though certain categories of companies are expressly excluded from the definition.

The effects of this legislation are far-reaching. In the first

[19] For *ex hypothesi* if they did, these would be for the use of others, probably rent-paying tenants.

[20] E.g. Chubb, *op. cit.*, paras. 45–58, especially 48–58.

[1] *The Laws of Eastern Nigeria*, 1958.

[2] This legislation is in similar terms to the Native Lands Acquisition Ordinance, No. 32 of 1917 as amended.

[3] As amended by the Eastern Region Local Government Law, 1960.

place it affects both resident[4] and non-resident strangers alike. Foreign missionary bodies are obviously covered unless they fall within one of the statutory exceptions. So also are foreign firms and entrepreneurs. These must now obtain the approval of the Minister of Lands to any proposed transaction in land rights or interests with a Nigerian. And this transaction must be presented to the ministry in the form of an instrument which presumably will have to delimit the physical as well as the legal extent of the rights and interests being acquired. This will, at least in legal theory, remove the age-old criticism levelled against the Missions in the words "*ata ma ọ kpalụ ani*". This criticism contains two elements. First, the Missions, like the *ata* (roofing grass) always begin by perching on a small piece of land (which they usually obtain *gratis* from the villagers). Secondly, they come in, hat in hand, as humble grantees of land. Gradually they expand their holdings in every direction. At the same time they consolidate their position and eventually claim absolute ownership. From the grantors' point of view, therefore, the new statutory provision is an unmixed blessing. He now knows from the start how much land he is parting with, and for how long.

Then, again, the new law will have the effect of bringing under ministerial scrutiny any dealings in land between non-Ibo landholders who are Nigerians and aliens properly called. For it is well known that considerable areas of Iboland have passed into the hands of non-Ibo Nigerians in one way or another. As many of these are held under what has come to be known as "kola tenancy", and as the statutory provisions regulating kola tenancies are now a dead letter, the new legislation will, if wisely administered, protect the rights and interests of both the kola tenant and his grantor, in addition to regulating the relationship between the kola tenant and his prospective successor in title.

But what if an alien (such as a missionary body) decides to dispose of his interests in land held *gratis* or for a nominal consideration to another alien (say, a foreign firm)? Apparently the 1958 legislation, like its 1917 predecessor, would be inept to protect the original grantor or anyone claiming under him. Section 3 of the 1917 Ordinance provides that no alien shall acquire any interest or right in or over any lands within the Protectorate[5] from a native except under an instrument which

[4] Or would-be resident.
[5] As Nigeria outside the colony of Lagos was then called.

has received the approval in writing of the Governor. In 1923 certain Calabar landholders leased a piece of land to a Syrian businessman. The latter erected a building thereon under the terms of the lease. Later, the land was seized by a third party under a writ of *fi. fa.*, and sold to yet another party. Thereupon the Syrian brought an action to annul the sale of the land (but not the building) on the ground that under s. 3 of the Native Lands Acquisition Ordinance the purported sale by his judgment creditor was null and void, as it had not been done under an instrument approved in writing by the Governor. This was the case of *Eyamba* v. *Kouri*.[6] The West African Court of Appeal held that the sale was not invalidated by ss. 3 and 4 of the Ordinance, as contended. This was because the transaction was not a *sale* of *land* by a *native* but merely a transfer of a Syrians interest in the land to a third party.

It is feared that the 1958 legislation of the Eastern Nigeria Parliament on this matter will meet the same fate in court in similar circumstances. A new clause should have been inserted to the effect that dealings in land between aliens on land rights and interests acquired before the commencement of this Law were to be subject to the provisions of s. 4. Indeed, there is no reason why such rights and interests "whenever acquired" should not come under the new section, as it is easily imaginable that a perfectly innocent person or organisation of foreign origin could be used to acquire land in the first place which is then subsequently transferred to another person or organisation of a more dubious character.

II. THE PLACE OF LOCAL AUTHORITIES

Historical

The Native Authority (Control of Lands—Amendment) Ordinance, No. 73 of 1945 and the Native Authority (Amendment) Ordinance, No. 3 of the same year conferred rather far-reaching powers on Local Authorities as regards the use of and transactions in land. No. 73 provided, *inter alia*, that Native (i.e., Local) Authorities could make regulations to regulate:

(1) the control and use of communal, or family, land;

(2) the control of mortgages (or pledges) of land;

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[6] (1937), 3 W.A.C.A., 186.

(3) the sale or purchase of land—this may be made subject to approval by the appropriate Local Authority;
(4) the limits of individual rights of control or user over family or communal land;
(5) the allocation of communal or family land by chiefs and family heads.

Section 29A of Ordinance No. 3 of 1945 conferred on Native Authorities what amounted to an almost absolute power to shape or modify the customary law. For it enabled them to declare and, where necessary, modify what is the " native law and custom " on a given point.

Elias thinks that the above provisions

> " can only lead to a multiplicity of land rules and customs far more numerous and divergent than would be desirable for the progressive development of the country."[7]

The ideal, he says, should be the encouragement and fostering of " uniformity . . . of principles of land usage and practice in Nigeria". To this latter statement there could be no objection. But when he asserts that this ideal could best be achieved through " the normal judicial process of taking the expert evidence of local assessors and arbitrators ", one is compelled to differ. In the first place, while it is true that Local Authorities in a given ethnic group could be numerous, it is equally true that they are much less numerous than the towns, villages and hamlets which today constitute the " area of jurisdiction " over which many customary rules of law are in force. And with the modern trend towards integration in local government affairs already quite noticeable in 1953,[8] there is little doubt that the Ordinance under discussion was an instrument, not of diversification but of unification.[9] And when we remember the considerable unifying influence of a Ministry of Local Government, the case for the Ordinance being put into active use seems even stronger.

In the second place, only a minute fraction of disputes involving customary rules of law and practice ever find their way into the higher courts where the " normal judicial process of taking the expert evidence of local assessors and arbitrators " holds

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[7] *Nigerian Land Law and Custom*, 2nd Edn. (1953), p. 207.
[8] When Dr. Elias wrote these words.
[9] We regret with Chubb the fact that more use had not been made of these provisions. Perhaps lack of adequate education of the Authorities on its merits and potentialities accounts for this.

sway. The bulk of litigation on land rights and interests takes place in the numerous customary courts scattered all over the country. And this fact certainly does not make for uniformity. Indeed, there was and still is a strong case for active intervention by Local Authorities in the evolution of customary law.

The Eastern Region Local Government Law, 1960

The Native Authority Ordinance, with its amending Ordinances—No. 3 and No. 73 of 1945 discussed above[10]—has now been repealed and substantially re-enacted by the Eastern Region Local Government Law, 1960 (No. 17 of 1960). Section 85 of the 1960 Law gives the Minister of Local Government power to authorise local government councils to make bye-laws regulating the use and control of land in their area of influence. Section 90 empowers him to make adoptive bye-laws in respect of functions which are or may be imposed upon local government councils. Conversely, this section also authorises local government councils to adopt and enforce such adoptive bye-laws as are made by the Minister of Local Government. The most important provisions from the present point of view are as follows:

> " 85. (1) The Minister may, by Instrument, declare that, subject to such limitations and conditions as he may impose, a council may make bye-laws for one or more of the following purposes—
>
> (*a*) regulating and controlling the use and alienation of land including land communally owned or of an interest in it;
>
> (*b*) controlling the borrowing of money or money's worth secured upon standing crops;
>
> . . . . . .
>
> (*e*) requiring a person to cultivate land to such extent and with such crops as shall secure an adequate supply of food for the support of him and of his dependents; or
>
> (*f*) establishing a registry or a system of registration for the recording or filing of documents and plans relating to the alienation of land or an interest in it."

It will, therefore, be seen that the 1960 legislation contains all the legal framework on which the Ministry of Local Govern-

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[10] See p. 85, *ante*.

ment can build a unified, rational system of land use and land control, with the aid of local government councils. It is realised, however, that mere legislation would not do. To achieve effective control would require (*a*) a comprehensive scheme aimed at improving agricultural technique and productivity, and (*b*) an efficient team of agricultural experts whose duty would be to re-educate the local farmers on these more up-to-date methods. It will also be necessary to alter the scheme of land inheritance in such a way as to prevent the present fragmentation of farm land at the death of an individual landowner. Something on the lines of the English trust for sale might be the answer; so that where a piece of land is inherited jointly by two or more persons, it must be sold—and sold in one piece—unless the new joint owners agree among themselves to farm it or let it to others as an undivided whole.

In view of these and other practical problems connected with land control among the Ibo (who are very touchy on the land question), it is not surprising that the Ministry of Local Government is adopting a *festina lente* (hasten slowly) policy. However, the more progressive local councils are already taking advantage of a general enabling clause (s. 88) in the Eastern Region Local Government Law, 1960, to make bye-laws regulating the alienation of land to both strangers and local grantees. These bye-laws are practically identical in their wording, and provide that in every case of alienation of land by a native to a non-native, or by one non-native to another non-native of the local authority's area—

(*a*) the local authority must be informed of the proposed transaction;
(*b*) the transaction must be discussed in public;
(*c*) the instrument of transfer must be approved by the local authority concerned;
(*d*) the transfer must be registered.

Failure to comply with these stipulations renders the purported transfer null and void, and makes the offending party liable to a fine or imprisonment, or both. Some of the local authorities that have made bye-laws in these terms in Iboland are the Izi, the Igbo-Etiti and the Uzo-Uwani District Councils.

CHAPTER 4

RIGHTS IN ECONOMIC TREES AND FISHING AND HUNTING RIGHTS

A. Economic Trees

(a) General Principles

One or two general principles stand out clearly in connection with rights and interests over economic trees. We may begin with a short statement of these. It will be noted that these principles are of universal application in two senses of the word: they apply to all economic trees; they also apply to all Ibo societies. The principles are as follows:

(1) If economic trees are self-sown they belong to the owner or owners of the soil on which they grow. But if they are planted by man, they are the property of the person who planted them.[1] It makes no difference on whose land they were planted.[2] Nor is it material that the permission of the landowner was not obtained before the planting was done,[2] bad faith apart. In all cases where a person plants economic trees on another's land, the landowner has no right over the trees or their produce. In normal cases he can only ask the owner to cut the trees down if they interfere with his beneficial use of his land. If this request is refused, he has a legal right to cut them down himself. This happens especially where bad faith is suspected, for example, where the planter is likely to lay claim to the land itself, using the presence of his trees thereon as circumstantial evidence, or again where a comparative stranger had planted permanent trees on another's land.

(2) Sale or other transfer of land does not necessarily carry with it any rights or interests in economic trees growing thereon.[3] Thus in the absence of express agreement to the contrary, the vendor, pledger or lessor of land retains full rights over all

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[1] Rowling, *op. cit.*, para. 89; Meek, *op. cit.*, p. 172; Chubb, *op. cit.*, paras. 99–115; Green, *op. cit.*, pp. 20–21.

[2] Chubb, *op. cit.*, para. 108.

[3] Meek, *Land Tenure and Land Administration in Nigeria and the Cameroons*, pp. 172–173; Field in *Man*, Vol. LXV, No. 47, 1945.

economic plants on it,[3] including the right to go on the land in question for the purpose of enjoying these rights, e.g., harvesting the year's crops. Similarly, on apportionment of communal, or family land, the trees remain in common ownership, unless and until arrangements are made for their distribution.[3] If a person is allowed to live on another's land, and he plants permanent economic trees there (with or without permission), they are his for ever.[4] Even if he ultimately moves to another site, he retains exclusive and heritable rights over the trees and their produce.[5]

(b) Classification of Economic Trees

Ibo law accords differential treatments to different types of trees. It is therefore essential that economic trees be properly classified if confusion on the one hand and tiresome repetition on the other are to be avoided. Various attempts at classification have been made with varying degrees of success. Miss Green,[6] for instance, adopts the method of enumeration. While the result is simplicity and clearness, repetition of legal rules is inevitable. Meek adopted a two-fold classification of economic trees, viz. planted and un-planted.[7] The most ambitious treatment seems to be that of Chubb.[8] But unfortunately, his classification is not based on one but on a variety of principles, with no clear indication as to the logical basis of the classification. The result may be likened to a number of intersecting circles with not a few perplexing overlappings. He says that trees can be classified as follows:

(1) household palms;
(2) compound palms;
(3) wild palms in groves;
(4) scattered palms on farmlands;
(5) plantation palms;
(6) Raffia palms;
(7) plantation trees other than palms;
(8) crop-bearing trees not in plantations;
(9) timber trees.[9]

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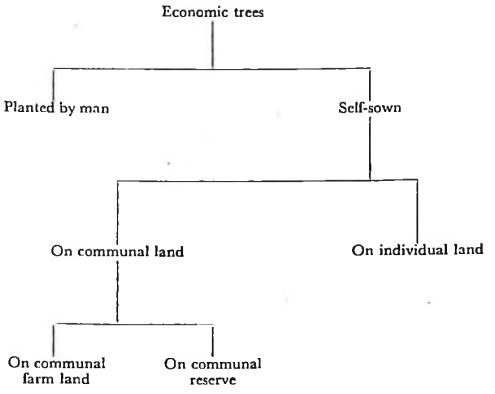
[4] Green, *Land Tenure in an Ibo Village*, pp. 18–21, especially p. 21.
[5] *Ibid.*, p. 32.
[6] *Ibid.*, pp. 18–23.
[7] *Op. cit.*, pp. 172–173.
[8] *Op. cit.*, paras. 99–115.
[9] *Ibid.*, para. 99.

Thus, the basis of classification is partly territorial (i.e., where the trees grow), partly the origin of the trees (i.e., whether planted by man or self-sown), and partly the source of economic value (i.e., whether fruit-bearing or timber-producing). Since any given tree can fall into any of these nine classes and since in fact many types of trees do fall into more groups than one at one and the same time, the possibility of confusion is obvious.

Perhaps no single basis of classification can be devised to take care of all economic trees in one swoop. But the classification *can* easily be done in stages, one basis being used for each stage. The following classification is therefore adopted—

CLASSIFICATION OF ECONOMIC TREES



(1) Economic trees planted by man

The most common among these are the oil palm (*nkwụ*), the raffia palm sometimes called the wine palm (*ngwọ*), the bread-fruit tree (*ụkwa*), the coconut tree (*akụ oyibo, akị bekee*), the pear tree (*ube*), the banana tree (*une, ogede, unele*), the plantain (*jioko, ojoko*), and the *ọha* (*ora*) tree. As already stated, the general rule

about trees of this category is that they are all individually owned by the person who planted them and his heir or heirs. As already indicated, too, it makes no difference where the trees are planted —whether near the home or away from it. Nor does it matter on whose land they were planted.[10] If the landowner happens to be different from the planter, the only remedy open to the former is to get the latter to remove the tree. In appropriate cases (already discussed), he can do so himself. But he cannot sell, pledge or harvest the trees without the consent of their owner. If a landowner disposes of the land in favour of a third party, whether temporarily or permanently, he retains full proprietary and beneficial rights and interests in all planted trees thereon, unless an express agreement on the matter was reached to the contrary. In the same way, it has been said, even if a man leaves his village, " he may lose his rights over his land, but he does not lose his rights over his trees."[11] But on this rule more will be said *infra* under 2 (*a*).

What happens if a member of a landowning group, say a villager, plants an economic tree on communal land? Does he possess exclusive rights over it, or do different legal principles apply here? The answer is that if he plants such a tree[12] without interference from the group or its head, he acquires and retains exclusive rights over it. These rights are transmissible to his heirs.[13]

(2) Trees not planted by man

The legal rules which govern these vary according as the trees stand on (*a*) individual holdings, or (*b*) communal holdings.

(a) Self-sown trees growing on individual holdings

These, like those planted by man anywhere, are individually owned. They are the exclusive property of the landowner. He retains this ownership even after he has parted with ownership or possession of the land itself to a third party. But, and here is the all-important difference which eludes many a foreign student of Ibo law, if a landowner abandons his holding and moves to another socio-political group for good in circumstances wherein the land reverts to his former group, then his rights and interests

[10] But see the discussion on *mala fides* and strangers, p. 89, *ante*.
[11] Meek, *op. cit.*, p. 172.
[12] Meek adds " and keeps the ground around [it] cleared of grass ".
[13] Meek, *op. cit.*, p. 172; Rowling, *op. cit.*, para. 89.

in both the land *and the trees* terminate. We therefore have the interesting rule that whereas an emigrant can still enjoy the produce of trees which he *planted* before his change of " domicile " he has no such rights over self-sown trees. Similarly, in a dispute over an economic tree which appeared for the first time while A was a tenant or pledgee on B's land, the focal point of interest would naturally be on whether the tree was *akụkụ* (i.e., a planted tree) or *osisi dalụ ndam* (a tree that fell " from nowhere "). *Akụkụ* of course belongs to the tenant-planter, while *osisi ndam* is the property of the landowner.

An exception to the general rule that trees growing on individual holdings belong to the landowner (unless planted by a third party) is said to be found among the people of Ngwa in Aba Division. There, according to Forde and Scott, *palms* growing on " private " land are thrown open to common exploitation for certain periods of the year.[14] But whether this practice is of ancient origin or a modern invention does not appear. Moreover it is not clear whether any distinction is drawn by the Ngwa between palms planted by man and those that are not. It would be strange, to say the least, if plantation palms grown at great expense are thrown open to all comers, along with straggling semi-wild palms.

(*b*) *Economic trees growing wild on communal reserve land*

Trees of this class are the joint property of all eligible members of the landowning group. The individual's rights therein are limited to freedom to act in common with others in accordance with recognised rules pertaining to harvesting and appropriation of the produce. These rules vary from place to place. In some places,[15] palm trees are the subject of special rules. In others all economic trees are on the same footing. Thus, in Umueke Agbaja, all palm trees on communal land are open to all members of the village group to harvest. In Ngwa, special days are set apart for the harvesting of palm nuts, while no restriction appears to be placed on the exploitation by the public of other economic trees on communal land. The general rule, however, is that, in the absence of local regulations to the contrary, all rights and interests in economic trees of this class are open and free to all full members of the landowning group. A corollary from this

[14] *Op. cit.*, p. 70; *Cf.* Chubb, *op. cit.*, para. 103, who includes " compound palms ".

[15] E.g., Agbaja, *vide* Green, *Land Tenure, etc.*, p. 18.

rule is that the group is at liberty to make such rules as to the manner and times of the actual enjoyment of beneficial interests in the trees, as it pleases.[16] But the onus of proving the existence of local regulations which oust the general rule is on the party asserting it.

(c) Economic trees growing wild on communal farmland

Ownership of trees of this kind is also in the landowning group *qua* group. And while the land lies fallow, the same rule as to freedom to harvest subject to agreed restrictions holds good. The only difference is to be noticed where the farmland is actually under cultivation. During this period the individual who actually farms the area around a given tree has exclusive rights over it. This rule probably had its origin in the desire to prevent damage to crops by one member exercising his right of entry among another member's growing crops.

B. Infants' Rights and Interests in Trees

A minor, whether boy or girl, can have vested proprietary rights in land as well as in trees growing on it. For example, a child can acquire exclusive proprietary interest in a palm tree in one of two ways. First, soon after his birth, a palm tree may be appropriated to him by his umbilical cord being buried under its roof. Secondly, the same result may be achieved by the first cuttings of the child's hair being buried at the root of a particular palm tree. In either case the tree concerned thereupon assumes the name of *nkwu ana* (*nkwu ala*). Ownership thereof passes to the child absolutely and exclusively and for ever. It makes no difference whether the child is a boy or a girl, as we have said.

As for actual enjoyment of the fruit of this tree (including its wine), the child's mother acts as care-taker during the child's minority. Such produce is supposed to be harvested and sold and the proceeds of the sale used exclusively for the benefit of the child. But, of course, there is nothing to stop the mother making use of the fruit or the money in her own interest so long as the child has no special needs of an urgent character. This fact has led many an observer to the conclusion that the mother, not the

[16] The landowning group may, of course, decide to "show" these trees to strangers or even to some of its members who would exploit their produce exclusively in consideration of an agreed rent paid in money or in kind.

child, is owner of the *nkwụ ana*.[17] Thus Green says of *nkwụ ala* in Umueke Agbaja: Henceforth the child's *mother* will have "exclusive rights over the nuts of this tree".[17] At her death, she goes on, the tree is inherited by the wives of her sons.

The position, however, is as follows. During the child's infancy, his mother, on behalf of the child, enjoys exclusive beneficial interests in the tree. "Exclusive", that is, of any other wives of her husband, and of her husband himself. If the child dies as a *baby*, ownership and beneficial interests will revert to the original owner of the tree. This is normally the child's father or grandfather. If the child dies during boyhood or girlhood (i.e., between seven and puberty), then as a rule, the mother is allowed to retain her rights of enjoyment—for sentimental reasons. Finally, if the child attains puberty and then dies, leaving a wife or children or both, the latter succeed to his rights and interests in the tree.

There is an apparent contradiction between the statement that a child acquires exclusive proprietary rights and interests right from the start and "for ever", and the later assertion that ownership, etc., "revert to the original owner of the tree". But there is no real contradiction involved. The child's rights are absolute and permanent. But the law of succession in effect dissolves a child's property rights if he dies before puberty,[18] leaving no issue. (Nor is there any contradiction in the words, "if he dies before puberty, leaving no issue". For under customary law a baby in arms could be married to a woman of child-bearing age. It often happened that a child was actually born (by proxy) to the baby who subsequently died, still a baby.)

The legal rights and interests of infants in trees are not restricted to the *nkwụ ana*. Occasionally, a child, including a baby, is helped on to "plant" an economic tree by his father or guardian, who, of course, does all the digging and filling in. Once planted, such a tree becomes the exclusive heritable property of the infant planter. Again, economic trees can be bought for an infant child.

[17] See, e.g. Green, *op. cit.*, p. 20.

[18] The tempting suggestion is that perhaps such "property rights" are never vested in fact. But this view of the matter must be rejected in view of the fact that (as will appear under "Succession") a baby's surviving child can succeed to the property (if any) of his deceased (baby) father (see the parenthesis in the text for explanation).

C. Women's Rights and Interests in Trees

As in the case of land rights, a woman's rights and interests in economic trees may be said to fall into two classes, viz. direct and derivative. "Direct" rights and interests are those which a woman has and enjoys (or could enjoy if she chose to) as of right, and independently of her status as a wife or a ward. "Derivative" rights and interests we define for present purposes as those which attach to a woman by virtue of her legal position as wife, widow, mother or ward.

Women's direct rights in trees

Nkwu ana

As already stated, a baby may acquire property rights in a palm tree,[19] and this baby may be a girl. A woman retains her rights over her *nkwụ ana* for as long as she lives. It is tapped for palm wine for her benefit and at her request. Its nuts are reaped for her, also at her initiative. Of course, she cannot do the harvesting herself. But this reflects no defect in her property rights. She cannot because the law of crime says so. Finally, it must be noted that marriage does not in any way affect the legal position of a woman in respect of her *nkwụ ana*. She retains all her former rights and interests in this tree after marriage, and usually continues to visit her place of birth from time to time in order to harvest it. Where she is married a long way away from home, however, or where she resides abroad, she normally appoints a beneficiary in her place.

Other trees

As for planting trees, it is unusual for women to do this before marriage.[20] There is no telling what distance will lie between a woman's place of birth and her matrimonial home, since marriage is both exogamous and virilocal. On the other hand a woman may, and often does plant economic trees in her matrimonial "home". If she does, they are her exclusive property. Common examples are such food trees as banana, plantain, paw-paw, breadfruit and "bitter-leaf" trees.

Just as a woman may purchase land either before or after marriage, so may she purchase economic trees either with or without the land on which they grow. Similarly she can lease them or take a pledge of them or accept a gift of them. Provided

[19] As its *nkwụ ana*.

[20] But if they do, the trees will be their individual property.

the purchase, pledge or acceptance was done by or on behalf of the woman and for her exclusive benefit, her guardian, parent or husband has no legal claims to the trees or their produce.

Women's derivative rights in trees

Children and wards

As a child or a ward,[21] a woman can claim the right *vis-à-vis* her guardian to be maintained out of the proceeds of the sale (or other disposition) of economic trees which were once her parents', now deceased. This is so even if, as a woman, she has no right of inheritance over those trees. As long as she is being reasonably well maintained by her guardian, she cannot claim the exclusive use or benefit of any such trees. But she has an action (before a Native or Customary Court) against a guardian who exploits her late parents' trees for his own benefit while neglecting to satisfy her reasonal needs and demands.[1]

Wives

As a wife, a woman has a right over certain economic trees of her husband's.[2] What exactly these trees are varies from society to society. Thus, in Umucke Agbaja, a wife is entitled to the fruit[3] of such trees as the breadfruit tree which " is looked on as a woman's perquisite and will belong to the wives of the men who own the trees ",[4] and the *oha* tree. In this society, too, women are entitled to the kernels (but not the oil) where man and wife co-operate in winning these articles from the palm nut. In most other Ibo societies, however, both oil and kernel belong to the woman. The Ibo saying on this point is, " *Akwụ dalue aụ nwanyi enwelụ* " (lit. " If a bunch of palm nuts falls to the ground, woman becomes owner "). Indeed, it may be stated as a general rule that timber trees belong to the husband while food trees belong to the wife as far as *beneficial interests* are concerned. But to this rule there are some exceptions. Notable among these are the pear tree (*ube*), the coconut tree (*aki bekee, akụ oyibo*), the citrus tree (*oloma*, etc.), and the kola nut tree (*ojị*). These, though food trees, are the exclusive property of husbands *a propos* their wives.

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[21] Of any age.
[1] This principle also applies to land and other forms of property.
[2] Green, *op. cit.*, pp. 18–23.
[3] Including edible leaves.
[4] *Ibid.*, p. 21.

[illegible] without children surviving, are entitled to [illegible] husband's economic trees during their life, so long as [illegible] among his people. In the words of Green, "a widow [illegible] the right to her husband's palm trees during her [illegible]. This is true of all but timber trees. In the case of [illegible] she has a right to cut as many as she actually needs [illegible]. Her late husband's lateral heirs too can help [illegible] as well if the deceased man left no male children as [illegible] so may his children, if he left any.

D. Fishing Rights

Fishing lakes and pools are normally the joint property of [illegible] groups such as the village[6] or the town.[7] Every member of such a group has fishing rights in these lakes and pools as well as in the rivers flowing through the village. As in the case of economic trees, however, the group may, and often does, make regulations controlling the methods and periods of fishing within its area of influence. Here, again, the burden of proof lies on the party asserting special local regulations. Fishing rights can also be sold, leased or pledged to individual village members or to strangers. But in the absence of express permission a stranger has no right to fish in the waters within a group's sphere of influence.

E. Hunting Rights

Every member of a given socio-political group has hunting rights over all the communal land of his group, in the absence of regulations to the contrary. As in the case of fishing rights, the game killed or trapped is the exclusive property of the hunter or hunters.[8] But where game is killed on land adjacent to dwelling houses there is a customary tribute which is due to the village head,[8] and sometimes the family head as well.

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[5] *Op. cit.*, p. 20.
[6] Chubb, *op. cit.*, paras. 117–118.
[7] *Cf.* Rowling, *op. cit.*, para. 107.
[8] Chubb, *op. cit.*, para. 121.

CHAPTER 5

MOVABLES

For the purposes of this book, movables are defined as all forms of property other than land, buildings and trees. Thus, they include chattels such as wearing apparel, tools of trade, utensils, etc., animals (both domestic and farm) and money. They also include the produce of the land and the tree after it has been severed. Though movables exclude wild animals and fish at large in their natural habitat, they do include these creatures while in captivity and whether dead or alive. Finally, they include those intangible forms of property known in English law as *choses in action*, for example, financial obligations due to a person.

(1) Movables and the Socio-political Authority

Under this head we shall inquire into the twin questions: (*a*) what, if any, are the rights and interests of the socio-political authority (the group) in movables which are in individual ownership? and (*b*) can the group *qua* group own movables? If so, what, if any, is the nature and extent of the individual's rights and interests in such property?

(*a*) Whatever views are held on " communal ownership " or " the overriding interests of the community ", one thing at least is certain. In the sphere of movable property, the principle of private ownership reigns supreme. The group has no rights or interests whatever in movables which are in individual ownership. Nor does it place any restrictions on the right of the individual to do with his own as he likes. Thus while land may not be sold outright to strangers, there is nothing in Ibo customary law or practice to restrain the owner of movable property from disposing of it to anyone at all in the wide world. In other words, the group has no overriding interests in the possession or enjoyment of movable property by the individual.

Movables, however acquired, are the exclusive property of those who acquired them. Thus though farmwork is sometimes done by co-operative labour, the resulting crops are individually owned. This principle is best exemplified perhaps in those

societies where communal farmland is annually cleared of grass by the collective effort of all able-bodied men within the group. After the grass has been burnt, the women go to work carrying the sticks and thorns and stubble away. It is only after this much of communal labour has been done that the farm is apportioned to individual members for the actual hoeing. And this, too, may be done by the joint labour of small working-groups. Nevertheless, the crops sown are the exclusive property of the individuals who provided them. So are the ultimate produce of the farm. It will be noted that it is immaterial whether the land on which the crops are grown is communally or individually owned.

There are, however, one or two instances of what at first sight looks like rights of the group over individual movable property. The head of a socio-political group or the ruling body within it[1] may, and in the past often did, require the individual to give up specific items of his individual property at more or less regular intervals for the enjoyment of all. Thus all wine-tappers may be ordered to hand in all or so much of their palm-wine to the chief, *ọkpala*, head of the *ọzọ* title holders or head of the ruling age-grade (*isi ọgbọ*). The wine is then turned over to the people at large for their evening entertainment. Indeed, some societies go further than this. The town-crier announces early in the morning that no tapper (*di ochi*) should touch his palms that morning till the public messengers have been to them. The announcement usually takes the form of "*onye alịna nkwụ enu*!" or its equivalent in the appropriate dialect (lit. "Let no one climb a palm tree!"). Messengers thereupon go round collecting all the wine from the palms irrespective of who owns which and how many gallons he has to give up in this way. But neither this practice nor any other on similar lines implies any legal rights in individual movable property in favour of the group. For these practices, though backed by legal sanction, are only an aspect of the right of a political authority to impose taxation on those members best able to pay, for the benefit of all. And anyone is yet to suggest that the state has any legal rights or interests in the private personal property of its citizens by reason only of its right to tax them.

Secondly, in the past, members of a given group had to pay specific tributes at regular (usually yearly) intervals to the legal

[1] E.g., the ruling age-grade, the *ọzọ* society, etc.

head of the group such as the Obi. Thus, a farmer might have to pay so many yams at harvest; a hunter might have to give up a leg, heart, liver or other part of each game killed; a tapper might have to hand in the first wine he tapped off each tree for the current season. But these tributes are no more than fair compensation to the group head for his ceaseless efforts to entertain visitors to the community, his numerous arbitrations in intra-group disputes, and his general responsibility for peace and good government. Even if for the purposes of argument we equate the state with the group head, the individual's obligation to make periodic tributes to him does not imply any legal rights in favour of the state attaching to movable property individually owned. It simply means that he is a taxable adult.

(*b*) Can the group as such own movable property? The short answer is, yes. But communal ownership of movables is different in kind from communal ownership of land or trees. In the case of land, no overt act of acquisition is necessary on the part of the group. There need not be any conquest or purchase. The group lives here. The land is there. No individual has appropriated or been given any of it. Ergo, the group is the owner.[2] But with movables, the position is different. The group owns these only if it has actually expended its labour in the act of acquiring it.[3] Thus a socio-political group can make (or purchase) musical instruments, or expensive dresses for its masquerades, etc. It can buy, borrow or be given live animals for breeding. Perhaps most important of all, it can own a common fund. This may be got from cash collections, or from the sale, pledge, lease or "showing" of parts of its communal land, etc.

What is the nature and extent of the rights and interests of the individual member in such property? The first general principle is that the individual has a mere *inchoate interest*. He is sometimes described as a joint owner, in that no distribution or alienation is lawful in the absence of proper consultation.[4] He is also said to be a joint owner in the sense that he is entitled to a share in the event of apportionment. But, owing to the inchoate nature of his interests, the individual has no right to demand his own share

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[2] Perhaps this absence of active assertion of right over communal land led many foreign observers in the past into the erroneous conclusion that tracts of land were ownerless in "primitive" society.

[3] Though such acquisition may be done by hired labour or by volunteers.

[4] What constitutes "proper" consultation varies with the Society and property concerned.

against all opposition, on the ground, for instance, that he intends to go abroad or that he is hard up for money. He is not what English law calls a " tenant in common ". He is more like the English " joint tenant ", but not quite. At any given point of time, there are as many *possible* shares as there are eligible members within the community. But the quantum of these shares alters as existing members drop off by death and others are born (or grow up, as the case may be). These inchoate interests are not heritable. A man's sons become entitled to participation as of right and by virtue of their own membership of the community. Needless to say, these interests can not be bequeathed by will whether written or nuncupative. For in the absence of apportionment, the deceased individual's share disappears and accrues to those of the survivors.

Can the individual assign his interests *inter vivos?* In legal theory there is no reason why not. But his assignee does *not* thereby become a co-owner. All he acquires is (*a*) the possibility of getting a share should this crystallise (and a share crystallises only if the property is apportioned in the life-time of the assignor), and (*b*) a right to such use and enjoyment as the assignor would be entitled to but for the assignment. (There is an apparent but no real inconsistency here. A member cannot bequeathe his rights and interests by will but he can assign them *inter vivos.* Why? This is because his interests are coextensive with his life, and disappear at his death.)

Finally, it will be noticed that ownership by a community differs radically from ownership by a corporation aggregate. Admittedly, the corporate body *per se* is owner of all its property[5], and so is the socio-political group. But here the analogy ends. The members of a corporation aggregate are the owners of their *shares* in the company. These shares are recognised items of personal property and can be bought or sold, donated or bequeathed. There is nothing corresponding to the share (or its visible manifestation—the share certificate) in the sphere of communal ownership of property, as far as Ibo law is concerned. Again communal ownership differs fundamentally from common ownership as it exists in the case of such an unincorporated association as a partnership. In general, and unless the articles of partnership provide to the contrary, the firm dissolves auto-

[5] As we know from the famous case of *Salomon* v. *Salomon and Co.*, [1897] A.C. 22.

matically at the death of any of its members so that the members' financial interests thereupon crystallise. They may then either share out or else decide to continue, in which case a new firm is in effect born. In the case of a community on the other hand, the death of the individual has no effect on the life of the group. Interests do not crystallise therefore. No one can claim any part of the community's property in the name of a deceased member unless apportionment had been made before such a member's death.

(2) Movables and the individual

For the purposes of this part of our inquiry we shall classify individuals into adults (or more accurately, persons that are *sui juris*) and minors (more correctly persons under legal disability). The latter class comprise children (male or female) and some adult women who for certain purposes are regarded by the law as wards under the tutelage of others. All other persons we shall include in the class of " adults " or persons *sui juris*. We shall consider the legal position of each of these classes in turn.

(*a*) " *Adults* " *or persons* sui juris

Ibo civil[6] law places no restriction on the right of the individual to acquire any form of movable property from any source. Livestock, household utensils, fishing outfit, farming implements, articles of personal adornment, harvested crops and money may be acquired by sale and purchase, by exchange, by gift or in any other lawful way. There is here no ban on selling, etc., to strangers or to aliens. Movables once acquired by the individual through his labours or with his money are his exclusive heritable property. This is so even where such property is won from a piece of communal land, a communal fishing pool or a village swamp. Exploiting communal land, etc., contrary to local regulations or customary law is, of course, a different matter. In that case, the acquirer has no property in the goods concerned. He is merely an offender, a trespasser, who can be compelled to surrender the ill-gotten goods and in addition, made

[6] Some writers, e.g. Driberg, prefer " public " and " private " to " civil " and " criminal " in discussing " primitive " law. But civil and criminal have the advantage of being more familiar. Besides, public and private introduce an element of confusion, in that certain " private " wrongs are " public " in the sense of affecting a large number of people as where murder, theft or adultery is treated by one group as an insult to itself by another group.

to pay a fine for the breach of regulation or of customary law, as the case may be.

In this connection it is interesting to note that Ibo law draws a distinction between misappropriation which is mean and reprehensible on the one hand and that which, though not strictly legal, is the fruit of valiant exploits. Property " acquired " by the former methods does not attach; in the case of the latter, it does. One or two examples will make this clear. In some societies the law provides that the first person to arrive on the spot where a breadfruit or a coconut drops from its parent tree thereby acquires exclusive ownership over the fruit, irrespective of who owns the said parent tree. But where such a tree belongs to an old man or woman, a cripple or a person in bad health, this rule of " first on the spot " is suspended. Public opinion will be against anyone who insists on his right of " first come "; should he ignore public opinion, an action lies against him in " conversion ". Again, a thief has no valid property in law in goods stolen within the confines of his town, but he has every right to goods stolen from strangers abroad. In the latter case there has been no " theft " properly called but a laudable act of valour! For *ori agbata* is at the worst merely immoral; it is not illegal. On the other hand, *ori ụnọ* is both immoral and illegal.[7]

To sum up, an individual acquires movable property by purchase, gift, pledge, physical exertion, loan or permissible acts of misappropriation. Once acquired, this property becomes his exclusively and may be inherited at his death. He can, during his life time deal with it as he likes—he can give it away, bequeath it, sell it or destroy it. If he decides to sell, there is no restriction on sale to strangers. Even where an item of property was once part of the natural vegetation or produce of communal land, it becomes exclusive to the person who took the trouble to win it from mother earth, or sister[8] forest, as the case may be.

(b) Persons under legal disability

To what extent, if at all, can persons under legal disability acquire movable property in their own right? The answer to this question will naturally differ however slightly from one

[7] A good proof, if one were required, that the Ibo distinguish clearly between morality and legality. See " Law or Morality ", p. 27, *ante*.

[8] There is some evidence, but by no means convincing, that the forest is personified as a woman, and as it is a child of the Earth like ourselves, is referred to as Sister.

society to another. But the general outline is as follows. Both *children* (i.e. persons who have not gone through the local process of initiation into adult life) and married women (during actual coverture) have extensive rights of acquiring movable property by any of the means open to persons *sui juris*. But their rights are subject to certain restrictions. A child cannot accept a gift of any form of property without the consent of his father or guardian.[9] Nor can he purchase property on credit without such consent. A married woman is in certain circumstances subject to the same restrictions, except that in *her* case it is the consent of her husband that is required. The reason for these restrictions is that Ibo law holds parents and husbands responsible, in general, for the debts and other obligations of their children and wives respectively. In some societies, too, a wife has no right to dispose of her livestock without the prior consent of her husband. This, it is said, is because he has a right of pre-emption. The requirement of this consent is not a matter of mere custom or social etiquette. A husband may impose a fine (usually a cock) on a recalcitrant wife. And should she still refuse to comply, the man can enlist the aid of the family head or an arbitral court.

In addition to the above restrictions on the power of married women and children to acquire movable property, there are other disabilities. There are types of property which a woman under coverture cannot own. Chief among these is the kola nut tree (*ọji*). A woman cannot *plant* this to begin with, and cannot harvest it with her own hands. It is an abomination to do so. If she happens to come into possession of one, e.g. by purchase, during her husband's life, it is he, not she, who owns the tree. He has the right to harvest it, with or without her consent, for his own benefit. The net result, therefore, is that kola *nuts* (which are movable property) cannot be owned by a woman during her husband's life time.[10] This is also true of timber from the iroko tree (*ọji*)[11] and the *ngwu* tree. These are men's property. A woman can lay claims to them only by virtue of her position as a widow or mother of an infant boy. (We shall see later that these restrictions are sometimes lifted.)

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[9] This may be given before or after the transaction, and may even be presumed to be forthcoming.

[10] But this restriction no longer applies to women trading on kola nuts.

[11] Though spelt the same, the Ibo words for kola nut and iroko trees respectively are pronounced differently; the second syllable in the word for iroko is much lower.

(3) Enjoyment of rights and interests in movables

As already indicated, there are no restrictions placed by Ibo law on the enjoyment by the individual of his movable property. The community as such has no right in or claims over it. Unlike land user, enjoyment of rights in movable property is not subject to customary rules. Thus, a socio-political group has the right to make regulations regarding such things as what crops may or may not be grown on land within its area of influence, what methods of cultivation may be practised) (e.g., mounds instead of ridges and *vice versa*), or what the minimum period of bush fallow shall be (even on individual holdings). But the group has no corresponding right to regulate the manner or extent of user as regards movable property. The reason for this dual standard is perhaps to be found in the fact that (*a*) whereas movables are acquired by individual exertion and so should be left to complete individual control,[12] land is god-given; (*b*) whereas movables are " perishable " in the sense that they *can* be exhausted with use, land is the perpetual source of human sustenance.

As we shall see in the chapter on Succession, there are limitations on a man's legal rights to dispose of his land by will, written or nuncupative. There are no such restrictions on his right to bequeath his movables.

[12] The Ibo saying is *onye lụa nya lie* (Lit. " if anyone works let him eat ". But not in the Pauline sense, but rather in the sense of " He who pays the piper should call the tune ").

CHAPTER 6

DISPOSITION OF LAND INTER VIVOS

Ibo law recognises six different modes of disposition of land *inter vivos*, viz.—*ex gratia* grants, leases, pledge, exchange, gift and sale. Mortgage is said to be recognised in some areas, and may be added as a doubtful seventh.

A. Ex Gratia Grants

There are said to be two types of *ex gratia* grants of land. These are (*a*) " showing " tenancies and (*b*) " kola " tenancies.

(*a*) " *Showing* " *tenancies* (*Iziko Ani, Izi Ala*)

The " showing " of land by one party to another is a widespread practice in Iboland. This is done by a landholder letting another person[1] into possession in circumstances where the payment of an economic rent is not contemplated. This beneficiary may roughly be compared to the English gratuitous licensee or tenant-at-will, or, perhaps less accurately still, the Roman usufructuary. It may be objected that the " showing " of land does not necessarily exclude the payment of an economic rent, so that this definition is too narrow. But the answer to this objection is that the absence of an economic rent is the *differentia* which marks " showing " from leasing. It is admitted, of course, that people sometimes speak of *izi ala* even where rent is charged. Even so, the older generation of Ibo people are careful to say " *izi ala n'ego* "[2] where rent is payable. This goes to show that traditionally " showing " without more must have excluded the idea of an economic rent, just as *olile* (sale) without more *implies* redeemable sale. It is important to emphasise this point because not a little confusion of thought has resulted from an oversight of that essential distinction. Thus Chubb[3] speaks of land being " shown " to a fellow villager *gratis* and to a stranger for monetary consideration. It is submitted with respect, that there is no general rule of law to this effect. Economic rent may be charged a fellow village member, and often is. Conversely, a stranger may be shown a piece of land for nothing. The fact seems to be that Chubb, like many others, subsumes two entirely different

[1] Usually a relative or friend. [2] *I.e.* to show land for money.
[3] *Op. cit.*, para. 91.

sets of transactions under the single head of "showing". We propose to avoid this ambiguity by using the term "showing" exclusively for the transfer of possession where no economic rent is charged. Where such rent is payable the transaction will be described as a lease.

The gratuitous transfer of land may take one of three forms, viz. (*a*) the showing of farm land for a specified period, (*b*) the showing of farmland for an indefinite period, and (*c*) the showing of a building site. The legal implications of these are very different, and will be considered *seriatim*.

(1) The "showing" of farmland for a specific period

At the commencement of each farming season people short of land approach those with a surplus and are "shown" some.[4] As a rule, a gift of palm wine or kola nuts, or both, precedes the grant. But this must not be construed as payment for the grant. It is an invariable practice for anyone who has an important request to make of another person to make a gift of this kind (which is consumed by all present) before he presents his case. (This explanation also goes for another gift of drinks or kola nuts which is sometimes made at the end of the season.) But there is also a usual gift in kind made after harvest. Is this rent? The answer, we submit, is in the negative, and here is why. The landowner has no action in law to recover such a gift should the tenant fail or refuse to make it. The only sanction is an economic one: in future neither the landholder nor his friends and relatives would be likely to be favourably disposed to consider similar requests from the ungrateful tenant (and his relatives too, perhaps).

Since the tenancy is understood to be for one season only, the tenant has, of course, no right to plant any economic trees on the land. But where he legitimately grows plants which in the nature of things yield crops for more than one season (e.g., pepper, *ańala/ọfẹ* (cabbages)), he has a right to go on the land in order to reap such crops.

(2) The "showing" of farmland for indefinite period

The owner of agricultural land (usually but not necessarily a community) may, and often does show a part of his holding to another person or group of persons, for an indefinite period of time, and at no economic rent. In the past, this was the usual method whereby immigrants acquired possession and use of

[4] Chubb, *op. cit.*, para. 91; Green, *op. cit.*, p. 30.

farmland. The parties may stipulate the terms of the grant, thus, for instance, restricting the grantee's rights of user to the planting of annual economic crops as opposed to perennial trees; stipulating the quantum and frequency of tributes due to the landlord; and setting out the circumstances under which the landlord would be entitled to evict the grantee. But usually no such stipulations are made. The grantee is simply let into possession after he has made the customary gift of kola nuts or drinks, or both, the only express term of the grant being that the land is required for farming purposes.[5] Everything else is left to the law, which writes all the usual terms of a customary tenancy into the transaction.

The following are the terms which, in the absence of express agreement to the contrary, the law implies in every "showing" tenancy.

(*a*) *Annual tributes*

In the case of a grant to strangers, the law implies it as a condition that the tenant shall make an annual tribute to the landlord. What exactly this tribute comprises will be determined with reference to the local practice in the society wherein the land is situate. But usually it consists of drinks, kola nuts or *ugba* or *ofe*, four units (or a multiple thereof) of whatever was the chief produce of the land for the current year, and, if the land is extensive, a cock.

The obligation to pay this tribute is coterminous with the duration of the tenancy. The landlord may waive or neglect his right to collect it for any length of time. But at any future date, he or his successor in title can demand it.[6] In that case, however, he can only do so for the current year, and thereafter for each subsequent year as it comes round: there is no action known to Ibo law for the recovery of arrears of tributes. But it must be emphasised that no period of waiver or neglect will affect the landlord's right to demand the customary tribute at any time in

[5] A grantee has to specify on first application for a grant what type of land he wants and what user he proposes to put it to, as different types of soil are suitable for different crops, and as the nature of the user proposed is a crucial point in deciding whether or not the grant would be made in the first place.

[6] See *Ikonyi* v. *Adighogu*, [1957] II E.R. L.R. 38, where "showing" tenancy was equated with a gift, and where such tenants who had been in possession since immemorial times without paying tributes were ordered first by the Native Court, then by Senior D.O. with Resident's judicial powers, and finally by Mbanefo, J. (as he then was) in the High Court at Aba, to pay annual tributes. See also p. 118, *post*.

the future. The doctrine of laches does not affect this claim, neither is there any period of limitation to bar the landlord's right. Should the grantee or his successor in title refuse to pay, he is liable to eviction at the landlord's suit: *Ikeanyi* v. *Adighogu.*[6]

(*b*) *Subletting*

The tenant has no right to sub-let the land or any part thereof without the prior consent of the landlord. If he does so, or indeed attempts to do so, he thereby renders himself liable to eviction at the landlord's suit: *Eyamba* v. *Holmes.*[7] But should the landlord permit or suffer him to sub-let, he is entitled to all the proceeds of the sub-lease under customary law.[8]

(*c*) *Mode of user*

There is an implied condition that the land shall be used for the purposes for which it was initially granted. Any substantial alteration in the mode of user requires a prior consent of the landlord. Failure to obtain this consent makes the grantee liable to eviction. An obvious example of a " substantial change in the mode of user " would be the development of agricultural land as a residential site. Another is a change from subsistence agriculture to plantation farming.

(*d*) *Economic trees*

The tenant has a right to grow a few economic trees and plants such as paw-paw, banana, citrus and even palm trees, the number permissible being determined by the number of similar trees which the average farmer in the local community grows on his own farmland. This is because ownership of a handful of these is considered a necessary adjunct to farming.

(*e*) *Security of tenure*

Other things being equal, i.e., so long as the tenant and his successors in title do not commit a breach of any of the conditions outlined above, or otherwise deny the landlord's radical title, the grant is irrevocable.[9] A grant of this nature determines in two sets of circumstances only, viz. first by operation of law when the tenants die out or abandon possession, and secondly

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[7] (1924), 5 N.L.R. 83; see also *Onisiwo* v. *Fagbenro*, 21 N.L.R. 3, and 8 cases cited there.

[8] But see the Kola Tenancies Ordinance, 1935 (pp. 112–114, *post*).

[9] *Eyamba* v. *Holmes* (1924), 5 N.L.R. 83.

by act of the parties, viz. when a condition of the grant has been broken or radical title denied. In the latter case, however, forfeiture is not automatic: the landlord must take legal action to determine the grant.

(*f*) *Interest in existing trees*

During the currency of the grant, ownership, possession and full rights of user in economic trees *planted* by the grantor or his predecessors in title remain in the grantor. But rights of user over *wild* trees (i.e., those that were self-sown) vest in the tenant. Similarly, at the end of the tenancy all economic trees planted by the tenant remain in his ownership and he retains full rights of user over them indefinitely. On the other hand, wild economic trees revert to the landlord.

(3) The " showing " of building land

Land may also be shown for the building of dwelling houses. As in the case of farmland, no rents are charged for a " showing " transaction. Only the usual gifts of kola nuts or palm wine, or both, are made. Also an annual tribute (usually consisting of kola nuts or palm wine, and occasionally a fowl as well) is payable to the original landowner or his successors in title if the tenants are strangers. But once again this payment is not a rent. In the first place, the quantum of the tribute due has no relation to the amount of land " shown ". In the second place, the grantor has no direct action for the recovery of this tribute, though he does have an indirect action—a spur—for failure to pay is tantamount to denying the owner's superior title to the land, and so will found an action for eviction. It may be objected that default in payment of an economic rent could have exactly the same result in the case of a lease in the English form. The answer to this is that whereas an agreement to that effect must be incorporated in the *lease* itself before default in rent payment can work forfeiture in this way, that agreement is implied by law in every case of " *showing* " tenancy between strangers, involving a residential site. Moreover, whereas the landlord in the case of an ordinary lease can either sue for rent or ask for eviction orders and can still sue for arrears of rents even after the tenant has left the premises, the landlord in a " showing " tenancy is confined to the one action—eviction.

Wild economic trees as well as all trees and buildings put on the land by the tenant are the property of the tenant; the land

itself is also regarded as his for all practical purposes. There are no restrictions on the extent of his user of the land,[10] and so he is free to plant economic trees. At his death the land, trees and buildings pass to his heirs. The latter, if they wish to go on living on the land, need not make a fresh request to the landlord for a renewal of the grant. Ibo law views with disfavour any conduct calculated to deprive people of their homes.

If the land is no longer required as a dwelling site, full rights of ownership and possession automatically revert to the original grantor or his successors in title.[11] Ownership of economic trees which were planted by the tenant, however, remains in the tenant and his heirs.[10] For Coker's statement to the effect that *quicquid plantatur solo, solo cedit* is part of Yoruba law[12] has no application to Ibo law. Again, the tenant loses his proprietary rights over the buildings on the land *qua* buildings so that, for instance, he cannot let them to third parties, but he remains lawful owner of the materials used in their construction and may remove them at will, within a reasonable time after quitting the site.

(*b*) "*Kola tenancies*"

Chubb defines "kola tenancy" as

> "the permanent right, subject to good behaviour, to occupy land, usually by a stranger, on a single original payment."[13]

This payment, he says, is usually a kola nut or a bottle of drinks. Meek, too, describes "kola tenancies" as arising out of *token* payments and ceremonial gifts of kola or palm wine by the grantee to the grantor.[13] So far then a kola tenancy is very similar to a "showing" tenancy, as already described, in that they both lack the element of an *economic* rent. But there is said to be this fundamental difference that at the death of a kola tenant his heir is required to make another formal request for a renewal of the grant. For, as Chubb suggests, the initial grant was, in the past, only for the kola tenant's lifetime.[14] The landlord, however, has no right to refuse this request (for renewal). What it amounts to then is that a kola tenancy is virtually a

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[10] Chubb, *op. cit.*, para. 92.
[11] Chubb, *op. cit.*, para. 92; Green, *op. cit.*, p. 32.
[12] *Family Law among the Yorubas*, p. 40.
[13] Chubb, *op. cit.*, para. 96. Meek, *Land Tenure and Land Administration in Nigeria and the Cameroons*, p. 140.
[14] *Ibid.*, *sed quaere?* Surely residential kola tenancies could not be for life only.

permanent grant provided that each successive heir of the grantee goes through the formality of asking for a renewal, and provided his general behaviour is not such as to warrant ejection.

With the commercialisation of land and the concurrent rise in land value, the stage was set for disputes between landowners and their kola tenants. For the practice grew of the latter sub-letting parts of their holdings to third parties at substantial economic rents. Not unnaturally, the landowners wanted to share in this (usually unearned) increment in the value of their land. The problem was most acute in Onitsha township in the late 1920's and early 1930's. One of the numerous disputes that arose there went to the Supreme Court in 1931.[15] The court held that there was no rule of law or custom in Onitsha on which the landlord's claim could be founded or sustained. The "Kola Tenancies" Ordinance, 1935,[16] was passed as a sequel to this decision. And although it is now of little more than historical interest, we summarise its main provisions here as an illustration of the legislative machinery being used to supplement the rules of customary law in a rapidly changing society.

The object of this Ordinance was to protect the security of kola tenancies, thereby enabling the tenant to benefit from any improvements he might have effected on the land, while at the same time giving the landowner (grantor) a fair share of the unearned increment of his land. Its main provisions may be summarised as follows:

1. Where a kola tenant, as therein defined, sub-lets to a third party so as to become entitled to an economic rent in respect of the land, the grantor may apply to the appropriate authorities for an extinction of the kola tenancy.

2. Thereupon an inquiry shall be instituted to ascertain the relative justice of each party's case with a view to adjusting their financial claims, having regard to any improvements effected on the holding by the kola tenant or his sub-tenant or both.

3. The grantee shall be given a choice between:

(*a*) having the landowner's rights in the land transferred to him, and paying reasonable compensation for such transfer; and

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[15] *Mgbelekeke Family* v. *Madam Iyaji*, Suit No. 4 (Onitsha), 1931.

[16] Now omitted from the *Laws of Nigeria* (1958 Edn.) as dealing with a regional matter, and not yet re-enacted or repealed by the E.R. Legislature.

(*b*) transferring *his* rights as tenant to the landowner in return for reasonable compensation. In each case, the compensation due is to be assessed by the *ad hoc* tribunal making the inquiry (the Resident being Chairman).

The above discussion has followed the traditional pattern of dealing with "kola tenancies" and "showing" tenancies as different subjects. But it is submitted that these are merely different names for the same subject-matter. All "kola tenants" are "shown" their tenements. All cases of "showing" are accompanied with a gift of kola nuts and drinks. In Ibo traditional society no request of this magnitude could be made, or if made considered, without a gift of kola and drinks. If, therefore, there is a valid distinction between a "kola" tenancy and a "showing" tenancy, this must consist in the alleged rule that at the death of the holder of a "kola" tenancy his heir must make a fresh formal application to the grantor or his successor in title for a renewal of the grant.[17] But so far, investigation into known cases of "kola" tenancies has not shown that there is either a rule of law or a general practice to that effect among the Ibo.

As already indicated, the position is that every grant of land or interest therein is preceded and accompanied by a traditional gift of drinks plus "kola" and/or a token money payment. In addition, a periodic tribute (in kind or in money or partly in one and partly in the other) may also be payable. The point of departure is this: stranger tenants have a legal obligation to pay these post-grant tributes on pain of being evicted; kinsmen tenants have no corresponding legal duty.

B. Leases

In addition to land grants made *ex gratia* or for mere token payments, there are what may be described as leases under English law. Here payments are agreed upon in advance. And, once the grantee takes possession, the landowner has an enforceable claim against him for the agreed rent. This rent may be paid in money or in kind,[18] or partly in one form and partly in the other, according to the terms of the tenancy agreement.

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[17] Whether this implies that if he did not the grant will lapse, or that he would be liable to an action for eviction for denying his landlord's radical title is uncertain.

[18] Chubb, *op. cit.*, para. 81.

Finally, it may be added that over and above the economic rent there is always the traditional gift of kola or palm wine, or both. In some cases, too, a tribute in kind has to be made to the landowner at the termination of the tenancy or at regular intervals during its currency.[19]

Leases are of two main kinds, viz.: (1) of farmland, and (2) of building sites.

(1) Leases of farmland

These are of two kinds. There is the short lease granted for the duration of a single farming season. Once the lessee notionally takes possession by clearing a portion of the land—cutting a branch off a tree or clearing a few square feet of bush will do—the landowner can no longer determine the lease at will.[20] If he attempted to do so, the lessee has an action for what amounts to an injunction restraining the owner from trespassing on the land. As always, there is an implied reservation of economic trees standing on the land, in favour of the lessor. But the law also implies the right on the lessee's part to climb such trees and prune them to the fullest extent allowed by local practice, having regard to the nature of the crops he intends to sow on the land.[1] In the same way, the law permits the lessee to cut down non-economic trees which are so large that it is safer and more reasonable in the circumstances to cut them down than to prune them. On the other hand, there is an implied obligation on the lessee's part to take all reasonable steps to protect economic trees on the land from total destruction or serious damage by fire.[2] In the case of large trees the customary precaution consists in clearing dead grass, branches and leaves away from around their base for a reasonable distance.[3] Young trees must be protected with green leaves, banana stumps, etc., placed against their stems, in addition to these measures. Finally, the fire must be started from the direction whereby economic trees will be subjected to a minimum amount of heat, having regard to the direction of the wind. Failure to take reasonable precautions as here indicated renders the lessee liable to an action for damages at the lessor's suit.

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[19] For implied terms, see (1)–(6), pp. 109–111, *ante*.

[20] Chubb, *op. cit.*, para. 75.

[1] Often this means stripping the trees bare of leaves and branches.

[2] It is customary to burn the bush before cultivation.

[3] What is reasonable here is determined by the age and character of the trees concerned, and the intensity of the heat expected, having regard to the amount of combustible material on the land, and the wind direction.

The second type of lease of farmland is one in which no fixed duration is agreed upon, but an annual rent (in money or in kind or in both) is stipulated.[4] Here either party can determine the lease by giving the other party a reasonable notice of his intention to do so. As a rule a year's notice is required. But in no circumstances may a landowner determine a lease so as to eject the tenant while his crops are still on the land. A reasonable length of time must be allowed him to reap his crops and remove his supporting sticks.[5]

All the rules as to the implied reservation of economic trees, the lessee's obligation to protect such trees from fire, and his right to cut down or prune trees if necessary, as outlined above, apply with equal force in this kind of lease.

Akin to the leasing of farmland is the letting of fishing pools, lakes, etc., and of palm trees. Sometimes specific pools, lakes, streams, or rivers are leased at an agreed rent normally payable annually. At other times a tract of land is let on the terms that the tenant or tenants shall be at liberty to fish in all the pools, etc., thereon. As in the case of a lease of land *simpliciter*, the rent may be payable in money or in kind. In addition, an annual tribute in kind is also payable to the landowner.

Exactly the same principles apply to the leasing of palm trees. Specific trees may be leased, and so may whole tracts of palm land. The lease may be specifically for the production of palm oil and kernels, or for wine tapping; or else the tenant may be left free to exploit the produce of the palms in any form he likes. The law assumes that a man who puts himself forward as an expert tapper seeking a lease of palm trees shall really be expert. If he is not, and damage to the trees results from his inexpert handling of them, he is liable in damages to the owner of the trees. The same rule applies to negligent acts causing damage to palms. But here, he must have been warned after one such mishap. Like the English dog, the Ibo expert tapper must have his first "bite", though it is otherwise where the damage is so widespread and simultaneous strongly to suggest wanton carelessness. In such a case the lenient treatment of the negligent tapper gives way to the summary "punishment" of the reckless. The owner's first losses will, in these latter circumstances, found

[4] Chubb, *op. cit.*, para. 78.

[5] If lessee has already manured or otherwise enriched the land in preparation for next season's farming, he cannot be removed till he has had the chance to benefit by such an act of good husbandry.

an action in damages. In addition, he has a right to determine the lease and eject the lessee. No period of notice is then required. This is known as *ikwọpu agbọ* (lit. " to pluck off the calabash ").

One general rule which is applicable to all forms of leases is that the lessor is entitled to determine the lease as soon as the lessee ceases to use the land, pool, etc., for the purpose originally contemplated by the parties.[6] Sub-letting a piece of farmland, converting a lease for oil production into one for wine-tapping, and attempting to erect permanent houses on farmland are obvious cases in point.

(2) Leases of building sites

A lease of a building site may take one of two forms. It may be for a fixed period, say five years, or of indefinite duration. The rent may once more be either in money or in kind or else in any combination of these. In more recent years deeds and seals have been introduced; so have revision periods (for rents). The introduction of written leases has brought in its train a new and disturbing factor in land tenure. As we have already indicated, Ibo law all but forbids an action to eject a tenant from his dwelling site while he is still in occupation. It would therefore be unthinkable in the past that an Ibo landowner would start an action to recover land from his tenant (unless the latter has moved from the site but continues to farm on it) merely because the period of tenancy originally agreed upon had expired.[7] Indeed, in normal circumstances, even a gratuitous tenant could not be ejected from his home. But with the advent of the written lease, it is now perfectly permissible to eject a tenant, however well behaved and however prompt with his rent payments, at the expiration of the lease.

Security of Tenure

As Chubb observed, outside the townships the indefinite lease is still the predominant form.[8] In view of the traditional bias against ejection, these leases are virtually permanent. This

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[6] Chubb, *op. cit.*, paras. 79–80.

[7] It may be asked whether Ibo law recognises building leases of a fixed duration. The answer is that it does, and has always done; e.g. leases have been known to be granted to refugees till their persecutor (at home) died; to farmers, tappers and hunters for the duration of their farming, tapping or hunting leases respectively.

[8] *Op. cit.*, paras. 76–77.

principle has received judicial confirmation in a number of cases. Thus in *Eyamba* v. *Holmes*[9] it was laid down that no grantee of land could be dispossessed by the grantor unless he had (*a*) attempted to alienate the land, or (*b*) abandoned occupation, or (*c*) attempted to use the land for a purpose other than that for which it was originally granted. This was reinforced in 1941 when in the case of *Eke* v. *Etim*[10] the court held that it was now

> " settled law that once land was granted to a tenant in accordance with native law and custom, whatever the consideration, full rights of possession are granted. The only right remaining to the grantor is that of reversion should the grantee deny title or attempt to alienate the land."

And MARTINDALE, J., went on,

> " . . . even the liability to forfeiture has been very much modified by the British [*sic*] courts by way of equity, by always granting relief against forfeiture."

It is therefore clear that in the case of an indefinite grant of residential land, a tenant who has no intention of vacating the land, who duly acknowledges his landlord's superior title in the traditional way and who sticks to the original user envisaged by the grant has the full protection of both Ibo customary law and the general law of the land. This security of tenure, as is apparent from *Eyimba* v. *Holmes*,[11] extends to all forms of residential tenancy—gratuitous, kola and rent-paying alike.

Tributes

A recent Privy Council case[12] has revealed yet another problem that emanates from a transition to the commercialisation of land. A piece of communal land had been granted to a tenant on the terms that he should pay four drums of palm oil a year in tribute. Later, he was joined on the land by a number of his kinsmen and after several generations there grew up a substantial " colony " of tenants. The landowners now demanded a tribute of four drums of oil from *each* tenant, while the tenants argued that *no more* than four drums were due from them, as a body. It was held by the Privy Council, reversing the Supreme Court of Nigeria, that the landowners' claim was valid—each tenant had to pay four drums a year.

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[9] (1924), 5 N.L.R. 83.

[10] (1941), 16 N.L.R. 43.

[11] (1924), 5 N.L.R. 83. See also p. 110, *ante*.

[12] See *Chief* [illegible] v. [illegible], *West Africa*, issue of 11th March, 1961; [1961] J.A.L. 100–103. For tributes generally, see p. 109, *ante*.

C. Gift

Our next method of disposition *inter vivos* is " gift ". As already indicated, the owner of a piece of land is free to dispose of it in any way he pleases, subject only to the overriding principle that land may not be sold outright or otherwise alienated permanently to a stranger. It is, therefore, quite lawful for a community, a family or an individual to make a free gift of a piece of land to another party for any purposes and upon any terms not in conflict with the general principles of customary law. Needless to say, the donee may be a kinsman, a resident stranger, a child or a wife.[13] Thus, among the " matrilineal " societies of Afikpo and Ohafia a father often makes an *inter vivos* gift of his individually owned land to a son or daughter of his.[14] Quite often, gifts of land to kinsmen have as their prime motive a desire on the donor's part to side-step the normal rules of customary succession. Thus in the Afikpo and Ohafia instances mentioned above the ostensible reason for a gift to a son is a father's natural pride in the fact that his son has proved himself sufficiently industrious and physically strong to be able to plant four hundred yams (*nnu ji*) in the course of one single day. In the case of a gift to a daughter, the ostensible reason is her father's appreciation of a particularly beautiful dancing performance during her *omume* title. But behind this façade of filial success conjuring up paternal tenderness lies the shrewd desire to circumvent the curious rule that a man's disposable property at death goes not to his children but to his brothers of the whole blood, or failing these, other maternal relatives.

In view of the general rule that in the absence of agreement to the contrary, express or by necessary implication, a *sale* of land is governed by the reservation that the land sold is always redeemable, what is the legal position of a donee of land? Is the land recoverable at the instance of the donor or his heirs? In other words, can such a donee rightly be regarded as a kind of " tenant at will "? Under the customary law governing gifts in general, a title founded on a gift which can be proved is an absolute title. The maxim is: *Ọ da abụ onye nyeṣịa madụ ife ọ nalụkwa ya* (lit. " It is not done that after a person has given a thing to someone else, he claims it back "). This rule holds good

[13] Land given to a wife becomes her individual property; and inheritance thereof is restricted to her *usokwu*.

[14] Chubb, *op. cit.*, para. 41.

in respect of gifts of land, made to kinsmen or to resident strangers. Neither the original donor nor his successors in title can revoke an outright gift of land lawfully made in the first instance.[15] Again, as we shall see under Succession, the "hotch pot" principle does not apply to gifts of land made under Ibo law by persons who are in *loco parentis* to the donee.

D. Pledge[16]

Pledge consists in the transfer of land from one party to another either in return and as security for a loan, or as security for the discharge of an outstanding financial obligation. There is a superficial resemblance between a pledge and a mortgage. But the two transactions are fundamentally different in fact. For whereas under a mortgage agreement possession of the land in question does not pass to the mortgagee till he has exercised his legal right of foreclosure, under a pledge possession (with the right of enjoyment) passes to the pledgee as soon as the deal is concluded.[17] Again, whereas English law gives *legal* title[18] to the mortgagee, as a rule, leaving the mortgagor with a mere *equity* of redemption, the Ibo pledgee never has anything higher than mere possession.

The rule, says Chubb, is once a pledge always a pledge.[19] In the words of Meek,

> "There is no right of foreclosure, and no right of sale even after the agreed redemption time is up; the land remains redeemable for all time."

For "a thing which is pledged is never lost". This rule is a natural consequence of the general prohibition against permanent loss of land rights and interests in the absence of a clear agreement to that effect. For if a sale which in form and appearance is an outright transfer is always construed as subject to a condition that the land is always redeemable, then *a fortiori* the right to redeem pledged land must be perpetual.

Redemption

Redemption is by payment of the original loan, or discharge of the original obligation, without interest.[20] The produce of

[15] *Ikeanyi* v. *Adighogu*, [1957] II E.R. L.R. 38.
[16] See generally, Chubb, *op. cit.*, paras. 59–72; Green, *op. cit.*, pp. 24–28; Meek, *Land Law and Custom in the Colonies*, pp. 159, 256, 263–264.
[17] Chubb, *op. cit.*, para. 73.
[18] Since 1948, this can no longer be ownership, but only a term of years.
[19] *Ibid.*, para. 59. See also Meek, *Land Law and Custom in the Colonies*, p. 256.
[20] Chubb, *op. cit.*, para. 59.

the land is regarded as the interest on the money lent.[1] But a reasonable notice of intention to redeem must always be given. What is reasonable is of course a question of fact to be decided having regard to the circumstances of each case. For instance, one or even two crop seasons may be "reasonable" where a pledgee has not had a chance to farm the land in question because, shall we say, the normal bush fallow period is still running. Again, no redemption should be attempted while the land is under crop as this may lead to wanton destruction of such plants as cassava, *ugu*, pepper, etc., which require a couple of years for their maturity.

In some places the law provides that if a pledgor wishes to redeem a building site, or a farmland before the pledgee has had at least one season's cropping, then double the amount of the original loan is payable.[2]

Sometimes, too, the parties themselves agree on a fixed period which must elapse before redemption, on pain of the pledgor having to pay compensation. Similar to this is a popular form of agreement—a kind of floating charge—whereby money is lent on the terms that should the borrower fail to repay the loan by a stipulated date, the lender shall enter into possession of a specific piece of land of his and shall be entitled so to remain for a stated period of time or until the loan is repaid, whichever is the longer. This arrangement Chubb gives the name of a "conditional pledge".[3]

Re-pledging

A pledgee has the right to re-pledge the land to a third party. But opinions differ on the question whether or not the consent of the original owner-pledgor is necessary for the validity of the second or subsequent pledges. Chubb thinks that this consent, though usually sought, is *not* essential because the original owner "is only concerned with redemption from the man to whom he pledged it".[4] Green says that her inquiries on this point received conflicting answers.[5] But it would be surprising if the customary law did not insist on consent, as the pledgee's farming habits are a crucial factor here. The rule is that the prior consent of the original landowner is required under Ibo law.

Economic Trees

A pledgee has no right to plant permanent economic trees or plants on the land, without the consent of the owner. But what

[1] Green, *op. cit.*, p. 24. [2] Chubb, *op. cit.*, para. 59.
[3] *Op. cit.*, para. 70. [4] *Ibid.*, para. 62. [5] *Op. cit.*, p. 25.

if he does so in defiance of this rule? Then we are faced with a conflict between the rule of law that a tree belongs to its planter even if planted on another's land[6] on the one hand, and the rule that a person shall not be allowed to benefit from the result of his wrongful act on the other. Conflicting solutions to this little dilemma are reported by Chubb[7] and others. But the better view is that the trees are the property of the pledgee who planted them, subject to the pledgor's right, if he sees fit, to destroy them or to call upon the planter thereof to remove them, as soon as redemption is effected and the pledgor resumes possession.[8] The pledgee's *mala fides*, for instance, would be a good reason why the landowner should want the trees removed.

Land may be pledged apart from the economic trees growing on it and *vice versa*. Moreover, in the absence of express agreement to that effect, the pledge of land does not carry with it the right to enjoy the fruit or other produce of economic trees thereon.[9]

Who may pledge?

As indicated above, the *owner* of a piece of land may pledge it as security for a loan or other financial obligation. Thus communal land can, as a rule, only be pledged by general consent of the members of the group. Family land must not be pledged without the consent of all the adult members of the family. Failure to obtain this consent will, in general, invalidate a purported pledge. There is, however, one instance when a family head has the right to pledge part of the family holdings without the consent of and, indeed, in open defiance of objections by other family members. This is when a family debt has to be paid off, and the other members cannot or will not assist with the repayment.[10] To this may be added the case of a family head who was left to bear alone the financial burden of performing the funeral and " second burial " rites of a deceased member who left no children and an insufficient estate. As for individually owned land, this may be pledged by the owner without the consent of anyone. Indeed, he need not consult even the *okpala* or the *obi* of his family. Where, however, an individual wishes to pledge his *right of user* in family or communal property, he is

[6] Subject to the landowner's right to cut it down if planted in bad faith.
[7] *Op. cit.*, para. 60.
[8] Alternatively, he can acquire them by paying compensation to the ex-pledgee.
[9] Green, *op. cit.*, p. 28.
[10] Meek, *Land Law and Custom in the Colonies*, p. 264.

bound to consult the other members. For as already pointed out, the character of the pledgee and his farming techniques are crucial points in deciding whether a given person is a suitable pledgee. And so no one should arrogate to himself the right to place a third party on another's land without that other's consent, or on land of which he is only a part-owner. Finally, an individual may, with the consent of other members, pledge part of family or communal *land itself*. Here, as well as where he pledges only his right to use the land jointly with others, the proceeds of the pledge are his exclusive property.

Inheritance

Land held on pledge is treated for purposes of succession to the pledgee's estate as personalty.[11] This is apparently because the land merely represents the money given out on loan by the pledgee or owed to him by pledgor. As a result, even in those societies where inheritance of land cannot be evaded by dispositions *inter vivos*, this type of holding *can* be alienated either in the pledgee's life-time or at his death so as to circumvent the law of succession.[11]

Proof of pledge

Not only the original pledgee but also his successors in title (including sub-pledgees), have a right to re-pledge. This right is heritable. The result often is that all evidence of the original transaction is lost in a comparatively short time: it soon becomes virtually impossible to prove who pledged what land to whom. Since Ibo law shares the English legal maxim that, " possession is nine points of the law ", it sometimes happens that the party in actual possession, acquires absolute title in this way. But, as Meek rightly points out, this obvious difficulty in establishing title on the part of the original pledgor (or those claiming under him) does *not* justify the sweeping generalisation often heard that after two or three generations the original owner's title is extinguished.[12] As a last resort, title can be established by swearing on oath: " A thing which is pledged is never lost ".[13] It is a frequent occurrence that a claimant to a piece of land which has been in other hands for generations has nothing more substantial to go on than a family legend to the effect that the land in question had been given out on pledge for so-much money. No one can say now who the parties to the original transaction

[11] Green, *op. cit.*, p. 26.
[12] See, e.g. Harris, *Papers on Land Tenure in Ozuitem.*
[13] Meek, *op. cit.*, p. 256.

were or when it took place. But this is not fatal. All that is required is the amount of the initial loan. The first step on the part of the claimant would be to notify the party in possession of his intention to redeem the land. This is followed by a tender of the alleged loan (or the value of other financial obligation), or its equivalent in modern currency. The party in possession, as successor in title to the original pledgee, may accept the fact of the land being held on pledge. But he may (and usually does) deny the accuracy of the alleged quantum of the loan. Even if he accepts the accuracy of this " statement of account ", he will almost certainly contest the accuracy of the computation from old to new currency. Now if the fact of a pledge is admitted but a different (and naturally higher) figure is set as the amount of the original loan, the matter is referred to a law court by mutual agreement. As, *ex hypothesi*, no positive proof is available, the court decides that recourse shall be had to the oath. It also decides which of the two parties shall swear the oath. As soon as he has sworn the oath in the words agreed or else prescribed by the court, the claimant is awarded ownership. Possession passes to him as soon as he has paid the debt.

Where the initial amount of the loan is not contested, but different values are placed on it in terms of modern currency, the duty of the court consists in merely settling the most equitable value—equitable because since the old money has ceased to be legal tender, it has no equivalent in modern currency. On the other hand, where the fact of there ever having been a pledge is denied, the court will have to decide which party shall affirm his allegation (or denial as the case may be) on oath. The question of which side should swear is here a crucial one, for each party might feel convinced that his own story is the true one, and so will be quite willing to swear the oath. Series of appeals, sometimes going up to the High Court, have been known to be founded on this question alone. However, ownership and possession will be given to the party who ultimately wins the right to swear the oath. From this account it is obvious that a statement to the effect that pledged land is lost after *evidence* of the transaction is lost is much too sweeping.

Who may redeem?

Who may redeem pledged land? Obviously the pledgor has a right to do so. (We have seen that where no time was originally fixed by the parties, the land may be redeemed at any time that

suits the pledgor, provided he gives reasonable notice to the other party of his intention to do so.) The pledgor's successor in title, too, has a right to redeem, for this right is heritable and perpetual. This "successor in title" may be either an heir or a purchaser. A landowner may sell his reversion to a piece of land which he had already given out on pledge to a third party. In such a case, ownership but not possession passes at the completion of the sale. And the pledgor's right of redemption also passes with this ownership. The purchaser can thereupon pay off the initial debt and so acquire unencumbered title to the land. The resemblance to a purchase of the legal estate in a mortgaged house which simultaneously transfers the mortgagor's equity of redemption under English law is striking. But it must be pointed out that different legal principles apply. The right to redeem under English law passes through two phases. Till the mortgage term is up the mortgagor's right to redeem is a *legal* one. As soon as the mortgage term is up, he loses his legal right, but is given the *equity* of redemption. The main difference today is that the courts have greater latitude in allowing or refusing redemption. In the case of a pledge under Ibo law, on the other hand, the right to redeem is a *legal* one from the start, and continues to be so for ever. The courts have, therefore, no power under customary law to refuse a demand to redeem. Hence it is that the "English" courts in Nigeria often have to resort to "the general principles of natural justice, equity and good conscience"[14] where they think in a particular case that great hardship is involved.

An individual may redeem pledged family (or communal) land. If he did, he remains in possession, reaping the produce of the land, till the family (or community) reimburses him. He is then bound to accept his money back and to surrender the land.[15]

E. Exchange

Another method of transferring land *inter vivos* is exchange. This is a common feature of land use and transaction.[16] A landowner may, for instance, wish to escape persistent ill-luck, frequent premature deaths in the family, or even mortality among

[14] The judicial magic wand which resolves all legal tangles by substituting the judge's "sense of justice" for customary legal rules—and which like "faith" needs no justification in reason.

[15] Meek, *Land Tenure and Administration in Nigeria and the Cameroons*, p. 130.

[16] Chubb, *op. cit.*, para. 74.

his livestock by finding a new home. He would look for a friend or relative who would be ready and willing to take over all or part of the ill-fated land in exchange for a new site. A man's plots of land may be so scattered and fragmentary (after generations of repeated apportionment) that he would like to exchange some of them for some other people's plots adjoining one or more of his own. Finally, it is a common practice among large-scale "plantation farmers" to build up a compact and extensive farm by consolidating a large number of adjacent farms taken over from their various owners in return for the acquirer's scattered holdings.

No special ceremony is needed for an exchange transaction, although as in every other case of contract of any magnitude, each party would bring one or two witnesses with him to the transaction. The question then arises. Has either party to an exchange transaction of this type, in the absence of an express agreement, an enforceable right to demand a re-exchange if he eventually becomes dissatisfied with his end of the bargain? It goes almost without saying that this right exists, and is perpetual. But the trend of High Court decisions in matters affecting the transfer of land generally seems to suggest that the non-customary courts applying the "principles of natural justice, equity and good conscience" will add a proviso to this rule (if it ever comes before them). This proviso will in all probability take the form that re-exchange may be ordered if, but only if the *status quo ante* could be restored. Thus the customary rule will probably be held to be inequitable where one of the parties has developed his holding to a substantial extent, e.g., by setting up a building or a permanent plantation on it. Similarly, it will probably be held to be inequitable to uphold a claim for re-exchange where one of the holdings has deteriorated to a considerable extent, e.g., on account of soil erosion. Apart from this possible encroachment on the customary law on the subject by equity, either party to a land exchange transaction can demand a re-exchange at any time in the future; so may his inheritors.[17]

F. Sale

Perhaps the first question here that springs to the lips of any person at all acquainted with the general principles of customary land tenure in Africa is this: is land a piece of vendible

[17] *Cf.* Chubb, *op. cit.*, para. 74.

property? So much capital has been made, by European experts on African law, of the notion that land is a deity, etc., that we may well begin with a straight answer to that question. And the simple answer is that whatever the religious significance and sentimental value of land, it can be bought and sold, and often is.

The next question is this. Having regard to the divine nature of land, what exactly is it that is bought or sold—the land itself or a mere usufruct of it? Here we may begin by pointing out, with Elias,[18] that there is nothing in Ibo land law corresponding with the Roman *usufruct*. But apparently people who speak of " usufruct " in the context of African customary law mean by it the bundle—the sum total—of those rights and interests, immunities and remedies which a landholder is entitled to in respect of that land. If so, the term usufruct differs little, if at all, from " land " as used in English or other legal systems so that nothing is gained by retaining it. Our answer then is that what is bought or sold is sometimes the totality of rights and interests, remedies and immunities (including the right to transmit these to others *inter vivos* or at death), which a landholder enjoys (or could enjoy) in or over that land, and sometimes only part of this totality. Writing on Ashanti law, Rattray says that no more than mere rights of user (his usufruct) are ever alienated.[19] Whatever the position in Ashanti law, this proposition is not true of Ibo law. For if mere user is all that could be alienated it seems to follow that the vendor (and his heirs) would always retain some rights and interests in a piece of land sold. At the very least, the vendor would retain a right to go on the land to offer sacrifice or otherwise do homage to the earth in its capacity as a deity. But as we shall see presently, land can be completely and definitively alienated under Ibo law so that the vendor becomes a trespasser if he ever goes on that land without the present owner's consent. Land, then, can be sold; and by " land " here is meant not the mere user of a piece of the earth's surface but the physical entity itself with its full legal paraphernalia, including the right to dig it all up if possible.[20]

(*a*) *Sale Defined*

What, in the context of Ibo customary land tenure does *sale* connote? Is it the same in its legal implications as *sale* in the realm of movable property? In the sphere of transactions in

[18] *Nature of African Customary Law* (2nd Edn.), p. 165.
[19] *Ashanti Law and Constitution*, pp. 342–350, and *passim*.
[20] Subject to statute law regarding, e.g., minerals, and to local bye-laws.

movable property, the term "sale" has a single meaning in Ibo law, viz. outright alienation for valuable consideration. But in the field of land tenure, *olile* stands for two entirely different transactions each with its own procedure and legal implications. These elements—the dual nature of land *sale*, differences in procedure and in legal implications—are well known to most writers on Ibo land tenure as will appear shortly. But local informants answering questions put by foreign students not unnaturally so misplace their emphasis at times that a rather distorted picture results. Thus Miss Green was able to say after intensive enquiries spread over many months that the sale of land "is unequivocally forbidden by native law and custom. The only title to permanent ownership of land is inheritance, and even that title does not give the right to alienate the land irrevocably".[21] Meek, on the other hand, came to the conclusion that

> "Purchase is frankly recognised, and the purchase price is normally twice the amount of that which would be received if the land were merely leased."[1]

Chubb's verdict is that "land may be sold outright by individuals or families . . ."[2] Meek and Chubb probably came to the conclusion they did, not as a result of express answers to questionnaires, but by collecting data on land which has changed hands and on what terms.

A summary of the law on the question of sale of land, as seen by Chubb, presents all the *apparent* contradictions and confusion in a neat form. He says:

> "Instances are numerous where land has changed hands *permanently* but, except where this concerns small plots usually required for building purposes (about two acres is the largest I have seen), the transaction is *tacitly* governed by the reservation that the land is *redeemable*."[3]

Here are "permanent" sales "tacitly" governed by a right to *redeem*. If this is so, "sale" must have a peculiar significance in Ibo law of land tenure, and to this peculiarity we now turn.

As applied to land, *sale* has two distinct connotations. There is (1) the outright alienation which Chubb recognises in connection with building sites, and (2) the redeemable sale tacitly governed by a reservation that the land is redeemable, which he says applies to all other sales of land. But while this distinction is quite valid, the line of demarcation, as drawn by the author, needs a little adjustment.

[21] *Op. cit.*, p. 7.
[1] Meek, *Land Law . . . in the Colonies*, p. 159 (with reference to the Ibo).
[2] Chubb, *op. cit.*, para. 42. [3] *Ibid.*, para. 43 (italics supplied).

(1) Outright sale

There is outright sale when, but only when, there is an *express* agreement to that effect, and this agreement is " sealed " by a special ceremony. (All other sales are redeemable.) These express agreements are usually made in the case of land required by the purchaser for his residence, but may be entered into in respect of any sale of land. The sealing rites vary in detail from one society to another, but are universal in their application. Thus goats, fowls, palm wine, tortoise and kola nuts are among the things which are produced and consumed by the people taking part in the ceremony. But it cannot be too strongly emphasised that an express agreement to the effect that the sale is to be outright and permanent is a *sine qua non* in transactions of this species. The mere production and consumption of goats, fowls, etc., without more will *not* do. J. O. Field[4] has said that the production and consumption of one or more of these things distinguish a sale from a mere pledge. But this, with respect, is not strictly accurate. The relevant distinction is not that between sale and pledge but the more subtle and infinitely more vital distinction between one *kind* of sale and another.

The " express agreement " we are here considering often takes the form of an exchange of oaths between vendor and purchaser. The former swears that neither he nor any of his heirs for ever will at any time in the future lay claim to the land being sold or any rights and interests in it. The purchaser, for his part, swears to pay off all arrears of the purchase money, if any, and never to lay claim to any more than the plot of land actually agreed upon. There is usually also a mutual sworn declaration of goodwill *in perpetuum*.[5] But this part of the oath is common to other forms of land transaction. In modern times the agreement for a permanent sale is usually set down in writing, executed, sealed and delivered.

Once land is thus sold outright, the vendor and his heirs for ever drop out of the picture for good and all. Ownership and possession pass to the purchaser forthwith even if part of the purchase price is still unpaid. There is no reservation as to re-entry in case of default by purchaser; it was (at least in the past) incomprehensible that a man would meddle in land or anything

[4] " Sale of Land in an Ibo Community ", in *Man*, Vol. LXV, No. 47 of 1945.
[5] This ceremony is known as *igba ndu* (to " join lives " in the sense of " joining hands " in marriage).

else after he had sworn to keep away from it. The vendor's only remedy in case of default is an action for debt.

(2) Redeemable sale

Sales expressed to be outright and sealed with the special oath ceremony apart, all other sales of land are redeemable. In other words, a redeemable sale need not be (and usually is not) expressed as redeemable. It is enough to make it so that it contains no express agreement to the contrary. There is then an implied condition—implied by law, that is—to the effect that the land is redeemable at any future time. Redemption consists in tendering the exact sum paid initially for the land, without interest, and irrespective of any intervening changes in the value of money. This may sound unfair to the purchaser. But it must not be forgotten that, as likely as not, the economic value of the land has altered to his advantage over the years so that he has probably got out of the land much more than he paid for it in the first place. The real thorny problem concerns a change of currency. In the past most land sales took place in cowries (shell money) or in manilla which are no longer legal tender. It is therefore a matter of great legal importance and practical difficulty how, for instance, to redeem a plot of land sold fifty years ago for, say, ten bags of cowries. This sum perhaps amounts to no more than a few shillings today, but who is to say how much in fact it is worth? As a last resort, parties take the matter to the local Customary (" Native ") Court for a pronouncement. But Government action seems to be called for here.

These problems of inflation and change of currency remind one of the rather fallacious theory put forward by a number of writers, viz. that where land is pledged for too high a sum, the owner thereby virtually declares his intention never to redeem.[6] What appeared exorbitant before the last War is today no more than a trifle. And this fact has in fact given rise to much litigation because so many people want to redeem land sold or pledged by their ancestors or predecessors in title.

As already stated, all redeemable sales of land are governed by the implied reservation that on tendering the original purchase money, the purchaser is obliged to relinquish all claims to the land. In theory, it makes no difference that he has built houses on the land. But in practice the strict letter of the law is tem-

[6] See, e.g., paras. 48-58 *passim*, in Chubb, *op. cit.*

pered by the Ibo rule of custom that no one is ever turned out of his dwelling house. If therefore the buildings in question are dwelling houses and are being occupied by the purchaser or his blood successors, the vendor is restrained from pursuing his legal rights till the houses are vacated.

What then is the position of the many persons who have purchased land from others without going through the special ceremony for outright sale as outlined above; or otherwise expressing their intention? According to Chubb[7] there are some three societies where land once sold cannot be redeemed. These are Ogba in Ahoada, Ndoki in Aba and Ibeku in Bende. Provided, it is said, that the sale is to persons within the kinship group, it can never be reopened. In all other cases and places, the customary law is that the original vendor or his heir can always redeem the land. What the "principles of natural justice, equity and good conscience" will be held by the higher courts to demand in cases where there has been substantial development of the land by the purchaser can be surmised from the case of *Uwani* v. *Akom*,[8] already cited, where the Supreme Court of Nigeria held that it would be inequitable to eject persons who had been "shown" a piece of land on which they had set up home and which they had done much to develop in the past fifty years. It is arguable, though, that the *Uwani* case was concerned with a "showing" tenancy to which different principles apply.

It will be noted that this discussion on the meaning and types of sale has made no reference to the different kinds of land or to the source of control thereof. The principles laid down are valid whether the land sold is farm land or residential land,[9] communal land or individual holding.

We shall now enquire more specifically into the rights (and modes) of sale of (i) communal land, and (ii) individual land, with special reference to the right to alienate to strangers in either case.

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[7] *Op. cit.*, para. 47.
[8] (1928), 8 N.L.R. 19.
[9] A purchase specifically made as a dwelling site (*anị obi*) may be said to be sufficiently "express" to take it out of the category of redeemable sale and into that of outright sale. But this does not follow, for as already pointed out, a grant of residential site may be for a limited period of time.

(*b*) *Sale of Communal Land*

Communal land can be sold either outright or conditionally. But, for the sale to be legally valid, it must be done by the community itself. How exactly a community can express its consent will naturally vary from one society to another. In some places, a general meeting of all adult members of the landowning group living within its territory[10] is required to give its blessing to the proposed sale. In other places all adult males, whether resident "at home" or abroad have a say in the matter. In yet other places only family heads need give their consent, though these will hardly do so without due consultations behind the scene, as it were.

The essential point to note here is that no single person has a right to sell communal land or any part of it without the prior consent of the others. Not even the *ọkpala* among the Eastern Ibo or the *Obi* among the Western Ibo has this right. Thus, speaking of the right to alienate family land, Chubb says:

> "No single person has the right to alienate the use of family land. Still less has he the right to alienate its ownership."[11]

This, we submit, is the law in respect of all land communally owned, including village and town land.[12] Again, the proceeds of such sale are the joint property of the members of the community as a whole. No individual—neither the traditional heads nor the new-found "chiefs"—could lay a valid claim to this fund or any part of it. It is important to stress this rule in view of the practice, noted by Rowling in connection with money obtained by leasing forest reserves,[13] of village heads arrogating to themselves not only the right to sell communal land of their own motion but also to appropriate a substantial portion of the proceeds of such sale.

To what extent is a community at liberty to sell its land outright (i.e., unconditionally) to strangers? In other words, what legal rights, if any, has one socio-political group to stop a proposed alienation of land by another group on grounds, for instance, of an alleged contravention of a generally accepted rule of customary law? In particular, what rights, if any, has a

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[10] As opposed to those resident abroad.

[11] *Op. cit.*, para. 32.

[12] On gratuitous disposition of family land by the *ọkpala*, see *Onwuka* v. *Abiriba Clan Council* where it was held that a disposition without the consent of the whole family was invalid, and that grantees were liable in trespass: [1956] 1 E.R.L.R. 17 (judgment of MBANEFO, J. (as he then was)).

[13] *Op. cit.*, para. 88.

larger group such as a village, to nullify a purported sale of land by one of its constituent sub-groups such as an *umunna*?

Unfortunately, no data seem to exist on these and similar interesting questions. But one can hazard a few statements here based on general principles of Ibo law and social structure. In the first place, if the vendor community happens to be a town (the so-called "village-group"), no other group has any legal right to interfere in the proposed sale. For, as we have said in the chapter on social and political organisation, the town is the highest unit for the purposes of the customary law and its administration. Each Ibo town could, in the past, be compared to a sovereign state in international law. In the past, therefore, no town would brook outside interference in its internal affairs, including its right to sell part of its reserve land. Even today, no such interference would be countenanced except, however, from the Local Authority or the Central Government.

There is therefore no legal right known to Ibo law whereby one town could restrain another town from carrying out a proposed sale of land on any ground, e.g., that the prospective purchasers are strangers. But it would appear that such a right does exist in favour of a given group *vis-à-vis* its constituent sub-groups. This statement is, however, based on no more than a piece of analogy of doubtful value. A community as a socio-political group had (and to some extent still has) a legal right to intervene to stop a sale of *individually held* land to a stranger, either because the purchaser had no intention of taking up residence on the land after the proposed sale, or because even if he intended to do so he would not be an acceptable immigrant. Several cases of the former kind have come to the present writer's notice in the last few years. In one such case a sale had been completed. The purchase money had been paid, the necessary papers drawn up, executed and sealed. Years later, the village community learnt of the transaction, and promptly notified the purchaser that the purported sale was *ultra vires* the vendor and so void. To give point to their contention they forthwith went into possession by putting up a building on the site and harvesting the seasonal crops of all fruit trees on the land. Up to the time of writing, the purchaser has done nothing about the matter. So far the village is still in possession. By analogy then it is submitted that a town can intervene to upset an objectionable sale of land by one of its constituent villages; a village can do so against one of its *umunna*,

while an *umunna* can do it against one of the families that compose it.

Another argument in support of the above submission is that both in the past and at the present moment a group has always exercised the legal right to expropriate a piece of land, property of one of its sub-groups or individual members, in the interest of the group as a whole. If group interest can thus be held to overshadow the sanctity of individual ownership and enjoyment, the inference seems justifiable that an objectionable sale can be upset by communal action in the interest of the group.

One or two technical points arise in connection with the sale of land by a socio-political group. The first concerns the execution of deeds of sale. This problem is easily overcome by the group appointing some of its members (usually family heads) to sign " for and on behalf " of the group. Another problem has to do with registration of title by the purchaser. What, for instance, should be entered under the columns, " Name of vendor ", " Address of vendor ", etc.? Fortunately, the Land Department and its modern counterpart, the Ministry of Land, have always taken a practical rather than legalistic view of the matter. Thus the group-name has always been accepted under " Vendor ", while a description of it in terms of the town and Division in which it is situated is taken as sufficient " address ".

(c) Sale of Individual Land

A discussion of this topic falls naturally under two heads: sale to *onye ụnọ* (non-stranger) and sale to strangers. *Onye ụnọ* or non-stranger we shall define as a person belonging to the same *town* as the vendor. All other persons we shall include in the general term " strangers ". It will be noted that *onye ụnọ* is here used in a rather loose sense. But perhaps no other definition of the word will better fit the facts of Ibo law on the subject of land sale.

(1) Sale of land to non-strangers

An individual landowner is quite free to sell his land to a non-stranger on any terms he likes.[14] The sale may be outright or redeemable. The vendor is not under any obligation to obtain the consent of his family, *umunna*, village or town to such a sale. Indeed he can sell in the teeth of family opposition. If this happens, as it often does, those family members who oppose the sale

[14] Chubb, *op. cit.*, para. 42.

normally persuade the purchaser to re-sell to *them* at his own price. But he cannot be compelled to do this. Neither does an action lie against him or against the vendor at the suit of any disgruntled family member, since, *ex hypothesi*, the land is not family land.

A general principle of Ibo land law is that at the death of a landowner his individual holdings virtually cease to be individual and exhibit many of the characteristics of family land.[15] This "family" character is most obvious where there are, not one principal heir, but a plurality of heirs. The question may therefore be asked: what legal rights, if any, have the heirs apparent to prevent a landowner from selling his land outright during his life time? The simple answer here is that there are none. Neither children nor brothers nor any other relatives have any legal rights, *qua* heirs apparent to interfere with an owner's right to sell at will.[16]

(2) Sale of land to strangers

Is the sale of land to strangers ever valid? If so, when and in what circumstances? According to Chubb,[17] outside the urban area (township) of Onitsha, the Ibo have no traditional conception of a fee simple carrying with it the right to sell outright to any applicant. The sting in this statement is to be found in the words "to any applicant". As already stated, the Ibo landowner has a full right to sell to any non-stranger of his choice. But, as also indicated in passing, there are legal restrictions on his right to sell to strangers. These restrictions vary with the nature of the transaction contemplated, and will next be considered.

(*a*) *Outright sale to strangers*

This, in the words of Miss Green, is unequivocally prohibited.[18] Chubb endorses this view, but excludes the Onitsha urban area. In this connection it is interesting to notice that the precedents used by the Modebe family in Onitsha and reproduced in Chubb's report are of two entirely different kinds. One provides for a "sale" for limited periods with an option to apply for permanent alienation. It is unlikely that this application if

[15] Where his children use the land in common. See pp. 166 *et seq.*, *post*.

[16] This is contrary to the general rule in a number of African societies, notably the Ashanti of Ghana.

[17] *Op. cit.*, para. 42 (No customary legal system in Nigeria has a "traditional conception of a fee simple").

[18] *Land Tenure in an Ibo Village*, p. 7.

made will ever be granted. The other precedent speaks of outright sale. But a close study of it reveals clearly that it was drawn up for use in transactions with fellow Onitsha purchasers. It would therefore appear that nowhere in Iboland is outright sale to strangers allowed by the law.[19]

We may then state, as a general proposition, that Ibo customary law forbids outright sale of land to strangers. But we must hasten to qualify this rule by restating a principle already noted. The prohibition against the outright sale of land to strangers does not apply to the sale of residential land where the purchaser intends to live on the land and to abandon his former domicile in favour of the new group of his choice. If this intention exists, and if the prospective purchaser is an acceptable immigrant to the new group, then the general ban ceases to operate. This, it is submitted, is the only circumstance in which Ibo law allows outright sale of land to strangers.

(*b*) *Redeemable sale to non-resident strangers*

As Meek has said, the sale of land is frankly recognised.[20] And as Chubb adds, instances of such sales are numerous.[1] Now, a study of the numerous instances of sales of land to strangers given by Chubb[2] would suggest that here is a recent development in the customary law—for practically all the examples quoted are transactions that took place within living memory. Two questions must therefore be asked. The first is: to what extent are these and similar transactions lawful sales of land in terms of Ibo customary law? In other words, are these valid transactions within the legal framework of Ibo society, or are they merely abortive attempts at a breach of that law? Enough has already been said on the general subject of land sale to show that the answer here will depend on which type of sale (outright or redeemable) the parties in each case had contemplated. If the sale in any given instance was intended as a permanent unredeemable alienation, then under traditional Ibo law it would be void *ab initio*. Either party (more probably their successors in title) can take steps to have the sale set aside by a court of competent jurisdiction. Any purchase money passing from the purchaser to the vendor can be recovered as money had and

[19] But see the next paragraph.
[20] *Land Law and Custom in the Colonies*, p. 159.
[1] *Op. cit.*, para. 43.
[2] *Ibid.*, paras. 48-58.

received for a consideration that has failed (or rather, that never existed). If, on the other hand, the transaction was intended by the parties, or could rightly be construed to have been intended as a redeemable sale, then it would be perfectly valid.

The second question that arises in connection with the recorded sales under discussion is this; and really emenates from the first. If, unlike the Modebe set of transactions, these sales were not put down in writing, and no formal "sealing" ceremony was performed; or if, being written, the memorandum in a given case contained nothing on the face of it to indicate whether or not it was an outright sale, what, if any, is the nature of the interest acquired by the purchaser? The answer to this has already been given: the transaction is no more than a redeemable sale.

At this juncture it may well be asked whether Ibo law has not sufficiently evolved by now to allow of strangers acquiring valid titles to land by outright purchase? After all, it is well known that the Ibo are some of the most adaptable peoples in the world, being like the Romans of old, pre-eminently practical. Would it not therefore be too much to expect Ibo law to remain static in the face of modern social and economic revolutions brought about by increased contact with the outside world in recent times? And so, it may be argued, why not accept these and similar innovations as social facts, as the necessary synthesis resulting from a fusion of the thesis of Ibo law and the antithesis of Western jurisprudence.[3] While the legal purist will no doubt deplore such a fundamental change as striking at the very root of our customary law, we must not lose sight of its possible advantage to agriculture and economic development generally. The final answer, however, must be left to the courts.

We may, therefore, sum up by saying that as the law stands at the moment, the sale of land to strangers *is* permitted (at least in the majority of Ibo societies). But each of these sales is, unless otherwise agreed expressly or by necessary implication, tacitly governed by a condition that at any time in the future the vendor or his heirs can redeem the land by re-paying the original purchase price. There is agreement "by necessary implication" where land is bought specifically as a permanent residential site for the use of the purchaser. But this does not include cases where land is purchased for development as a commercial build-

[3] To adapt the famous Hegelian phrase.

ing such as a block of flats. In cases of this sort an express agreement is required, and is usually made. Nor does agreement " by necessary implication " cover cases where a commercial enterprise (of whatever nationality) or a religious/medical mission acquires land by purchase. In these and similar cases, the general rule holds true to the extent that as soon as the original object of the purchase is abandoned, the vendor has a right to redeem his land. And this right of re-entry applies to his successors in title. Finally, if the sale is an outright one, and is to a non-resident stranger, it is illegal and void.

G. Mortgage

(*a*) *Mortgage and Pledge*

Chubb says that mortgage as understood in English law does not exist in Ibo customary law. We shall therefore briefly examine the essential characteristics of an English mortgage and then make a short comparison with transactions on similar lines recognised by Ibo law.

Lindley, M.R., has defined a mortgage as a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it was given.[4]

> " The essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property, with a provision for redemption, i.e., that upon repayment of a loan or the performance of some other obligation the conveyance shall become void or the interest shall be reconveyed."[5]

These definitions reveal a superficial resemblance between a mortgage and a pledge as already described earlier. But there are great differences. In a mortgage there is a conveyance of property (or whatever other interest the mortgagor had in the land) to the mortgagee who thereupon becomes owner; in a pledge there is no such transfer of ownership. What is called the general property remains in the pledgor. In a mortgage, the original owner normally remains in possession; in a pledge, the creditor goes into possession. In a mortgage there is a right of foreclosure and usually of sale; in a pledge there is no such right: the creditor must either retain possession or else re-pledge. Finally, the object of fixing a time limit for a mortgage is to enable the creditor to foreclose and thus be in a position to recoup

[4] See Gibson on Conveyancing, 18th Edn. (1959), p. 273.
[5] Megarry and Wade, *Real Property*, 2nd Edn. (1959), p. 840.

himself from at least the income of the land. In the case of a pledge, on the other hand, the object of fixing a time limit is merely to enable the creditor to determine the arrangement and sue for repayment of the loan.

(b) Mortgage under Ibo Law

Chubb reports a form of transaction which very much resembles a mortgage in Anam and Nzam, Onitsha Division. Here owners of land or fishing pools sometimes obtain quite substantial loans on the security of these while remaining in full possession. They are merely supposed to set aside a part of the annual produce of the land or pools for the payment of interest.[6] We have here two major departures from the normal pattern of a pledge and two points of similarity with a mortgage: the owner remains in possession; interest is charged on the debt. Nevertheless, the transaction falls far short of the basic requirements of a mortgage. The Anam landowner will be shocked if it were to be suggested that he was parting with ownership of his land even for one brief moment, or that if he defaulted with his repayment at the agreed date, the mortgagee could foreclose his right of redemption.

Then there is the form of transaction in which a loan is made on the security of a piece of land, a date being fixed for repayment. In case of default, the creditor has the right to go into possession and so remain till the debt is paid. Chubb calls this a " conditional pledge ".[7] This looks like the English mortgage. But it is not. For whereas an English court has the power to order foreclosure,[8] the Ibo customary court has not. And whereas the *right* to sell arises as soon as the mortgage debt is due, and is *exercisable* soon after,[9] there never is a right of sale under Ibo law, in the absence of a clear agreement to that effect.[10]

It would appear then that there is no mortgage (as understood by English law) in Ibo customary law or practice. But it must be added that there is considerable freedom of contract in Ibo law, and so one would not be surprised to find isolated cases

[6] Chubb, *op. cit.*, para. 73.
[7] *Op. cit.*, para. 70. " African charge " has also been suggested.
[8] I.e., to terminate the equity of redemption.
[9] I.e., after due notice as to arrears, or where there has been a breach of condition.
[10] Power of sale under English law is not statutory but implied by the common law: Megarry and Wade, *op. cit.*, p. 862.

of what is on all fours with an English mortgage. Finally, it may be mentioned that there does exist in Ibo law a practice which in all essentials resembles an English mortgage. This concerns movables. These can be (and often are) given as security for repayment of a loan, left in the owner's possession, and sold if he defaults.

CHAPTER 7

DISPOSITION OF MOVABLES AND TREES

(1) Inter vivos disposition of movables

As we have already seen, the items of property which come under the general heading of "movables" are such things as articles of personal adornment ranging from bracelets and straw hats through elephant tusks to precious stone necklaces, farm implements such as hoes and cutlasses, domestic animals like dogs and goats, and farm animals such as sheep and oxen.[1] These forms of movable property are disposed of *inter vivos* by sale, gift, pawn, or "loan". As these methods of disposition have already been touched upon in other contexts, we shall here merely summarise the salient legal principles involved.

Sale

The owner of a piece of movable property has full legal rights to sell it to any bidder. The sale may take place at home, in the local (e.g., village) market or in distant lands. There is no rule of law which requires such an owner to obtain the consent of any other person or body of persons to the proposed sale, minors and wards apart. There is here[2] no restraint on the right to sell to strangers. Where the owner is a family or other socio-political group, the decision to sell, as in the case of land, is the joint responsibility of all members acting either "democratically" or through their family heads. A sale effected without such a consent is *voidable* (though not void) at the instance of those members who ought to have been consulted but were not. The proceeds of sale of group-owned property is, of course, the joint property of all the members of the group. In some societies the group head is entitled to a portion of the proceeds by virtue of his office. But apart from this, he has no exclusive claim to such a fund or any part of it. This applies to such ruling groups

[1] Until recently goats were reared "at home" while sheep and cattle were kept in the "bush". Hence this rather curious classification of goats as domestic and sheep as farm animals.

[2] Contrary to the law on the sale of land.

within the community as the senior age grade, the council of elders and the *ọzọ* title " lodge ".

The sale transaction is complete as soon as the vendor hands over the goods and the purchaser pays the agreed price. Neither party may thereafter re-open the bargain on the ground, for instance, that the price was not fair or that the goods were not as sound as they appeared to be at the time. But this rule is subject to the proviso that the purchaser had a fair chance of examining the goods and either failed to take it or else was negligent in his examination. If the circumstances were such that it was clear at the time that he was relying exclusively on the information given to him by the vendor, he can repudiate the sale on discovering the truth. Thus if a man, relying on his own commonsense, buys, say, a cockerel for sacrificial purposes under the mistaken belief that it has not yet learnt to crow,[3] he cannot return it to the vendor on learning later of his mistake. This is so even if the discovery took place only minutes after the sale is completed. If, on the other hand, the vendor, whether fraudulently or innocently, gives a false warranty, the sale is voidable at the instance of the purchaser.[4] Thus if the vendor states that his cockerel has never crowed, or that the fish he is offering for sale is of a given species (usually with a special medicinal value) or that his animal is quite sound in health—the purchaser can return the object in question and recover his money in full if the statement turns out to be false. In case of dispute, the purchaser has an action in law to recover the price he paid. If, as often happens, the vendor denies having given such a warranty, resort will be had to the oath.

Where only one party is ready for the time being to fulfil his part of the bargain, then the deal is concluded the moment the price is agreed upon and one party does fulfil his end of the bargain. Thus in case of credit sale, as soon as the price is agreed upon and the purchaser takes delivery, the contract is complete. The vendor has an action to recover the price (subject, of course, to the rule about warranties outlined above). It makes no

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[3] " *Oti nku eghe ọnụ* " (" A flapper that never opens its mouth "). These birds have a special significance, and are rather expensive.

[4] This is all reminiscent of the English Sale of Goods Act, 1893, especially s. 14. But the situations here described are quite indigenous to Ibo society. Many a quarrel has its origin in what Ibo commercial parlance calls *nkwuli* (getting the other party to part with too much for too little either by puffing too much or by disclosing too little) and *nzụgbu* (trickery in market dealings).

difference that the subject matter of the sale perishes soon after in the hands of the purchaser. Conversely, where the price is agreed upon for the sale of a *specific* object and the purchaser pays the price, the deal is concluded. If the thing perishes while awaiting delivery, it is bad luck for him, in the absence of bad faith or negligence on the part of the vendor. The contrary is also true. If after purchaser has paid the agreed price, vendor fails or refuses to deliver the goods, the former has an action for specific performance (if this is still possible), or for a return of his money (where specific performance is no longer possible because, for instance, the goods have perished).[5]

We began by saying that an " owner " of movables can sell them without anybody's consent. But there are cases of *apparent* ownership which are very difficult to distinguish from true ownership. The Ibo phrase for this is *onwunwe nwata nwe ewu n'ajji* (i.e., ownership which a child has over a goat " in the hair", i.e., while it is still alive). In these cases B has a controlling interest in A's property. This sometimes happens in the case of a child, a ward or a wife. For instance, a wife acquires a piece of property by virtue of her position as a wife, say as a gift from her husband's personal friend or even from her parents following a marriage ceremony in which the husband has had to make payments to his " in-laws ". In these and similar circumstances the husband is entitled to an overall control over the disposition of the goods as he has paid (or may be expected to pay) for the gift in kind or in money. While therefore the wife is the owner, she may not sell the property without her husband's consent, even if the proceeds are hers to spend. It may be argued that the husband in such cases has a first refusal[6] should she decide to sell. But this is not so. He has to give his consent to any transaction proposed by the wife in cases of this kind, otherwise the transaction would not be valid. Similar situations often arise as between guardians and wards. As regards a child's right to sell what is his, the position in law is that, except for minor articles such as fruit picked " on the commons ", handicrafts, etc., a father or other person in *loco parentis* to a child must give his consent to a proposed sale of movables. This rule is apparently founded on the law of contract which places certain restrictions

[5] The question of *damages* for non-performance is outside the scope of this book, and cannot be entered into even in this digression on the Ibo law of contract.

[6] I.e., a right of pre-emption.

on the activities of children and wards. Or it may be founded on the general law of persons which gives to parents and guardians the right to decide when a proposed act is or is not in the best interest of their children or wards.

Gift

Gifts of movables are much more frequent and less restricted than gifts of land. Unlike the donee of land, the donee here can be anybody at all—slave or free, kinsman or stranger. A gift may be outright, or it may be conditional. In the latter case the condition may be continued good behaviour on the part of the recipient. A gift may be made conditional during the donor's life time, then outright at his death. Thus an elderly man may give his gun or livestock to a kinsman to be used so long as the latter continues to make him occasional presents of game killed[7] or the offspring of the livestock, the gun or animals to become the donee's absolute property at the donor's death. Conditional gifts of this nature are a prolific source of litigation between the donee and the donor's inheritors. But given good faith on both sides, a case of this nature is easily settled. If there is even one trustworthy witness who can testify (on oath if need be) that he overheard the deceased saying that he had " given " (i.e., made a gift of) the property in question to the recipient, there is an end to the matter. In the absence of such a witness, it is for the alleged donee to affirm on oath that the property was a gift to him—and the conditions if any. The deceased donor's heir or heirs should never be made (or even allowed) to swear that no gift was ever intended. Ibo law and practice eschew the idea of a third party swearing on oath on the intentions of a dead man, unless these intentions were manifested in words in his presence.

As the name implies, a conditional gift may be revoked on the occurrence of the stipulated event. If the condition is continued good behaviour by the donee, the donor has a right to call for a return of his property if the former ceases to behave to his satisfaction. Where the recipient is a stranger, " good behaviour " is rather subjective in the sense that the donor himself can decide when behaviour ceases to be " good ". But if a kinship tie intervenes, then there is an objective test. Do other kinsmen consider the donee's behaviour towards his benefactor as good, bad or indifferent? This is perhaps because kinship involves moral responsibility on the part of those who have the means to give economic aid to those who have not. Aid once

[7] With the gift gun.

given will therefore not be allowed to be withdrawn except on good grounds.

An outright gift of movables, on the other hand, cannot be revoked. Should a dispute arise between the *original* parties to the gift as to whether it was intended as outright or conditional, it is for the donor to prove that it was conditional. If he cannot, the property belongs to the donee. If, on the other hand, the donor is now dead, the *onus* is on the donee to prove his title. This he does by calling eye-witnesses or else swearing an oath.

Pawn and pledge

A pawn is very much like a pledge; but there are three subtle differences. In the first place, there is nothing in the law of pawns corresponding to a " conditional " pledge. In a pledge, a loan can be made on the security of a piece of property which is allowed to remain in the debtor's possession till the time fixed for re-payment is up, when the creditor may then take possession; a pawn always begins with possession being transferred to the creditor. In the second place, a pledgee has a legal right to make (proper) use of the article in question. Not so a person who lends money in return for a pawn. For in the case of a pledge (whether of land or of movables), the user is supposed to stand for interest on the loan. In the case of pawning, on the other hand, interest is normally charged.[8] The consequence of this liberty to use in the one case and not to use in the other is that the creditor is not liable for damage to the article pledged in the absence of negligence in its user, but he is so liable in the case of damage to the pawn once it can be shown that such damage occurred while the article was being used. Thirdly, a pledge may be given for an existing debt, a pawn only for a new loan. Hence, pledge = *ife ibe*; pawn = *ife e ji gbalụ mbibi*.

A pledged article can be re-pledged to a third party, so may a pawned article. In neither case is the consent of the owner necessary. For he is only concerned with redeeming his property from *his* creditor. Normally he merely hands the amount of the debt to his creditor, who in turn hands it to his own creditor in return for the goods. Where the first creditor is a man of shady character, a middle man is employed to bring the money to him and, after merely showing it to him, to go with him to the second creditor to redeem the article. A serious problem arises where the article is pledged or pawned for a sum in excess of the

[8] A hundred per cent. per annum is not unusual.

original loan. If the first pledgee or pawnee is unable to make up the difference so as to redeem when the owner wants the articles back, the position is as follows. The owner may make up the difference himself, redeem his goods and then proceed against the first creditor to recover the said difference. Alternatively, he may bring the first creditor before a law court, tender the amount of the original loan, and ask the court to compel the creditor to redeem the goods. Of course, he can also come to an agreement with the latter as to the proper time to redeem.

Loan

The standard of care which the law imposes on a borrower of movable property is so high that his liability may be described as absolute. If the goods are lost or damaged, he can only escape liability by proving that no blame whatever can be laid at his door. If he has been at all negligent in relation to them, he has to pay. What is more, the burden of proof lies, not on the owner to show negligence on the borrower's part, but on the borrower himself to establish the absence of negligence.[9] It is not enough to prove that he had exercised the same degree of care over the borrowed property as he would (or normally does) over his own goods. For the law governing the safe custody of *ife nnunu* is more strict than this.

In case of loss or damage, there is a presumption, not of innocence, but of bad faith. Hence as we have seen, the onus is on the borrower to prove his innocence to the satisfaction of the owner or of the court, as the case may be. In all cases, the loss or damage must be reported promptly. Delay is a clear indication of bad faith, and may defeat an otherwise perfectly good defence. In any case, it has to be justified.

Cases of damage fall under two heads, viz. damage by the borrower himself, and damage by a third party. In case of damage by the borrower himself, he has to prove that it was both accidental and unavoidable. It is not enough to show that the damage was accidental in the sense that there was no *animus spoliandi* on his part. He must go a step further and prove that it was not reasonably foreseeable and therefore that there was nothing he could reasonably be expected to do to avoid the mishap. What is " reasonably foreseeable " or " reasonably to

[9] The inherent difficulty of proving such a negative contention is obvious. But it is only fair to lay the onus on the borrower, as he would be in a better position to know when the damage occurred, and how. *Cf.* the English principle of *res ipsa loquitur*.

be expected " must, moreover, be assessed in the light of the high standard of care required of a borrower. It would be fatal to a defence of accidental damage, for instance, if it could be shown that at the material time the goods were not in the best practicable place of safety in the circumstances. The borrower would then have failed to prove the absence of negligence on his part.

Where borrowed goods are damaged by a third party, the borrower has to prove that no act of commission or omission on his part had in any way contributed to the damage. This implies, *inter alia*, showing that he was not negligent in leaving the goods in a position where unauthorised persons could have access to them. (If the third party was negligent or malicious, he would be liable, of course. But it is the duty, not of the owner, but of the borrower to recover the value of the goods from him.)

The damage may have been done by the blind forces of nature, or by animals. Thus borrowed clothes may be damaged by goats or cattle or by white ants. Borrowed goods may be carried away by floods or damaged by the rain, heat or lightning. In all these cases the question is: having regard to the nature of the goods and the fact that they are *ipso facto*, were they in the safest practicable place at the material time? If yes, the borrower is not liable; otherwise he is.

A borrowed article may not be lent or pawned or otherwise transferred to a third party without the prior consent of the owner.[10] To do so would be to commit a fundamental breach of the bailment agreement. The owner can determine the loan forthwith and compel the borrower to return the goods even if the time initially agreed upon has not elapsed. If the goods are damaged or lost while they are wrongly in the possession of a third party, the borrower is absolutely liable to the owner. It makes no difference here that the loss or damage has occurred in circumstances which would otherwise have been described as " accidental " and " unforeseeable ". If the transferee was blameless, he would escape liability *vis-à-vis* the borrower-transferor. But the latter has no defence as against the owner. If the transferee was negligent, he would be liable for the value of the goods. As we have already pointed out, the duty is upon the borrower to take proceedings to recover this value. But should he fail to do so, the owner may proceed against him,

[10] Borrower's liability here may be compared to the strict liability of such special bailees in English law as inn-keepers and common carriers. See Carver, *Carriage of Goods by Sea* (10th Edn.), p. 3.

bringing in the transferee as a second defendant, especially where the borrower is not a man of substance.

Finally, the borrower may not sell or otherwise permanently alienate borrowed property. It is theft (*ori, oshi*) if he did so without the owner's consent. But this is theft in an attenuated form. The remedy is an action to recover the value of the goods,[11] there being no criminal sanction in addition, as there is in most other cases of theft.

Disposition of economic trees

The most common methods of *inter vivos* disposition of economic trees are sale, lease and pledge. These topics have all been fairly exhaustively treated above, and so no more than a very brief summary is called for here.

Sale[12]

Economic trees may be sold by their owner without the consent of anyone else. There is no restriction against sale to strangers as is the case with land. Trees may be sold apart from the land on which they stand (and *vice versa*), so that ownership of trees and of the land is in different hands. In such a case, the purchaser has a right of entry on the land for the purpose of looking after the trees and harvesting their produce. But he must exercise this right in a reasonable manner. In the case of a timber tree, the purchaser has a right to cut it down and have it sawn[13] into timber even if this process involves considerable inconvenience to the landowner. Similarly, the purchaser may at will cut down his trees even if their continued presence on the land would have been more beneficial to the landowner. This is a common source of dispute where shade-loving kola nut trees and coco yams are on the land.

Pledge

Economic trees may also be pledged apart from the land. The pledgee, *ipso facto*, acquires a right of access over the land to the trees. He may re-pledge without the owner's consent, though this consent is normally sought and readily given. If a third party trespasses on, or steals from, pledged trees, it is for the pledgee, not the owner, to take legal action. If no time was

[11] Rather like the English action for conversion. See *Salmond on Tort* (11th Edn.), p. 314-51.

[12] There is no presumption in favour of "redeemable sale" here, as is the case with the sale of land.

[13] Or chopped.

initially fixed for redemption, the owner may redeem at any time after giving reasonable notice. Where fruit trees are involved, the pledgee is entitled to harvest any fruit already on the trees (whether ripe or unripe) before parting with possession. If they are ripe, he should harvest as soon as he reasonably can; if they are not, he may remain in possession till they are, even if redemption money has already been paid to him. This is because the produce of pledged trees is supposed to stand for interest on the loan.

Lease

Once more economic trees may be (and often are) leased apart from the land on which they grow. The rental for this lease may be payable in money or in kind, or partly in one and partly in the other. A lease carries with it a right of access to the trees concerned. In the absence of agreement to the contrary, a lessee may sub-lease without the owner's consent. Such a sub-lease also carries the right of entry on the land even if the immediate lessor here is not the landowner. After all, trees' owner and landowner need never be the same.

Just as a lessee may sub-let, he often brings in others to share the fruit of the trees with him *gratis*. This raises two separate questions regarding the rights of the original owner. In the first place, has he a right in law to determine the lease and eject the lessee on the ground that the rule about liberty to re-lease does not apply to freedom to admit gratuitous licensees? After all, the two cases have very different bases, the one being economic while the other is purely social. But Ibo law does not take so logical a view of the matter. So long as the trees are being used for the original purpose for which they were leased (e.g., tapping), and so long as this user continues to be reasonable in spite of an increase in the number of beneficiaries, the lessor has no action in law against the lessee. After all, there is nothing to stop the latter from employing any number of "hands" to assist him with the job of harvesting the produce of the trees. The second question arises from the first. If a given periodic payment was initially agreed upon as consideration for the use and "exploitation" of the trees, and the lessee later introduces third parties who reap the produce for their own separate benefit, can the lessor call upon these persons to pay the same "rent" each as the lessee had contracted to pay? This question arose in a recent

case which came before the Privy Council[14] in a modified form. The Privy Council held, reversing the judgment of the Nigerian Supreme Court, that *each* person had to pay the tribute[15] initially agreed upon between the lessors and the lessee.

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[14] *Chief Okoro Orukumakpor* v. *Itebu, for Elume Family*, [1961] West Africa, 11th March; (1961), 5 J.A.L., No. 3, pp. 159–165.

[15] The equivalent of a rental for our present purposes.

CHAPTER 8

SUCCESSION IN PATRILINEAL SOCIETIES

A. General

(*a*) *Administration of Estate under Customary Law*

At a man's death all his property—land, economic trees and movables alike—passes to his eldest son if he is old enough to look after it. If he is not old enough, or if the deceased had no son, then the deceased's eldest male relative—brother, uncle or cousin on the paternal line—takes charge of his property. At this stage, the son or relative, as the case may be, is a mere administrator. His main duty is to perform the funeral and "second burial" (*ịkwa ozu*) ceremonies of the deceased. But with the property pass also to him the deceased's obligations to his family and dependants. It is therefore part of the administrator's duty to maintain the dead man's wives and children as well as all those for whom he stood in *loco parentis*. The better to be able to carry out these onerous duties, the administrator has the legal right to call in all outstanding loans made by the deceased,[1] to collect all his property (e.g., yams, livestock, etc.) wherever they may be found, and to sell, pledge, pawn or otherwise dispose of any such property. The law requires every debtor to come forward and declare the amount of his debt to the deceased. Similarly every creditor has to put in his claims as early as possible. These declarations of financial interest are then considered by a meeting of the deceased man's kinsmen on the twelfth day following the death (*izu ato*). Doubtful cases are settled on oath. But the burden is always on the alleged creditor or debtor to establish the quantum of his claim. *He* must do the swearing, not the administrator who is normally not a party to the original transaction. Thus the alleged creditor has to affirm the amount of his credit on oath (in the absence of living witnesses, that is), while the debtor must affirm on oath that his debt to the estate is so much and no more (also in the absence of living witnesses).

[1] At all events if there is no binding contract as to time of repayment.

The administrator can sue or be sued in the name of the deceased, though, if the latter left a young son surviving, the administrator merely acts as the child's " next friend ". Similarly the administrator may determine a contract entered into by the deceased if he is of the opinion that its continuation would be detrimental to the interests of the estate. This is not to say, however, that an administrator has liberty to commit breaches of contract. But it does mean that where the deceased could by his own motion have determined a given contract, his administrator has a right to do so.

The period of administration varies from society to society. In some places it lasts for only twenty-eight days (*izu asa*); in others it continues for fifty-six days (*asa naabọ*). In yet other places it goes on for a year of thirteen lunar months or until the completion of the " second burial ", whichever is the first. At the expiration of this period there is usually another meeting of kinsmen wherein the administrator gives an account of his stewardship and so formally ends his " term of office ". If he is also the deceased's principal heir (as he often is), he undergoes a change of status, becoming then a legal owner of the net estate. If he was merely acting for an infant heir, he now assumes a new role, that of a caretaker. It is tempting to refer to him as a trustee, but the Ibo " trustee " differs slightly from his English counterpart. For while the latter must not benefit from the estate,[2] the Ibo trustee of this kind may lawfully do so as long as he performs his duties towards the beneficiaries reasonably well. This he does by making such provisions for their education, advancement and welfare generally as he would if they were his own children, wives or other dependants. There is thus a case for keeping out the idea of trust from a discussion of Ibo customary law and adopting instead the term " care-taker ".

Women and Administration

Can a woman ever lawfully administer a man's estate? Strictly she cannot, and normally does not. For administration is after all only a step towards inheriting the estate. And though women may be given specific items of property, they do not inherit a man's *estate* in patrilineal societies.[3] To inherit an

[3] *Brocksopp* v. *Barnes* (1820), 5 Madd. 90; *Williams* v. *Barton*, [1927] 2 Ch. 9; *Bray* v. *Ford*, [1896] A.C. 44; *Re Macadam*, [1946] Ch. 73. In appropriate cases, however, the courts will permit a trustee to derive some benefit from his post of trustee: *Marshall* v. *Holloway* (1820), 2 Swans 432; *Cradock* v. *Piper* (1850), 1 Mac. & G. 664.

[2] For exceptions to this rule, see p. 185 in connection with the Western Ibo.

estate in these circumstances is, besides, to step into its late owner's shoes as regards property rights and family responsibilities: women just do not do this under customary law. Nevertheless, it sometimes happens that a woman assumes the role of administratrix. This she may do when her infant son is the rightful heir to the estate of either her husband or her son, and either there is no fit close male relative for the task, or feelings between her and such a relative are estranged. Similarly a mother may act on behalf of her absent son.

It is therefore safe to conclude that a woman, whether married or not, has no legal right to administer a man's estate in her own right, though she can act as caretaker thereof on behalf of her son or sons. This statement is also true of her legal position regarding a deceased woman's estate, though in this respect a daughter normally plays quite an active part in disposing of her mother's personal articles and generally realising the estate. Where, however, a woman goes through an Ordinance marriage (or a Christian marriage), she comes under an entirely different set of rules as regards the estate of her husband or her unmarried sons. In such cases the question of administration is determined on English law principles, so that a widow in the one case and a mother in the other has a prior claim to rights of administration *vis-à-vis* brothers or other relatives. The widow's right as here stated was specifically pronounced upon by the High Court of Nigeria in the case of *Re Emodie, Administrator-General* v. *Egbuna*.[4] The mother's case seems a natural inference from this and similar cases arising out of Ordinance and Christian marriages.

(*b*) " *Primogeniture* " *in Ibo Customary Law*

In the vast majority of Ibo societies succession on intestacy[5] is patrilineal[6] and, essentially, on the principle of primogeniture. But this latter term, as applied to Ibo customary law, does not bear its literal meaning of " succession by the first-born ". To begin with, Ibo law denies women the right of inheritance to landed property in all but a few cases, as we shall see later. This at once gives primogeniture something of its feudal connotation of " succession by the eldest son ". But the situation is further complicated by the fact that the law recognises, indeed encourages polygyny (popularly known as polygamy) and what

[4] (1945), 18 N.L.R.1.

[5] Intestacy being the norm.

[6] I.e., the right to succeed is founded on blood relationship on the male line. This at once cuts off widows and maternal uncles, cousins, etc.

may be called the "principle of inheritance by houses".[7] (Succession *per stirpes* would seem to be the nearest English equivalent but is not exactly the same.) That means that in the case of death intestate of a polygamist, there is joint succession by as many "houses" (*nkpuke*, *usokwu*) as have male children in them.[8] As regards inheritance by one's sons, therefore, primogeniture bears two entirely different meanings. Where the deceased was a monogamist or else had sons by only one of his wives, the term has its purely feudal signification of succession by the eldest son. Where, however, there are sons by two or more wives (whether married polygamously or in succession), primogeniture connotes joint succession by the eldest sons, one from each "house". On the other hand, where the deceased left no sons and no male issue of a deceased son, the term primogeniture assumes yet another meaning. Here succession is by the eldest brother or the nearest male relative on the father's line. Where several persons stand in the same degree of blood relationship to the deceased, the eldest of them will inherit.

It may be objected that in this last set of circumstances—where there are no sons—we have passed beyond the realms of primogeniture. But we have not. For, as already indicated, here the heir is to be found among a compact *class*[9] of relatives—surviving male descendants of a given progenitor. And it is the eldest member of this class—the eldest "son" of this ancestor—that inherits. Meek probably had this in mind when he said that "various classes of relatives are bonded together under common classificatory titles" so that primogeniture may mean not succession by the eldest son but succession by the first-born within the class.[10] Finally, it must be pointed out straight away that where an heir-apparent predeceases the man he was to succeed, his own eldest son,[11] if any, will succeed in his stead under the principle of representation. In this case primogeniture may be described as succession by the eldest male member of the senior branch of a family.

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[7] The term "house" is used here to denote the separate domestic establishment of each wife in a polygamous household. *Cf.* Schapera on the Tswana of Bechuanaland, Rattray on the Ahanti, Allott on the Akan.

[8] *Usokwu* means: (*a*) a wife's hut (physical); (*b*) a wife's progeny (legal). See also p. 165, *post*.

[9] "Class" because the persons concerned all stand in the same degree of blood relationship to the deceased as opposed to everybody else.

[10] *Land Law and Administration in Nigeria* . . . , p. 180. This "first born" is, however, to be read with reference to males only.

[11] As *nwa dipkpala* (son of eldest son).

To sum up, primogeniture, in the context of Ibo customary law, may mean one of three things:

(1) succession to a man's estate by his eldest son, where all his sons were born of one and the same wife;

(2) succession jointly by a man's eldest sons—the eldest sons by his various wives irrespective of their relative ages *inter se*; or

(3) succession by the oldest man among a class of persons each of whom can in turn be described as his nearest patrilineal blood relation.

(*c*) *Succession to a Man's Movable Property*

The great missionary pioneer, G. T. Basden, summarised Ibo law of succession to personalty in these words,

> " Personal property, including the wives and slaves, descends to the eldest son as heir, or failing a son, to the eldest brother or male relative."[12]

In view of what we said above concerning joint succession by the eldest sons of a man's wives (" succession by the house ") which is widespread in Iboland, this picture is an obvious over-simplification. A more serious objection is this. Assuming for the sake of argument that wives rank as *property*, would it not be shocking to think of a son as inheriting his own mother, as part of his father's estate? And yet, this is exactly what would happen, under Basden's scheme, wherever a man leaves as his widow (or one of several widows) the mother of his eldest son and heir. We shall have a good deal more to say in a later section on the subject of " widow inheritance ". For the present, suffice it to say that a wife is not property under Ibo law, and is not inherited.

In the main, and barring the few societies in which women can inherit their father's estates,[13] succession to a man's movable property in patrilineal societies is in the following order of priority:

1.—(*a*) The eldest son, where all the sons of the deceased were born of one and the same mother. In that case the eldest son inherits to the exclusion of everyone else. But as the new head of his father's immediate family, he also assumes his father's responsibilities towards all his dependants. These include his widow or widows, younger sons if any, and unmarried daughters whatever their age and by whichever

[12] *Among the Ibos of Nigeria*, p. 32; *Niger Ibos*, p. 268.
[13] See further at p. 185, *post*.

wives. (The existence of daughters by different wives does not bring into play the doctrine of "succession by the house", in societies where women do not inherit their father's property.[14])

(*b*) Where the deceased is survived by sons born of different mothers, the eldest sons (*ọkpala*) from the various "houses" (*usokwu*) will succeed jointly. This is so whether the wives were married polygamously or in succession. The eldest son of all (*diọkpala*) by whichever wife[15] is, by virtue of his position, entitled to certain specific items of property—mainly those connected with the ritual, ceremonial and military functions of a family head.[16] Should the children ultimately decide on apportioning their inheritance, there is first a division into as many shares as there are *usokwu*. As a general rule, these shares are all equal (*ike nhanya*); but it is said that there are societies where they are in a descending order of magnitude (*ike ọkaliọka*). As between the children of each "house" (*usokwu*), the position is as under (*a*), *supra*. The *ọkpala* thereof takes to the exclusion of his junior brothers and to the exclusion of all sisters, whatever their ages. But he also assumes responsibility for their upbringing, maintenance, advancement and welfare generally, subject to the overall control and responsibility of the *diọkpala* of the whole family.

2.—Failing sons, brothers of the whole blood will inherit. It is said by a number of informants that in some societies all brothers share equally. But the better view is that where there are only brothers of the whole blood, the eldest of them inherits exclusively as in the case of sons; and even if there are half-brothers as well as brothers of the whole blood, the eldest among the latter will succeed exclusively. This is because full-blood brothers have a higher priority than half-brothers.[17] This statement applies to sons of deceased full-brothers. These, too, have a higher priority than their half-uncles, taking as they do in place of their fathers. Similarly, the eldest son of the eldest full-brother, as *nwa diọkpala*,[18] has a higher

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[14] Which is the normal situation.
[15] That is whether by the senior wife (*anasi*) or not.
[16] He is also entitled to a portion of land. See pp. 175-176, *post*.
[17] It must be emphasised that the priority of a full-brother is in no way affected by his age as compared with that of half-brothers.
[18] Lit. "son of eldest son".

priority than the surviving full-brothers themselves. This is because a man is not dead, for the purposes of intestate succession, if he has a son living.

3.—Failing brothers of the whole blood, the father succeeds. But opinions are sharply divided, not only as between informants from different societies but also as between those from the same society, on the question who takes precedence: the deceased's father or half-brothers. It may well be that fathers inherit only in the absence of half-brothers in some places, but in spite of them in others. On principle, fathers ought to have a higher priority than half-brothers. Ibo law not only recognises but encourages polygyny at every turn. One of the main objectives of a polygamist is to produce as many " branches " of his family as possible. Therefore the closing down of an *usokwu* as happens where the last or only son of a given wife dies in his father's life time leaving no male issue, is a major catastrophe in a man's life. It would be surprising, to say the least, if the law did not grant the old man the wherewithal to found another " branch " by giving him a right of inheritance in these circumstances.[10]

4.—If the deceased's father is already dead, half-brothers will inherit the net estate. If these are all sons of the same mother (i.e., belong to the same *usokwu*) the eldest will inherit to the exclusion of the others, as a general rule, though there are said to be societies where they succeed jointly. If, on the other hand, they belong to more than one *usokwu*, there is once again joint inheritance by the various *ọkpala*. Distribution among them is generally on equal basis, regardless of their relative ages or the number of brothers in each *usokwu*.

5.—If there are no sons, no brothers and no father, the nearest paternal male relatives will inherit. Where several persons stand in the same degree of relationship to the deceased (e.g., all first cousins), we are faced with the same problem of joint inheritance and subsequent distribution. If these relatives were all born of the same mother, their eldest brother will normally inherit exclusively. It is where they are sons of different mothers that the question of joint succession arises. But the same solution applies here as does in the case of brothers and sons, and will presently be explained.

[10] The question of his age and reproductive capacity at the time of the son's death need not arise. Male proxies are frequently employed to produce perfectly legitimate children in most Ibo societies.

It will thus be seen that under Ibo customary law neither mothers, wives nor sisters have inheritance rights over a man's movable property.[20] The customary law is that in patrilineal societies women do not inherit a man's estate or any part of it on intestacy.[1] They may, of course, be left any part of the *disposable* estate by will, be it written or nuncupative. If so, they are entitled to it. But this is the limit of their right of inheritance in this respect. And, but for a piece of "social engineering" and judicial legislation on the part of judges of the High Court in the past, this would also be the extent of their statutory right outside Lagos. Finally, it will be observed that though succession is patrilineal, maternal relationships are not entirely without legal effect, in view of the rule that full-brothers have a pride of place as compared with half-brothers of the deceased.

So far we have spoken of the eldest son or brother inheriting to the exclusion of his junior brothers. This is the general rule as regards succession to movable property. But there are said to be some Ibo societies in Owerri Division in which (apart from the specific items mentioned at the beginning of this section, which go to the eldest son or brother by virtue of his status) a man's movables are inherited jointly by all his sons, half-brothers or full-brothers as the case may be. In these places then, distribution is said to be as follows. Where all the heirs are children of the same mother (*nne ojiji*), distribution is *per capita*. If they are from more than one mother, there is first a distribution "by houses" (that is into as many shares as there are *usokwu*), and then a sub-division *per capita* as between members of each such *usokwu*. We shall see this principle of joint inheritance involving *per capita* distribution in operation again in relation to succession to land.

(*d*) *Succession to a Man's Economic Trees*

Succession to a man's economic trees is governed by the same legal rules as we have just discussed in connection with succession to movable property. There is, therefore, no need to set them out *in extenso* here. But convenience calls for a summary statement of the priority of rights, which is:

(1) (*a*) the eldest son where all the sons of the deceased were born of the same wife;
(*b*) the eldest sons, one from each wife, jointly, where the deceased had sons by more wives than one;

[20] This is even more true of land. See pp. 170–185, *post*.
[1] Barring the special case of the *Idegbe* among the Western Ibo.

(2) brothers of the full blood;
(3) the father;
(4) half-brothers: i.e., same father, different mothers;
(5) nearest paternal male relative, whatever the degree of relationship.

These rules are, however, subject to the following remarks. In the first place, there are societies (such as parts of Bende) where economic trees (especially palm trees) are not the subject matter of individual ownership. They belong to the community as a whole. Indeed, palm trees on individually owned land too belong to the community in some places. In these circumstances, therefore, the question of succession to economic trees simply does not arise in these societies. In the second place, where the law of succession requires distribution of economic trees among several persons, the trees are distributed separately from the land on which they grow, and irrespective of who inherits or owns such land.

Thirdly, though a widow has no right of inheritance over her deceased husband's economic trees, she has a right of user over their produce for life.[2] If she has sons, she shares this right with the wives of her sons, if any. In all cases, the rightful heir retains a mere right of reversion during the widow's life. As we shall see later, this rule applies to the matrimonial home and other forms of landed property. Fourthly and finally, in one society,[3] palm trees dedicated to infant children soon after birth[4] (*nkụ ala*) are inherited by the wives of the mothers' sons.

(*e*) *Succession to Title and Status*

The subject of titles and succession to them is a fascinating one but is, unfortunately, outside the scope of this book except in so far as property rights and interests are involved. We shall therefore confine our discussion to three titles, viz. *obi*, *ezeani* and *ọkpala*. As for status, we shall deal with that of the *osu* and of the *ohu* (*oru*) only.

Definitions; obi, eze, chief

These titles are used in different parts of Iboland to designate

[2] This statement refers to such trees as palms, oil bean trees, *ọra*, etc., which are regarded as a wife's prerogative in her husband's life time. *Cf.* Green, *op. cit.*, p. 22.
[3] Umueke Agbaja, as *per* Green, *ibid.*, p. 20.
[4] By having their umbilical cord or first hair cuttings buried at its root.

the highest political head of the largest socio-political group such as a town (*obodo*, *ala*) or a number of inter-related towns. *Obi* is widely used among the Western Ibo, and is possibly a derivative from the Yoruba *oba*. *Eze* is used in Onitsha town and Oguta as interchangeable with "King", but has a slightly less majestic signification in other societies. This is perhaps because nowhere else in Iboland east of the Niger does an *eze* both rule and reign. Powerful personages have emerged at various times in the history of practically all Ibo societies, and imposed a form of autocratic rule on the people, arrogating to themselves all sorts of resounding titles. But all they did was rule by virtue of their superior intelligence and might. They never had that love and respect and willing loyalty of their "subjects" as would be expected in a monarchy where the Sovereign not only rules but also reigns. The reason: the Ibo are incurably republican in temperament. The term "chief" came with the British administration and is now in use all over the Eastern Region.[5] *Eze ani* ("land king") is, as the name implies, the land priest. *Okpala* ("eldest son") may be described as an *obi* in miniature. He never rules, to say nothing of reigning. He is simply the living head of his kinship group, the visible link between the living and the departed members of the group. His functions were partly ritual, partly administrative and partly judicial—the last two of which he always shared with the elders, *ọzọ* title holders, etc.

These titles and the offices which they stand for carry with them certain well defined proprietary and administrative rights over land, economic trees and movable property. Their incumbents have a great deal of say—in some places indeed the final say—over such matters as which parts of the communal land should be cleared for farming for any given season, what plants and trees shall be sown there, what land shall be given out on lease to strangers and on what terms. In return for their numerous activities, they are entitled to specific plots of land known variously as *ani dịọkpala*, *ala ishi*, *ani eze* and *ani obi*. They were

[5] Chiefs as found in the Region today can be classified under two main heads, viz. (*a*) customary, and (*b*) non-customary. Customary chiefs have recently been given official recognition by the Regional Government (following the *Jones Report on Chiefs and Natural Rulers*), and divided into traditional, first class and second class chiefs. Non-customary chieftaincy is of recent origin, and is conferred by a given local community on its outstanding citizens in recognition of their public (especially political) services to the nation. This title has just about the same degree of social or political significance as a knighthood in contemporary British society. It has no property rights attached to it, and so will not be considered further.

also entitled to certain occasional tributes from all persons under their sphere of authority, as we have already seen. These rights and interests pass at their death to the next incumbent of the office.[6]

As a general rule, succession to these titles and offices is hereditary. But as in many things Ibo, "hereditary" bears slightly different meanings in different societies. In some, succession is on the strict principle of eldest-son-after-father. Here we have primogeniture in full play. Succession is by the eldest son (*diọkpala*) and this right remains in that particular line for ever. Thus even if the oldest direct descendant (through first sons only) is many years younger than another descendant of the original *obi*, *ezeanị*, etc., the former, as *nwa diọkpala* or *nwa obi*, etc., will succeed. The diagram on p. 162, *post*, will make this clear. In the diagram S_1, S_2 and S_3 are the three sons of the original *obi*, *ezeanị*, *ọkpala*, etc. S_1 is the eldest son. The lengths of the vertical lines A, B, C, D indicate the relative ages of the grandsons *inter se*, great-grandsons *inter se* and great-great-grandsons *inter se*. The rightful successor is SUC, that is Great-great-grandson A. This is so in spite of the fact that he is obviously younger than his opposite number in the line of his great-great-uncle, S_2. Indeed, even if S_2 (or S_3) himself is still alive, the title will go to SUC nonetheless, as the oldest *nwa diọkpala*. The title will go to one of the other lines if, but only, if the line of Son_1 fails. In that case, the oldest descendant of Son_2 will succeed, unless his line, too, has failed. This is what is meant by the oft-repeated phrase that the *ọkpala* need not be the oldest member of the socio-political group of which he is the head.

To this normal schema there are variations, however. In some societies succession is by the oldest male descendant (through sons only of course) of the original head whether or not he belongs to the line of the first *diọkpala*. In our diagram, this would be Great-great-grandson A in line Son_3—from the length of the lines (ages of the candidates). In yet other places there is an election by the elders, from a short list of persons each of whom is in the same degree of blood relationship to the original head. In our diagram this would be the twelve great-great-grandsons. In yet other places, any member of a given line of

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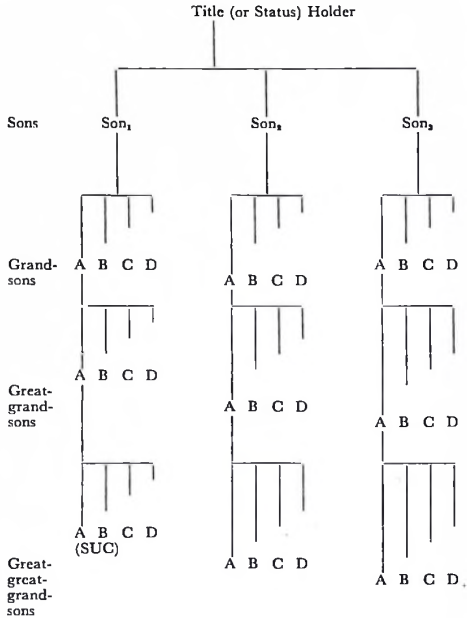
[6] Meek, *Land Tenure and Land Administration in Nigeria and the Cameroons*, p. 181.

descent is eligible for nomination by the King Makers, as in Onitsha town.[7]

Succession to Title and Status



Note.—Lengths of verticals (A B C D) represent relative ages of title holder's issue in successive generations.

[7] See generally, G. I. Jones: *Report on the position, status and Influence of Chiefs and Natural Rulers in the Eastern Region of Nigeria* (Enugu, Government Printer, 1957).

Ohu (slave) and Osu

The status of the *ohu* and the *osu* is hereditary. But here, the right of " inheritance " is not confined to the male line. Neither is it confined to male issue. All the children of an *ohu* or *osu* are *ipso facto* themselves *ohu* or *osu* as the case may be. And the issue of each such child is also of the same status. If a daughter of an *ohu* marries, her issue are all *ohu* even if their father is a free-born. The fact that slavery has been abolished in the country for the better part of a century does not affect the issue as far as this dreadful status is concerned. The 1956 Abolition of Osu System Law of the Regional Parliament has not had much success socially either.

From " inheritance " of the *ohu* (*osu*) status by virtue of direct descent in both male and female lines must be distinguished the purely eugenics-inspired rule that sexual contact between an *osu* and a non-*osu* reduces the latter to the same status as the former, whatever their respective sexes. This rule is still of considerable importance in parts of Owerri Division but has lost most of its former significance. It has never gained ground in the Onitsha area. Indeed, there is the curious rule in Onitsha Division that if a male *oru* or *osu* begets a child by his own wife,[8] that child " succeeds " to his status, whereas if he begets a child by a free-born woman who is not his wife, that child is free!

The words " inherit " and " succeed " are used in quotes all through this section because we are not really dealing with a case of inheritance. The issue of an *osu* or *ohu* do not have to wait for their father's or mother's death to succeed to their status. They are *osu* or *ohu* right from the moment of their birth.

Where does the property of the *osu* (*ohu*) go at his death? In the past the master in the one case and the idol-owner in the other succeeded to both his property and his children, if any. Today, succession to the estate of these persons takes the same line as is prescribed by the law for free-born members of the society. One is tempted to say that *ohu* (*osu*) has ceased to be a legal status, or at least ceased to have practical legal consequences as a status. But this temptation must be resisted in view of the fact that an *osu* (*ohu*) cannot, for instance, assume the role of *ọkpala* or priest or *ezeaṇị* over a mixed society of *osu* (*ohu*) and free-born persons. In some areas, e.g., Atani, they may not even take certain titles (except among themselves).

[8] Whatever her own status before marriage.

B. Succession to Group Land

For the sake of clarity and simplicity of exposition we may classify rights and interests in group land under two heads, viz. (*a*) those in communal land, and (*b*) those in family land. How far the various rights and interests can be inherited, who inherits them, and what the individual can lawfully do to evade the normal rules of inheritance will form the substance of our discussion in the next few pages.

(*a*) *Communal Land*

This, as we saw earlier, may be described as land owned and controlled by a community such as *umunna*, village or town. As already said elsewhere, too, the individual member of such a group has no proprietary rights over any specific part of communal land. All he has is a right to a share of whatever user the group decides to put the land to. He is also entitled to a share of whatever produce the land yields—rents, palm wine, timber, fruit, fish from the pools, etc. If it is finally decided to partition the land, every male adult member[1] of the group is entitled to a share. But until this is done, there is not a square yard of the land that the individual can call his own.

Is this "right to a share" the subject matter of inheritance? According to Meek, it is, at all events where farming rights are concerned. In his own words,

> "each individual *householder* has the right to occupy and use particular parts of the lineage farmland[2] when the time comes to cultivate that particular sector. *These farmland rights, like those of the houseland, are heritable* and pass to the cultivator's immediate male relatives."[3]

We may begin by pointing out that it is not "householders" alone that are entitled to farming rights over communal land. As we have seen, each community has its own rules as to the age at which its youth are to be accorded rights of user over such land. In most places, initiation into manhood is the normal time, and this may be a considerable time before the youth becomes a householder in any sense of the word.[4] A more serious objection, however, concerns the assertion that "these farmland rights . . . are heritable". At what point of time do

[1] There are no shares for women when the land is partitioned permanently.
[2] Which he describes as being vested in the community.
[3] Meek, *op. cit.*, p. 133 (italics supplied).
[4] That is by having a house of his own or by marrying.

the inheritors actually come into their inheritance: on their father's death, or on attaining their majority according to the local law? Certainly not the former, for if a householder dies leaving only babies as his heirs-at-law, these will not necessarily become entitled to farming or any other rights over communal land by reason only of their father's death. Where land is scarce, the babies' mother or guardian may ask for a portion of land for growing food crops for them, and this request will hardly ever be refused. But this is a different proposition from saying that the babies are entitled to such user. For, they will not be given plots unless a request is put in for them; if their request is refused, they have no legal action against the community. Then again, a person's right to a seasonal share of the communal farmland may actually vest (and often does so) long before his father is dead. These arguments are also applicable to all those persons who may be subsumed under Meek's general term " immediate male relatives ".

If then the individual's right to a share of farmland rights is independent of his father's death, and can actually vest in his father's life time, it could certainly not be said that this right is heritable. For *nemo est haeres viventis*[5] is as much a principle of Ibo as it is of English law of succession. Miss Green is nearer the truth when she said that the individual has no power to vary the customary rules of succession to his interests in communal land.[6] The reason, in our submission, is that there are no rules of succession to vary. The individual is entitled to rights and interests in communal land[7] by virtue of his membership of the community as a male, adult free-born indigene. The question of inheritance simply does not arise.

(*b*) *Succession to " Family " Farmland*

We define family land for the purposes of this section as land held by a compact socio-political unit in its character as a corporate entity, the unit which, for want of a more appropriate term, we have called the nuclear family. Family land as thus understood is the most numerous single type in Iboland. And so long as there is polygyny in our society with its necessary concomitant—succession *per stirpes*—it will continue to play an important role in Ibo land law and agricultural methods.

[5] " No one is an heir to a living person."
[6] *Land Tenure in an Ibo Village*, p. 13.
[7] As opposed to individual holdings.

Family farmland arises in this manner. The individual owner of plots of land dies survived by a number of sons by different wives. Under the doctrine of succession by houses (*usokwu*), these plots are now jointly held by as many first sons as the deceased had son-bearing wives.[8] The joint heirs decide not to partition the land which is thus thrown open to common user by *all* the issue of the deceased, and this may go on for several generations. The alternative to common user, in the absence of partition, is monopoly by the respective " first sons ". But as the junior brothers are entitled to a share of their respective *usokwu's* inheritance in land, and to advancement and general economic aid[9] from their eldest brothers, the question of senior brothers monopolising the land by virtue of their legal position as chief heirs is quite untenable. The result is that all the brothers *and* their issue after them are entitled to farming rights over the land.

If therefore the family decide to retain their holding as family land, the rights of the individual members resemble those in the local communal land already discussed. As they grow up, they become entitled to a share of farming rights over all family land. The question of who inherits what arises if partitioning and permanent appropriation of the land is decided upon by the family. The problem then is: should the land be shared equally among all the surviving male members of the family; or should resort be had once more to the old doctrine of inheritance by "houses"? The second alternative is invariably the right answer.[10] Of course, there is nothing in law to stop the family from deciding to share out the land *per capita*. But in the absence of an agreement to this effect, division is *per stirpes*. The number of *stirpes* corresponds to the number of *usokwu* of the original owner that have male issue surviving at the date of partitioning. Thus any *usokwu* whose line of male issue has failed is omitted; those whose present male issue are numbered by the dozen (as often happens) still receive but one share of the inheritance. Thus suppose the original owner-ancestor had seven wives. Each of them would give rise to an *usokwu*. At his death only those

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[8] Excluding wives who left no sons. Deceased sons retain their title so long as they left male issue in the direct line of succession.

[9] Including provision of farmland, if the family holding is not enough.

[10] But see Miss Green who reports a system of *per capita* division in Umueke Agbaja with the shares diminishing with each son's age (*op. cit.*, p. 12). For a commentary on Green's schema, see pp. 177 *et seq.*, *post*.

usokwu with sons (or male issue of sons) living would be entitled to a share of the family farmland on apportionment. Let there be five such *usokwu*. Partitioning is postponed for several generations. Three of the five eligible *usokwu* subsequently fail of male issue. One of the remaining two has four and the other eighteen males surviving. Partition is decided upon. The land must be divided into two equal parts (after the senior *ọkpala* has received one or more plots by virtue of his position as the head of the senior branch of the family). As between the members of each *usokwu*, sub-division is on a *per capita* basis.[11] The injustice to the eighteen-member branch is apparent. But this is perhaps a better alternative than fragmentation into twenty-two plots. For the chances of the members of each *usokwu* agreeing to sell their shares to one of themselves or to a third party are much brighter than all the family members agreeing to do so. (After all, partitioning is hardly ever contemplated unless intra-family feelings are estranged.) And where the *usokwu* members do succeed in retaining their share as an undivided whole for development on a commercial basis, the benefit to scientific planning could be quite considerable.

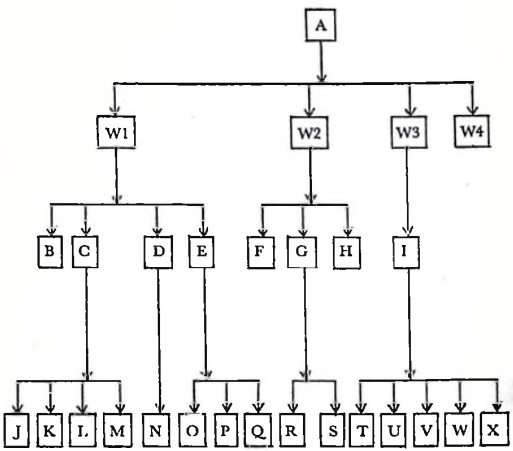
To summarise: family farmland is inherited " by the house " (i.e., *per stirpes*), the number of *stirpes* depending on the number of the original owner's " houses " (*usokwu*) in which there are male issue surviving at the moment of time when partitioning is decided upon. Should the members of a given " house " decide on apportionment, this is done on a *per capita* basis. In the absence of apportionment, the eldest brother takes exclusive charge. In that case, however, he is no more than a managing agent for himself and the other members, and may be called upon by them to sub-divide the land.

If partitioning is postponed for several generations as often happens in traditional Ibo society, the result is usually a substantial increase in the number of family members who are ultimately entitled to a share in the land. The principle, however, remains the same, except that the actual process of apportionment has to be done in stages—each stage corresponding to a generation in the genealogical tree. Thus, suppose that A was survived by eight sons, children of three out of his four wives—

[11] The Ibo rule of inheritance to family farm land is neatly summed up in a maxim, given here in two dialects: " *E kesịa n'obi e kee na mkpuke* ", " *E kesịa n'ịba e kee n'usokwu* " (We divide in the compound, and sub-divide in the kitchen).

W1, W2, W3, and W4. Suppose further that W1 begot B, C, D and E; W2 begot F, G, and H; W3 had only I; while W4 had no sons surviving. (Any daughters she might have do not count here.) The children fail to partition their inheritance and subsequently all die. B left no male issue surviving; C left four, viz. J, K, L, and M; D left one, N; E is survived by O, P, and Q; F by none; G by R and S; H had no male issue; and I left five, viz. T, U, V, W and X. (See the following diagram.)

A's Family Tree: Illustrating stages in "per stirpes" division of his farmland by his grandchildren J—X.



Now the grandchildren decide to partition their family land. This will have to be done in three stages. In Stage One, there will be a division into three equal parts corresponding with the number of founder A's fruitful " houses ". (The eldest son of A, or his eldest surviving male issue, will, of course, first receive a portion of land by virtue of his position as *okpala.*) It will be noticed first that there is no share for W4's house because it has no male issue; and secondly, that the three shares are equal in spite of the diversity in the number of the notional participants in the three branches.

In Stage Two, there will be a sub-division by members of W1's house. As only three, C, D, E, had male children surviving, there will be three equal shares. (The eldest of these will have no special share, as this is the prerogative of the senior *okpala.*) There will be no sub-division at this stage in respect of W2's and W3's houses, as in the former only G's, and in the latter only I's family have male issue surviving.

In Stage Three, the final stage, the issue of C will partition their share into four equal parts, the final recipients here being J, K, L and M. N is sole heir to his father's share. E's children sub-divide into three shares, there being O, P and Q as participants. The two sons of G (R and S) each receives half their father's portion. Finally, the five sons of I sub-divide their father's share among themselves, viz. T, U, V, W and X.

The end result is as follows:

(1) four shares each equal to 1/36th of the family land go to J, K, L and M, one to each;
(2) one share, the equivalent of 1/9th goes to N;
(3) three shares each equal to 1/27th go to O, P and Q, one to each;
(4) two shares each equal to 1/6th go to R and S, one to each;
(5) five shares each equal to 1/15th go to T, U, V, W and X, one to each.

In view of the fragmentation resulting from apportionment of family land in the course of a few generations, the practical commonsense of retaining such land as group property will be apparent. And because of this weakness in the system, one sincerely hopes that the Farm Settlement Scheme of the Eastern Regional Government will make suitable provisions for succession to each farm in one piece where the settled farmer dies intestate.

C. Succession to Land Individually Held

(*a*) *Introduction*

The literature on the subject of succession to land individually held is rather confused and confusing. This is partly because in the past many attempts were made by students of Ibo land tenure to generalise from too few data, and partly because too many classes of landed property were (and still are) often subsumed under the term " individual land ". A necessary preliminary to a discussion on succession to land of this type will therefore take the form of classification. But first, a caveat is called for. There are Ibo societies in which the very idea of individually held land is viewed with deep-rooted distaste. Examples are to be found in parts of Owerri Province, especially in the Bende area. In these places land is owned by the individual only where he either (*a*) carved it out of virgin forest himself, or (*b*) bought it with his own money.[12] Even so the period of this individual ownership is limited to the acquirer's life time. At his death, the land passes into the ownership and control of the community as a whole. For the rest, the individual has no higher title to his holdings than a bare right of user. In the case of residential sites, he has a right of exclusive occupation and user but only for as long as he lives there. So will his descendants after him. As soon as they vacate the land, it reverts to the community. There is no right of alienation by way of sale. In the case of farmland or pasture land, all that the individual is entitled to is a right to be given a fair share of whatever plots the community decides to make use of from season to season. In a word, therefore, the question of succession at death does not arise as far as non-residential sites are concerned. As for residential land, inheritance is limited to a right of exclusive possession of one's home in the sense of the site on which one's compound is situated. The discussion that follows will, therefore, not apply to societies of the above kind.

(*b*) *Individual Land Classified*

We shall now attempt a classification of rights and interests in

[12] Either from a landowning group at home or from a neighbouring society where individuals can both own and sell their land. Some informants maintain that land bought by the individual with his own money in parts of Bende goes straight to the community of which he is a member, the purchaser being content with the thought that he is a benefactor to his people. However, even here land held on pledge is said to represent the pledge money, and so remains in the pledgee's possession. *Cf.* Green's statement that land held on pledge is inherited as personalty: *loc. cit.*

individually held land, and a summary of the rules of inheritance for each class. There are six main types of such rights and interests, viz. those in:

(1) residential land individually *owned*;
(2) farmland (including pasture land, fishing pools, etc.) individually *owned*;
(3) residential land held on "kola tenancy" or "shown";
(4) farmland held on "kola tenancy" or "shown";
(5) land held on pledge; and
(6) communal land held by a "protector".

(1) Residential land individually owned

For the purposes of the law of succession a man's residential site may be divided into three parts: (*a*) the owner's separate house (the *obi*) with its gardens;[13] (*b*) the wives' individual houses (the *usokwu*) with their gardens; and (*c*) the rest of the site, which we may call "the vacant lot" for short. Finally, we shall consider (*d*) succession to the entire family residential site if and when it is vacated by all.

(*a*) *Succession to the obi—the "family house"*

Ibo indigenous society sets great store on the practice of having separate establishments for the family head (this is the *obi*), for the wives (these are the *usokwu*), and for each adult dependant of whichever sex. There is therefore no "family house" in the well-known Yoruba sense of a huge many-roomed building which houses the entire family.[14] But the structure of the Ibo "compound"[15] is gradually changing. Besides, so many Ibo families now live in what we call townships (i.e., urban areas) where the normal pattern is the "family-house" that it would be naive to omit a discussion of this subject.

Unfortunately, however, the subject of family houses is one in which sentiment, ethos and law are hopelessly intermixed. The law is simple enough but is hardly ever enforced in its full rigour. In the traditional setting where the principal family house in the sense of the *obi* is the exclusive property of the

[13] For the sake of simplicity this will be deemed to include the man's sleeping quarters—the *ofe* or *unp aja*.

[14] But these do exist in some riverain areas such as Onitsha, Oguta and Asaba.

[15] The large walled-in space which holds the various "establishments" referred to in the text.

family-head, succession to it is by the deceased's eldest son[16] by whichever wife. Failing sons, his eldest brother inherits. In the absence of a brother, the nearest male relative will inherit. There is no question of partitioning. There is no joint inheritance by first-sons. There is no question of joint ownership by male members of the chief heir's *usokwu*. There is only one heir—the eldest son of the deceased,[17] and his title is exclusive. If he predeceased the late owner, his eldest son will succeed in his place. If this son is himself dead, *his* eldest son will take, and so on down the line. It is only where the original *diọkpala's* line has failed that the family house goes to the next son in order of seniority. With the family house go also such things as ancient carvings, the family *ọfọ* and *ikenga* which by English law may perhaps be described as heirlooms.

Complications arise where other family members were allowed to reside in the family-house during the life time of the deceased. Can the heir-at-law turn them out of the house on coming into his inheritance? The answer is emphatically in the negative. Natural justice as understood by Ibo law strongly prohibits a family member being turned out of his residence if when he entered into possession the legal owner was in the position of guardian or quasi-guardian to him. This prohibition extends to brothers, uncles, cousins, nephews and nieces as well as to widows, sons, daughters and other issue. This is the position in the indigenous Ibo society. But there is little doubt that cases of threatened ejection from township houses will be decided on the same principles if customary law is given a fair chance at the trial of the action.

If then family members in occupation are so effectively protected by an interaction of the principles of law and those of equity, may we not say that family houses are in fact jointly inherited by all family members as under Yoruba law? The answer once more is in the negative. In the first place, only persons in actual occupation are allowed to remain: non-occupiers have no rights or interests in the house. In the second place, as soon as the occupiers move away to another residence their interests lapse automatically. Finally, while in residence, they cannot dispose of their interests in the house to third parties (whoever they may be), and a persistent attempt to do so renders

[16] See, on the Western Ibo, Rowling's Report, *op. cit.*, para. 99.

[17] Contrast the Yoruba law on this point: Elias, *Nigerian Land Law* (2nd Edn.), p. 144 and *passim*.

them liable to ejection with the full support of the law.

The matrimonial home and the widow.—As indicated above, most Ibo societies do not have " matrimonial homes " in the sense of a single building, shared jointly by husband and wife (or wives) and their children. But some societies do have them, among these being Onitsha town, Oguta, Ozuitem and, of course, the numerous Ibo township homes. Moreover, even where matrimonial homes in this sense are not the rule, there are nevertheless young couples who as yet cannot afford the luxury of separate establishments for men and wives. The result is that in this section and the next we shall be dealing with two sets of " homes ", a joint home and the wife's separate home. And our main concern at present will be the place of the wife in the picture.

It may be stated quite categorically that a wife has no right of succession to the matrimonial home where this takes the form of a single house shared with her husband in his life time. Succession follows the lines we have already indicated in the section on the family house (p. 171, *ante*). But unless the heir ultimately gets married to the widow, he cannot go into possession till the widow has died or otherwise ceased to be the deceased's widow.[18] In other words, the widow has an unassailable right to reside in the house. It makes no difference to her rights that she had no sons or indeed that she was childless. She cannot be ejected from the house by reason only that a new legal owner has emerged following her husband's death.[19] She retains this right till death, remarriage or return to her people. But she has no right to dispose of the house or any part of it either permanently or for a period of time.

What would be the legal position where, as happens in townships, a widow decides (after her husband's death, that is) to move into another of the dead husband's houses? Has she a legal right to do this in the face of opposition from her late husband's relatives? Obviously this is a novel situation in Ibo social life and the question cannot be answered by reference to any rules of customary law properly so called.[1] But there are analogies one can properly draw. There is the case of a widow who wishes to move to a new site because she is fed up with the old home. Can she do this if her late husband's relatives object?

[18] Either by re-marrying or by going back to her own people.
[19] *Cf.* the position of "resident relatives" under "Family House", p. 172, *ante*.
[1] In the Austinian phrase.

There is also the case of a husband who died leaving two widows. One of them decides to remarry or to go back to her own people. The other wishes to move into the home of the deserting widow. Can she do this if there is opposition to the move? In the one case the new site, in the other the fellow widow's house was once the property of the deceased husband. Now there is a new owner in the person of the husband's heir-at-law. For women do not inherit their husband's land or houses under customary law. The similarity with a second township house is thus apparent.

Under customary law the answer to our question depends then on who the heir to the deceased husband's land is. If he has only one chief heir, and this happens to be the son of the widow in question, she has a perfect right to occupy whichever house she fancies, at all events during the heir's infancy, when she would act as his guardian[2] (actual or nominal). If, however, the heir happens to be a brother or other relative of the husband, the widow has no right to occupy a new residential site without the consent of the heir. The position is that the law allows the childless widow to retain the *status quo ante*. She may retain possession of whatever house (or part of a house) she occupied during the husband's life time. She may continue to farm on her husband's land as before.[3] But she has no right otherwise to disturb the economic state of the inheritance without the consent of the heir. This is also true where her son is a joint heir to her husband's land, the other joint heir or heirs being the eldest male member or members of the other house or houses (*usokwu*).

(*b*) *The usokwu*

The rights of occupancy over the wives' own houses (*usokwu/nkpuke*) are inherited by the eldest son as the *okpala nne ya* ("eldest son of his mother"). If the eldest son predeceases his mother, *his* eldest son, if any, inherits in his stead, as in the case of the *obi*. The difference lies in the fact that whereas the *obi* goes to the eldest son of its owner by whichever wife as *dikpala* of the household or "compound", succession to the *usokwu* is confined to the members of that "house" itself.[4] Thus suppose that the

[2] I hesitate to use the term *trustee* to avoid confusion with the English gratuitous caretaker of that name. But guardian is hardly apt here, as an uncle, etc., may in fact be acting as guardian to the infant heir at the same time.

[3] *Cf.* Green, *op. cit.*, pp. 15 and 31.

[4] But as will appear below, there is a fundamental difference in the nature of the rights inherited in the two cases. One covers the legal ownership, the other possession only. (See under "The vacated residential site, p. 175, *post*.)

eldest son, A, in a given *usokwu* is thirty years old while one of his half-brothers (same father, different mothers) is forty-five. A will still inherit his mother's *usokwu* and gardens. If a given *usokwu* fails of male members, its surviving female issue, if any, will retain full rights of occupation and user over their mother's house and its gardens, though not as owners. If they die out or marry and so cease to live there (marriage being virilocal), the house passes to whoever is the *diọkpala* (senior *ọkpala*) at the time. If all the *usokwu* fail of male issue so that the owner's line of descent determines, any surviving female issue actually in possession of the premises or parts of them will retain their full rights of occupation and user for life or until marriage, whichever first occurs. Thereafter, the eldest brother, or failing brothers, the nearest male relatives of the owner will succeed—priority being in order of seniority.

(*c*) *The vacant lot*

This we defined above as the rest of the residential site apart from the houses and their surrounding gardens. Succession to this, like succession to the *obi*, is by the eldest son of the deceased. If the eldest son is himself dead, *his* surviving eldest son inherits. Succession right here is exclusive, and so no other member of the family may make any use of this vacant lot or any part thereof without the heir's consent. In other words, the principle of joint inheritance has no application to this part of the estate.

(*d*) *The vacated residential site*

The " inheritance " rights of family members in the residential site after the founder's death are merely possessory, as already mentioned in passing. In other words, they have a perpetual right of possession over whatever part of the compound that was allotted to them by its founder, including, as we have seen, the right of a son to occupy his mother's house with its gardens or turn the same over to his wife. While they live there, the *ọkpala* has no right to evict them or otherwise interfere with their use of the land. (But they have no right to sell the plot or the houses thereon, or otherwise dispose of it permanently.) The chief heir's interest in these plots is, therefore, merely one of reversion if and when they are vacated.

If the members of a given *usokwu* die out or vacate their holding, however, possession thereof vests in the *diọkpala*. But there must be abandonment permanent and definitive, with complete loss of the *animus revertendi*, the onus being on the party who asserts such a loss to prove it. It is not enough that the occupier

has gone away to another part of the country in the interest of his education, trade or profession. It is not enough that while thus away he has secured a pensionable job or a township house, or both, of his own. For it is a notorious fact that the Ibo man, however well he does in foreign parts, and however long he resides there, will always want to spend his last days on earth in his place of birth. Hence the rule that *animus revertendi* has permanently been abandoned. But it is enough that the members of an *usokwu* have, for instance, moved house to another part of the family land, as often happens.

(2) Farmland individually owned

Where there are male issue

We use " farmland " here as a comprehensive term to include not only land used for seasonal crops but also pasture land and fishing pools. Succession to land of this type follows one of two main patterns. There are societies, chiefly in Owerri Division, where it is said that succession is by all the sons of the deceased owner jointly. In these societies partition, if agreed upon, is on a *per capita* basis. Thus after the eldest son (*diọkpala*) has received his traditional portion by virtue of his position as the new family head, the rest of the land is shared equally among all the surviving sons of the deceased. Choice of shares, as in most cases among the Ibo, is in order of seniority of age. The seniority of the various *usokwu* is determined not by reference to the arrival of the wives in the family but with reference to the birth of their first sons. Thus the youngest wife can give rise to a man's senior *usokwu* as between his children. (It is otherwise as between the wives themselves; for here the date of their arrival under the husband's roof, not their dates of birth, determines seniority among the wives *inter se*.)

The general rule for the vast majority of Ibo societies is, however, that as in the case of what was described above as family farmland, division among the joint heirs of the deceased is *per stirpes*. Thus there will be apportionment into as many equal shares as there are *usokwu* with surviving male children in them (after *diọkpala* has had his special share). The *usokwu* without male issue surviving will be disregarded, though its female members, if any, will be entitled for life to farmland (for their ordinary needs) commensurate with the amount of land available in the family. As between the members of each *usokwu*, division

is *per capita*. Both here and in the case of *per stirpes* partitioning, choice of shares is in order of seniority of age.

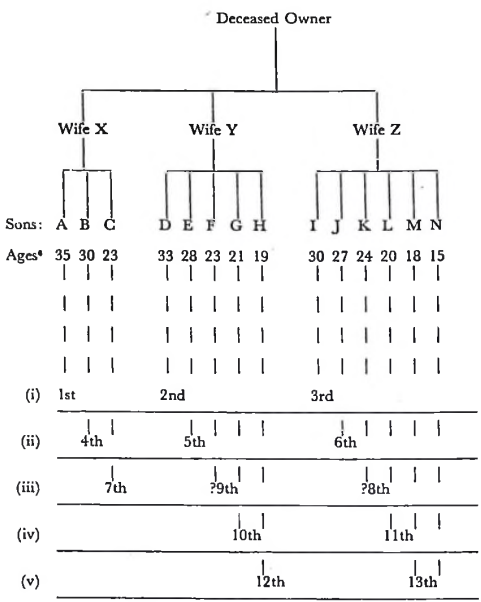
A rather curious form of proportionate division is reported by Miss Green among the people of Umueke Agbaja.[5] There the " chief share " is said to go to the deceased man's eldest son by whichever wife, as *diopara*. The next biggest share goes to whichever son, by a *different mother*, is next in age, and so on till the eldest son of each wife has had a share. The second sons next come in, again beginning with the house to which the *diopara* belongs. Then the third sons, the fourth, etc., the first share in each round going to *diopara's* house unless already exhausted. The shares diminish regressively all the time. But in what proportion does not appear. The scheme is shown in diagrammatic form on p. 178.

There are six rounds, (i)-(vi), and fourteen sons A-N born of three wives, X, Y and Z. The sons' respective ages are given under their names. In round (i) we begin with the house of Wife X because she has the oldest son, A aged 35. X need not be the first wife. The second share goes to D who is next in age, etc. In round (iii), C takes first because he belongs to Wife X's house (i.e., *diopara's* house) though he is younger than K, and the same age as F. But as between F and K, the older K should take before F according to Green's analysis. For though we always begin with *diopara's* house, the next share goes to whoever is the oldest son by a different mother in each round. But why? If 23-year-old C takes before 24-year-old K in round (iii) because of the former's membership of the X house, why should 23-year-old F not come in before 24-year-old K because the latter (K) belongs to a still junior house (Z), seniority being reckoned with reference to the age of the eldest son in each house? Perhaps there is no logic in the proceedings? One suspects that the whole scheme as enunciated is the result of a painstaking and ingenious analysis of the outcome of a single partitioning operation encountered in the field. Be that as it may, the fact remains that as a rule where division of the inheritance is done *per capita*, the sons take their shares purely in order of seniority of age, irrespective of what houses they belong to. We may also point out an apparent discrepancy between the scheme under discussion (Green, *op. cit.*, p. 12) and the more general account which followed it (Green, *op. cit.*, p. 13). In

[5] *Op. cit.*, p. 12.

Apportionment of Family Land

(Schematic representation of Green's order of priority)



[a] These age ranges are quite normal in Ibo society.

the general account we are told that if a man's sons by different wives[7] wish to apportion their father's holdings among themselves, the eldest son (*dịọpara*) is asked to choose a piece of land he would like for himself.[8] The rest is then divided up *equally*[9] among them all, including the *ọpara*. It is our submission that this is a correct account for practically all societies where division is *per capita*, and should be concluded with a statement to the effect that the sons then choose their shares in order of seniority of age.

Where there are no male issue

So much for succession by the sons of the individual owner of farmland and the question of partitioning among them. We turn now to the owner without male issue surviving. The order of succession here is first brothers of the whole blood, secondly half-brothers and, failing them, the nearest male relatives. Where there are more eligible heirs than one,[10] either they all succeed jointly or else the oldest of them inherits exclusively, according to local rules on the point.

In the case of land acquired by purchase, or held on pledge, lease or kola tenancy, a further complication may arise. The holder's father may survive him. In that case the father's place in the order of priority varies from place to place, as we have seen on more than one occasion. He certainly comes after brothers of the whole-blood and before those we have designated as " other male relatives ". But does he take in preference to or in the absence of half-brothers? There is no uniformity here; both answers are correct for different societies.

Sons or brothers?

Forde,[11] summarising data collected by Harris[12] on social life and property rights in Ozuitem, says that in that society brothers have a prior right of inheritance to sons as regards " personal land ".[13] On this Chubb remarks that perhaps Harris was dealing here with a case of an uncle acting as caretaker for his young nephew or nephews.[14] Chubb, for his part, maintains that sons do inherit in preference to brothers in

[7] The same situation as in the scheme on p. 178, *ante*.
[8] This is the *ishi ala, isi anị* (i.e., " head land ").
[9] Italics supplied.
[10] I.e., where two or more persons are in the same degree of blood relationship to the deceased.
[11] Forde & Scott, *op. cit.*, pp. 64–65.
[12] Unpublished papers on Ozuitem.
[13] This roughly corresponds to what we have called " individual land ".
[14] *Op. cit.*, para. 39.

Ozuitem. The present writer's investigations have led to the same conclusion.

To round off, we may recall here the order of succession as reported among the Western Ibo. This is said to be: sons, daughters, parents, brothers, and other paternal relatives.[15] It is interesting to note, too, that the English doctrine of *hotchpot* has no application to gifts made under Ibo customary law. (This is the doctrine under which a joint heir or beneficiary under a will who had a separate gift in the same will is required to bring it into account if he wishes to take a share of the joint property, subject to a number of conditions one of which is that the testator must be a parent of, or other person in *loco parentis* to, the beneficiary in question.)

(3) "Kola tenancies" and "showing tenancies"

We said elsewhere that whereas there is a fundamental difference between gratuitous tenancies[16] where the land is required for building sites on one hand, and gratuitous tenancies involving plots of farmland on the other (as regards security of tenure, the mutual rights and obligations of landlord and tenant, etc.) there is no material difference between "kola tenancies" and "showing tenancies" *per se*. The discrepancy, if indeed there is any, in the nature of, or the need for token payments in the two cases, as well as the necessity to renew the grant at the death of the present holder in one case but not in the other, stems not from the inherent nature of these two tenancies themselves but from the presence or absence of kinship ties between the parties thereto. Token payments are always made whether the land is merely "shown", or let on "kola tenancy". Annual tributes may be due in either case. The holder's heir may be required to ask for a renewal of the grant in either case, on pain of being turned out of the land. But whereas stranger-tenants and remote relatives must pay these occasional tributes and may be expected to make those applications for renewal in both cases, kinsmen are not expected to and do not do so. We shall, therefore, deal with these two types of tenancy—"kola" and "showing"—as two identical subjects for the purposes of the law of succession, while keeping residential and farming tenancies apart.

(4) Building sites held on "kola tenancy" or "shown"

Building sites held under one of these tenancies in Ibo tradi-

[15] Rowling, *op. cit.*, para. 99.

[16] As opposed to those for which economic rents are charged.

tional society are inherited in much the same way as individually owned residential sites already discussed.[17] Thus the eldest son of each *usokwu* inherits his mother's house and gardens. The eldest son of all inherits the *obi* and its gardens. In addition, this eldest son inherits the vacant portions of the site. If any *usokwu* is without male issue, its female members, if any, retain their rights of occupation and user for life or until marriage (or re-marriage), whereupon the plot passes to the eldest son.

But there are several points of departure from the normal rules of inheritance arising out of the very nature of these tenancies. In the first place, the detailed rules of succession (e.g., whether there will be joint tenancy or primogeniture in relation to the "vacant lot") may be different from those prevailing in the locality where the land is situated. This is because the tenants concerned may have been absorbed into the social fabric of the landowning group for all practical purposes. In that case the local rules of inheritance[18] will prevail among their descendants and heirs. On the other hand, these tenants may have come in large groups and retained their separate identity. This is a frequent feature among Awka and Aro settlers. In such cases, the detailed rules applicable will be, not that of the local society, but the personal law of the tenants.[19] In the second place, succession to tenancies of these kinds is normally limited to the sons of the tenants. Brothers or other relatives do not succeed unless they too were resident on the site at the time of the principal tenants' death. To give brothers or other kinsmen the right to inherit otherwise would be tantamount to having to accept new tenants whose character is neither known nor approved by the landlord or the society at large. If then the tenant dies leaving no male issue, his female dependants living on the site, if any, are allowed to remain there for life or until marriage, as indicated above. Thereafter, the land reverts to the grantor or his heirs.

In the third place, this may not be strictly a case of succession to land. It may rather be one of inheriting a right to ask for a renewal of the grant. As we saw earlier, the heir to the estate of a stranger-tenant sometimes must, if he wishes to remain on the

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[17] See pp. 171 *et seq.*, *ante*.

[18] The *lex situs*.

[19] A miniature case of conflict of laws. Contrast with the English rule on the subject which says that succession to land is always governed by the *lex situs*.

land, apply to the landlord for the time being for a renewal of the tenancy. And as we have seen, the latter has no right to refuse the request provided the heir in question is either a son or a resident dependant of the deceased. It is this *right* to have the tenancy renewed on request that is the subject matter of inheritance in a case like the present, not the land itself. Finally, the heir may not wish to remain on the land. In that case, the land reverts to the landlord. But not so any economic trees and plants grown thereon by the tenant. These remain the property of the tenant and his heirs, and succession thereto may be governed by the personal law of the latter. If they are kinsmen, this will be the *lex situs* incidentally. If, being strangers, they leave the local society, their personal law may be quite different from the *lex situs*. This raises the question: At what point of time is the law applicable to a given case of inheritance decided—at the time of the tenant's death or at the time when partition is decided upon, which may be a considerable time after the heirs have left the land? The *prima facie* answer, following English law, is: the time of death. But is this true of Ibo law? Suppose a kola tenant, T, dies leaving three sons by different mothers A, B, C. According to the *lex situs*, A, B and C should inherit jointly. But according to the law of the society to which they removed after the death, the eldest A, should inherit. They move away shortly after the tenant's death (as happens where foul play is suspected in connection with his death), before his estate is distributed. Months later, they decide to distribute the estate. Will they let A have the economic trees in question in accordance with the *lex situs*? Surely not. The chances are that they will apportion the estate in its entirety in accordance with the law of their new home. Unfortunately, however, the present writer has not been able to discover a concrete case of this nature.

(5) Farmland held on "kola tenancy", or "shown"[20]

As we saw earlier on, "kola" and "showing" tenancies are always conditional on the tenant's continued good behaviour, and are sometimes governed, besides, by a tacit understanding that the grant is for the tenant's life only.[1] If he is not a kinsman, then at his death his heirs, if they wish to remain in possession,

[20] We are here concerned with those indefinite *ex gratia* grants which are characteristic of Ibo customary tenure.

[1] See Chubb, *op. cit.*, para. 96, for "kola tenancies".

have to ask for a renewal, and must make fresh kola payments to the landlord or his successor in title. It may be objected, therefore, that the tenancy comes to an end with the tenant's death and so there is nothing left to inherit. But this is an over-simplification. The tenancy indeed determines at the tenant's death. But, other things being equal, his heirs have a right to apply for a renewal which the landlord, for his part, has no right to refuse.[2] As already indicated, it is this right, not the land itself, that is the subject matter of inheritance.

The rules of inheritance are the same as those for personalty,[3] except that the list of eligible heirs is shorter in the instant case. Succession is limited to the tenant's sons or, failing sons, those dependants who had close kinship ties with him. This cuts off such dependants as his wives' brothers and cousins living with him in his life time. As between his sons, the eldest is exclusively entitled to succeed, because it is both his duty and his privilege to provide the family, of which he is the new head, with farmland sufficient for their normal requirements. In the absence of sons, brothers or other immediate relatives may succeed but only on two conditions: first that they are his dependants, and secondly, that they used to farm on that land with him, or would if they were old enough. Wives and daughters are entitled to continue using the land for life or until marriage. Once the tenancy has been renewed, the individual family member's rights of user therein are the same as in the case of ordinary family farmland.

(6) Land held on pledge

Land held on pledge is regarded everywhere in Iboland as personalty, representing the loan advanced on it. Succession to it is therefore on the same lines as we have discussed in connection with movables. Thus if the pledgee left sons, all by the same wife, his eldest son will inherit to the exclusion of his junior brothers.[4] If there are sons by different wives, the oldest from the various *usokwu* (" houses ") inherit jointly. Failing sons, brothers of the whole blood will succeed. If there are no brothers of this class, the father takes. Failing father, half-brothers succeed, the eldest taking to the exclusion of the rest. In the

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[1] Chubb, *loc. cit.*
[2] *Cf.* succession to land held on pledge, para. (6), *infra.*
[4] And to the exclusion of all his sisters and half-sisters, whatever their ages.

absence of half-brothers, the nearest male relatives inherit in order of seniority. Rights of user attaching to family members are the same as if the land in question were family farmland.[5]

(7) Communal land held by " protector "

It sometimes happens that wealthy or influential members of given land-owning groups (family, village, etc.) assume the role of " protector " over specific tracts of land owned by that group, the object being to prevent the land in question being lost to outsiders in litigation or feud. The " protector " need not have spent any money in preserving the land for the group. If he did, his rights and interests would be those of an ordinary pledgee (for all practical purposes) already dealt with under the last heading above. In cases of the instant kind, all he does is to place the land under the protective umbrella of his awe-inspiring name by letting it be known to the world that the land in question is his individual property. To give semblance of truth to the story, the group transfers to him what Chubb calls full usufructuary rights over the land. But there is a tacit understanding that he will surrender these rights to the group at his death. In actual fact, however, he never does, and they pass to his heirs, particularly where these (or some of them) happen to be wealthy or influential too. The order of inheritance here is sons, father, brothers or nearest relatives in order of seniority. This is the legal position. In actual fact whoever has the wealth or influence in the family takes over the land for life. This " selective succession ", as it may be called, may go on from generation to generation till the original owners'—the groups'—title is either forgotten or else re-established in full by their resuming possession. There is, of course, nothing in law to prevent succession to rights and interests in land thus held being done in strict accordance to the normal principle of primogeniture. But then the whole point of " protection " would be lost if the land were to pass into the hands of a man of modest means or humble social prestige. If the danger which gave rise to the transaction in the first instance still exists, the group will be forced to enlist the services of a new " protector " and so terminate the existing line of succession. If that danger no longer subsists, the group would naturally want to recover possession; and the weak economic or social position of the present holder would facilitate their move in that direction.

[5] Chubb, *op. cit.*, para. 37.

D. Succession to a Man's Estate by his Daughter

The general rule in Ibo patrilineal societies is that a woman—be she wife or daughter, sister or niece—has no right of inheritance over a man's estate or any part of it. But this rule is subject to exceptions among the Western Ibo, where the influence of the Yoruba law of succession can be clearly seen at work. For here is found that interesting institution known as *idegbe* whereby a daughter may choose to remain unmarried in her father's house with a view to raising children in his name.[8] This happens where a man dies leaving a substantial estate but no sons or other male issue to inherit it, and so the *idegbe* institution is designed to save his line of descent from closing down. (Incidentally, a similar institution is also to be found in parts of Iboland East of the Niger, e.g., in Abatete, Onitsha Division. But its existence there does not disturb the normal rules of inheritance.)

As an *idegbe*, a daughter can inherit her father's estate, that is both land, trees and movables. Pending the birth of her children (by a paramour), she is regarded as the legal owner of the estate. If she dies without issue, the normal law of succession operates as if she never existed. If, however, she does bear sons, they will succeed in accordance with the normal principle of primogeniture already described. During the children's infancy, the mother holds the estate for them as caretaker, though she has a right to her maintenance out of its produce. If only daughters are born, they too can succeed, and presumably the eldest will in turn choose to remain as an *idegbe*.

In addition to a woman's right of inheritance as an *idegbe*, however, she can also succeed to her father's property in the absence of sons, in most parts of Western Ibo. This is evidently a result of close proximity with Yoruba societies whose law gives women practically equal rights of inheritance with men. But as Rowling himself said, this rule is subject to qualifications in a number of places.

E. " Widow Inheritance "

It is a popular opinion among European writers on African law that widows can be, and normally are, inherited. Some even go a step further and assert that they are inherited as property—

[8] Rowling, *op. cit.*, para. 99.

as an integral part of the deceased man's estate. Thus we find Archdeacon Basden asserting categorically that

> " Personal property, *including the wives* . . . descends to the eldest son as heir . . . A wife ordinarily has no rights, either over herself or her possessions. . . . She is part and parcel of her husband's property."[7]

As we saw earlier on this could lead to the absurd situation wherein the eldest son inherits his own mother as property. But in actual fact the mother of a man's eldest son and heir can only be married by one of his brothers or other relatives, never by any of his sons who, ex hypothesi, are all younger than her eldest son. Could we then say that widows are inherited, and inherited the normal way, except that the mother of the eldest son is inherited by a secondary, not principal, heir? This raises the fundamental question: what exactly is *inherited* in relation to a widow? Is it the widow herself as a chattel,[8] the widow as a wife, or a right of first refusal should the widow decide to marry again? The first alternative is patently absurd. Even in the darkest days of the slave trade an heir-at-law had no right to dispose of a widow to the highest bidder, at his sweet pleasure. The Ibo wife is not a chattel and never has been. Many an inter-village feud in the past had their origin in complaints by maltreated wives to their own people against their husband (or his people) followed by a practical demonstration of resentment by the former. As a last resort a wife could always go back to her own people—which could not be said of slaves, themselves placed on a higher rank than chattels by Basden's own admission.[9]

Is it then the widow as a wife that the heir inherits? In other words, is there really what has come to be known as " widow inheritance " in Ibo law? Let us take a brief look at the process by which a widow becomes the wife of her husband's heir. At least fifty-six days after the man's decease (*asaa naabọ*) there is a meeting of senior members of the lineage group, including daughters being married elsewhere. The widow is brought in and asked if she likes H, the heir, and would like to marry him. If she says No, there is the end of the matter. If she says Yes, a day is fixed for the re-marriage ceremony. Till this ceremony

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[7] *Among the Ibos of Nigeria*, p. 32.

[8] As implied in Basden's words: " She is part and parcel of her husband's property."

[9] *Op. cit.*, pp. 109–110.

(*inughari di*,[10] *igbugha ọkụkụ*[11]) has been performed, widow and heir are *not* husband and wife. Indeed it is a cardinal rule of law that no act of sexual intimacy shall take place between them until this is done. If this rule is broken, *there is* ipso facto *an absolute bar on marriage between the two persons*. Moreover, three other alternatives to marrying the heir-at-law are open to a widow. She may decide to go back to her own people. She may decide to " remain for " her late husband (*inọlụ di ya*) in which case her marriage with him is not dissolved but goes on in spite of his death, any subsequent children being the dead man's legitimate children. Or she may decide to marry another member of the late husband's family, not the heir.

Enough has been said to show that succession to a widow is *not* automatic and never has been. If then a man's principal heir does not *inherit* his widow, if a widow is not inherited at all unless she consents to remarry within her late husband's family, if there must be no husband-wife relationship between heir and widow while still a widow, one wonders what justification there is for talking of " widow *inheritance* " in the context of Ibo customary law. An overt act—a compulsory ceremony—is required to terminate the widow's marriage with her deceased husband,[12] and another is required to unite her to the new spouse. If the breaking up ceremony is not performed, the widow remains wedded to the deceased. But this is not, as might be thought, because she is part of his estate, but because African marriage is for most purposes proof against husbands' death. What then does the heir inherit in relation to the widow? It is our submission that this is no more than a right of " first refusal " should the widow decide to re-marry. Perhaps " first refusal " is inaccurate, as the widow, not the heir, has the last word. " First option " seems more apt; but as the final choice is the widow's we should perhaps best describe the heir as " the most eligible candidate ". Whatever the right term for the heir's legal position *vis-a-vis* the widow, it is *not* a right of inheritance. And lest it be objected that this contention is based on a recent develop-

[10] Lit. " to remarry ".

[11] Lit. " to kill the change-over fowl ", the idea of change-over being expressed in the suffix *gha*.

[12] It is a well-known principle of African customary law of marriage that the death of the husband does not necessarily terminate the marriage state of the surviving wife. See, e.g., Stafford and Franklin, *Principles of Native Marriage and the Natal Code* (1950), p. 113; Phillips (ed.): *Survey of African Marriage and Family Life*, p. 287.

ment in the law—a new-found freedom of self-determination on widows' part—we must hasten to add that the widow has always been free to decide whether or not to remarry, and to whom.

F. Succession to Women's Property

(*a*) *Unmarried Women*

We define "unmarried women" for the purposes of this section as women who have never been married and those who have been legally divorced in so far as concerns property which the latter acquired after the divorce. This definition excludes widows who choose to remain, unattached, in their late husband's place, for, as we have seen, they still retain the legal status of married women in some respects at least.[13] Women falling within this definition may perhaps better be designated as *femes soles*, as "unmarried" seems to imply "never married". And the *estate* of a *feme sole* as thus understood may be defined as all her disposable property at death, including the ante-nuptial property of a divorcee which she never brought to her ex-husband's place. As we shall see later, property of this kind remains the woman's separate property even during coverture.

In the matter of succession, the estate of a *feme sole* may be said to consist of three parts: (1) articles of personal adornment such as trinkets and clothing; (2) land and economic trees; and (3) all movables other than the former.

(1) Articles of personal adornment

These are inherited in the following order of priority:

1. The eldest sister of the whole blood. She takes to the exclusion of all other sisters; but unlike a male heir, she assumes no corresponding obligations towards her junior sisters.
2. Failing a sister, then the mother. Her right to the articles is an absolute one. But if the deceased had died rather young, the mother would think of her inheritance as held in trust for her grand-daughters if any, as the items that constitute the subject-matter of inheritance under this head would naturally be a little too flashy for a middle-aged or old woman. However, there is nothing in law to stop her from disposing of them at will and to anyone of her choice.

[13] E.g., any children born to them subsequent to their husbands' death are legitimate children of those husbands; they retain their rights of occupation and user over their late husbands' landed property, etc.

3. Failing the mother, the eldest brother of the whole blood. Naturally he will not have much use for these articles, and usually hands them over to his wife or daughter. But here again, he has full legal rights to dispose of them at will.
4. Failing brothers, the father may inherit, though in some societies half-sisters[14] have a higher priority than the father in this connection.
5. Failing fathers or half-sisters (according to the local rules), the nearest eldest female relative of the deceased on the father's line will succeed.

Children of a divorcee who were born before the divorce have no right of succession to their mother's post-divorce property.

(2) Land and economic trees

These are inherited by men only, the order of priority being:

1. The father. It is not surprising that the law gives him a higher priority than brothers in view of the fact that, after all, he was entitled to the deceased woman's " bride price " (marriage consideration) but never got it, or, having received it in the case of a divorcee, has had to refund it.[15]
2. Brothers of the whole blood come in next in order of seniority—the eldest taking to the exclusion of all others.
3. Half-brothers,[16] in order of seniority.
4. Failing these, the nearest eldest male relative of the deceased's father.

(3) Movables[17] other than articles of personal adornment

These are inherited in much the same order of priority as land and economic trees except that the mother comes in here. The order is therefore as follows:

1. The father.
2. The eldest full-blood brother.
3. The mother.

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[14] I.e., of the same father but different mothers. Half-sisters in the sense of daughters of the same mother by different fathers do not come in at all except perhaps where the second father was of the same family as the first so that there has been " widow inheritance ". Even here sentiment, not law, would be at work.

[15] There could be no legal divorce under customary law till the marriage consideration (" bride price ") has been refunded.

[16] These have the same definition as half-sisters (see note 14, *supra*) with the sexes changed.

[17] This class includes money and animals.

4. The eldest half-brother.
5. The eldest, nearest male relative on the male line.

(b) Succession and Illegitimate Children of a feme sole

What, in terms of succession rights, is the legal position of any children the deceased woman might have had as a *feme sole*? To begin with, such children are illegitimate under Ibo law. Incidentally, this is the only case of illegitimacy known to Ibo customary law. A child is not illegitimate merely because he was born of a liaison between his mother and a man who is not her husband. Provided the woman concerned was, at the time the child was conceived, the lawful wife of anyone, or a widow whose marriage consideration (bride price) has not been refunded, the child is a legitimate child of her husband whether living or dead. But a child born to a woman who is unmarried or legally divorced is an *ọdịị, ọdanye* (" a fallen tree ", " a wild plant ", the idea being that whereas legitimate children are sown by man, this one was self-sown). He is not, in strict legal theory, a member of his mother's family into which he was born. He does not belong to the land. He cannot inherit land on anyone's intestacy. As far as the strict letter of the law is concerned, therefore, an illegitimate child has no rights of inheritance over his mother's land or economic trees.[18] But custom or sentiment may have other results, and often does. The result is that *nnwa ọdịị*, though in law *nnwa usokwu* as opposed to *nnwa obi* is almost invariably allowed to share the family property as if he were a member thereof.

As regards property of class (1) type, viz. articles of personal adornment, an illegitimate daughter ranks above any sisters of the deceased, for, father or no father, she is still her mother's daughter. An illegitimate son, too, has succession rights here, but he ranks below his illegitimate sister, though above everybody else. The order of priority here is, therefore, daughter, son, full-sisters, mother, full brothers, father or half-brother, and the nearest male relative.

As to property class (3), (movables other than articles of

[18] Such a child has no legal relationship to his natural father and can not succeed to any of his property on intestacy. The position would, however, be quite different if he were later legitimated by subsequent marriage between his " parents ". But the question whether or not legitimation is recognised by Ibo law, fascinating as it is, falls outside the scope of this book and cannot be pursued here.

personal adornment), an illegitimate son ranks highest in order of priority. Next comes an illegitimate daughter, followed by father, full-brother, mother, half-brother and nearest male relative, in that order. This means that, land apart, a *feme sole's* property is inherited by her illegitimate children, if any, dress articles going to daughters, other movables to sons.

G. Married Women's Ante-Nuptial Property

We saw earlier on that though women as a rule do not inherit land, least of all in their place of birth, they can acquire exclusive rights and interests in land by purchase, pledge, gift, or lease.[19] This right to acquire is open to them both before and after marriage. And a woman can, as we saw, not only acquire but also inherit movables. What rules govern the right of succession to a woman's ante-nuptial property? Once more a little classification of such property is necessary, this time into movables and land (including economic trees).

(*a*) *Movables*

She may have taken these to her husband's place on marriage. If she did, they thereby become integrated into his property *vis-a-vis* everybody but herself,[20] and are inherited exclusively in *his* line of descent. Thus, at the wife's death, such movables (or what remains of them) will be inherited by her children born for him: articles of personal adornment by her daughters, the rest by her sons. If there are only daughters, they inherit the whole, so do sons where there are no daughters. In the absence of children, the husband succeeds, as he does her post-nuptial property. If he is already deceased, *his* nearest relatives will inherit, in accordance with the rules already discussed. Where there are children but these are infants at the time of the woman's death, their father (or nearest male relative) takes over the property as caretaker for them.

Sometimes, however, a woman fails to take some of her movables to her husband's place following their marriage. This she may do for a variety of reasons. She may decide to give them away to friends or relatives. She may sell them or give them out on loan. In the case of livestock, she may farm them out to a

[19] Meek, *Land Tenure and Administration in Nigeria and the Cameroons*, p. 186.
[20] E.g., it is his duty to defend them or sue for the appropriate remedy in case of detinue or conversion.

third party under the traditional form of contract whereby she is entitled to two of their young for every one of the caretaker's. What is the fate of property thus disposed of at the woman's death? In the case of sale or outright gift, there is nothing that her heir or heirs could do. But in the other cases—pledge, conditional gifts and livestock contracts, a serious point of law could arise. Does the fact of her retaining rights of ownership during her life time and coverture constitute a sufficient act of constructive " bringing to her husband's place " so as to give him and his heirs a right of inheritance? Or is the fact of her thus keeping them away from her husband's place proof of her intention to take them off his line of succession? Where there are children of the marriage, this dilemma does not exist. They inherit the property, and may call on whoever has them for the time being to hand them over. This is because a woman's children inherit her movables whenever acquired.[1] If, however, she left no children surviving, some extraneous evidence is required to tip the balance of claims in favour of either the husband or the woman's people. There must be evidence of her intention either to keep the property for her people or to pass it over to her husband. Any declarations of hers are admissible whether as direct evidence by the person told, or as hearsay evidence by anyone. Ibo law does not reject hearsay evidence simply because it is hearsay. (The question of what weight is attached to it is a different matter.) Indeed it is good evidence of intention that she kept quiet about the property in her husband's place while making no secrets about it among her own people, and vice versa. Once this little dilemma is broken, succession takes the same lines either as we have indicated above, or as will appear later under " Property Acquired During Coverture ", p. 193, *post*.

Land, including Houses and Economic Trees

In the nature of things, landed property acquired before marriage is not brought to the husband's place, and never comes under his control or ownership by operation of law. Succession thereto is not by him or his heirs but by the woman's own people, if she died, leaving no children. If she left any children, inheritance is confined to them and their issue, to the exclusion of their father's other children.[2] Sons inherit the property itself.

[1] Post-divorce property apart.

[2] *Cf.* Harris, " Papers on the Economic Aspect of Life Among Ozuitem Ibos " (1943), 14, " *Africa* ", at pp. 12 *et seq.*, 302 *et seq.*

Daughters succeed to their mother's exclusive right of user, for life or until marriage (where there are no sons). If, there being no sons of the woman, her daughters' rights of user ultimately determine, the property goes to the woman's brothers, etc., as if she were a *feme sole*. A husband does not succeed to the landed property acquired by his wife before marriage.[3] (This rule applies also to property received by a woman before marriage under the will of one of her relatives.)

A problem of growing importance is the husband's legal position with reference to his late wife's house acquired before their marriage and in which they lived at her death. If she died childless, can the husband succeed to this house apropos his wife's male relatives? The High Court has held with reference to Onitsha law that the woman's male relatives, not her husband, would succeed in these circumstances. This was in *Nwugege* v. *Adigwe*.[4] There is every reason to believe that this principle is one of general application to all Ibo customary law. Our law is resolutely set against a non-member owning residential land within the confines of a given society unless he intends to become absorbed into the social fabric.

H. Property Acquired During Coverture

This subject represents one of the most interesting aspects of Ibo customary law, cutting as it does right across the rules of inheritance to property. Here for the first and only time we are face to face with the principle of *ultimogeniture* (succession by the youngest child) found among the Marki of the Verre "tribe" in Northern Nigeria,[5] running side by side with the normal Ibo principle of primogeniture.

(*a*) *Land*

We saw elsewhere that a married woman can acquire rights and interests in land by purchase, loan, pledge or lease.[6] We saw, too, that so long as these rights and interests are acquired

[3] Meek, *op. cit.*, p. 186. This is subject to there being contrary agreement with her husband.

[4] (1934), 11 N.L.R., 134.

[5] Elias, *Land Law* (2nd Edn.), p. 233, and Meek, *Tribal Studies in N. Nigeria*, Vol. I, p. 415.

[6] Forde and Scott, *Native Economies of Nigeria*, pp. 66–67; Meek, *Land Tenure and Land Administration . . .*, p. 186.

with the woman's own money or are given her separate use, they are exclusive to her so that neither nor his kinsmen could interfere with her use or disposi during her life time. At her death, these rights a pass to her sons. In some places, chiefly in Onitsh there is joint inheritance by all the sons. But the gen that the eldest son succeeds to the exclusion of the ot case of residential land (on the familiar principle geniture); whereas all sons succeed jointly where th question is farmland. If the sons are still infants, the (or his nearest male relative, if he is dead) takes over c the land as caretaker[7] for them.[8] Succession to a woma in after-acquired land is restricted to her male descendan patrilineal basis. Her own kinsmen have no right of su to any property which she acquired during coverture. includes property acquired after her husband's death but her marriage consideration (bride price) was refu (Daughters have no right of inheritance over their m landed property.) Failing sons,[10] the husband inherits. I already dead, his sons by other wives, or brothers or n male relatives will succeed in that order. But in all those where the deceased woman left daughters and no sons, daughters have a right of user, for life or until marriage, over t mother's land.

(b) Movables

While land and economic trees are inherited by sons e clusively, many movables are inherited by daughters. The ch heiress here is the *youngest daughter*, hence our remark about ult mogeniture above. The saying is: *ọdụ nnwa na-eli aku nne ya* (li "the youngest child eats the mother's property").[11] The elde daughter is entitled to a few items. For instance, in parts o Onitsha Division all she gets is a right to select one article of clothing, one necklace and one or two cooking utensils. The

[7] Meek, and Forde and Scott use the term "trustee".

[8] Forde and Scott, *Native Economies of Nigeria*, pp. 66–67; Meek, *op. cit.*, p. 186.

[9] As we saw above, marriage under customary law is not dissolved by the death of the husband. To do this there must be either a formal dissolution and re-marriage within the late husband's family, or a refund of the marriage consideration (bride price).

[10] Or grandsons (i.e., sons' sons), for these succeed in their father's stead.

[11] As we saw in the section on classification of property, "*aku*" as "property" does not include land and may be called "personalty".

rest of the mother's movable property other than money goes to her youngest daughter. Intermediate daughters get nothing. An only daughter gets the lot, of course. Money goes to the *eldest son.*

If there are no daughters, the *youngest son* inherits all the movables except money, which is always inherited by the eldest son. If the principal heir or heiress is already deceased, his or her children will succeed in their place according to sex. We may point out here that so far as succession to a married woman's property is concerned, it is immaterial that her chief heiress or her eldest daughter, as the case may be, is already married at the time of her death. She retains her right of succession and may come over from her husband's place to claim her inheritance.[12] In the absence of sons or daughters or their issue, the husband inherits his wife's movables as he does her land. If he, too, is already dead, his sons by other wives, brothers or other male relatives inherit in that order.

To summarise, land acquired by a married woman during coverture is inherited in the following order of priority: sons jointly or eldest son exclusively,[13] husband, husband's sons by other wives,[13] husband's brothers or nearest male relatives; movables are inherited in this order: youngest and eldest daughters,[14] youngest and eldest sons, husband, husband's sons by other wives, husband's brothers, or his nearest male relatives; the husband takes control on behalf of infant heirs; so does his nearest male relative, if he is dead.

I. Infants' Property

General rule

Succession to the property of a boy is exactly on the same lines as succession to the property of an adult male who left no wife and no issue, and has already been dealt with. Similarly, succession to an infant girl's property is the same as that to a *feme sole*, also already described.[15] Here it is necessary to point out a rather special case of inheritance rules concerning *nkwu ala (nkwu ana)* as defined on p. 94, *ante*. According to Miss

[12] And to discharge her onerous and expensive duties in connection with her mother's funeral and "second burial" rites.
[13] Or their male issue.
[14] The chief share going to the first-mentioned.
[15] See pp. *156–157, 179, 188–190, ante.*

Green, the infant's mother has " exclusive rights over the nuts of this tree ". And at her death the tree is inherited by the *wives* of her sons.[16] Whatever the local variation in Umueke, the general rule is as follows. If the deceased was survived by sons (or by sons of his deceased sons), his eldest son inherits his *nkwụ ana* (*nkwụ ala*) exclusively. If he left a wife or mother but no male issue, she is entitled to a life interest in the palm tree. At her death, the father of the deceased owner (or whoever dedicated the palm tree to him) will resume ownership and possession. It may be pointed out that in all cases where a man inherits or otherwise acquires a palm tree, its user is normally turned over to his wife, or if unmarried, to his mother. But this is a different proposition from asserting that *nkwụ ana* is *inherited* by mothers.

For the sake of convenience, the other rules of inheritance to infants' property are summarised here.

Boys' estate

Both *land and movables* are inherited as follows: By the deceased's eldest full-brother (*nne ojiji*); if none, by his father; if already dead, by his eldest half-brother (*nna ojiji*); if none, by his nearest male paternal relation. The son of a deceased brother takes in place of his deceased father.[17] (This scheme applies where the infant left no children, child marriage being lawful until 1956, when it was prohibited in the Eastern Region of Nigeria by the Age of Marriage Law, 1956. If the infant left children, the normal rules of inheritance apply.)[18]

Girls' estate

A girl's *land* is inherited by her father; if he is already dead, by her eldest full-brother (*nne ojiji*); if none, by her eldest half-brother (*nna ojiji*); if none, by her nearest male paternal relation. Here again, the son of a deceased brother takes in his father's place. A girl's *articles of dress* are inherited by her eldest full-sister, or mother, or eldest full-brother, or father, or half-brother, or half-sister, or nearest male paternal relation—in that order. Her *other movables* are inherited by her father, eldest full-brother, mother, eldest half-brother, or nearest male paternal relation—in that order.[19] (This is for unmarried girls.)

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[16] *Op. cit.*, p. 20.
[17] For details, see pp. *156–157* and *179, ante.*
[18] For these, see pp. *155–159* and *165–168, ante.*
[19] For details, see pp. *188–190, ante.*

CHAPTER 9

SUCCESSION TO PROPERTY IN DOUBLE-DESCENT SOCIETIES

Chubb says there is matrilineal succession to both land and movable property in the Afikpo, Amaseri, Edda, Enna, Okpoha, and Uwana areas of Afikpo Division, and in the neighbouring town of Ohafia in Bende Division.[1] This is, however, not the whole picture. The true position is that there is a complex system of double descent in these areas. Everyone of the informants consulted says so, and the researches of Ottenberg in Afikpo town confirm it.[2] But before we go into the detailed rules of inheritance one or two observations seem to be called for. To begin with, it will be noticed that these societies border on the Ekoi territory of the upper Cross River basin with their characteristic matrilineal laws of inheritance. Indeed a large part of Afikpo Division is not Ibo-speaking, while the inclusion of Ohafia in Bende rather than Afikpo Division may well owe its origin to some ethnological mistake on the part of one of the early British administrative officers. Be that as it may, the point is that the seven towns under discussion have at least as much in common with the Ekoi as they do with the Ibo. Nevertheless, the influence of Ibo culture and outlook (however elusive these concepts are) may be seen at work in two directions here. First there is a patrilineal system superimposed on the normal Ekoi matrilineal system. Secondly, there is the same bewildering diversity as between neighbouring towns or even villages—the hallmark of Ibo law and society. The other point is that the idea of individual ownership and control of land is still rather elementary in these societies. The question of succession to land, therefore, does not generally assume such important (and often explosive) proportions as it does in the more individualistic parts of Iboland.

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[1] *Op. cit.*, paras. 40-41.

[2] Simon Ottenberg, *Double Descent in an Ibo Village-Group* reprinted from *Selected Papers of the Fifth International Congress of Anthropological and Ethnological Sciences, September 1956* (Philadelphia, 1956, University of Pennsylvania Press).

Men's Estates

Classification

For the purposes of the law of succession a man's estate may be said to comprise three distinct parts. These are (*a*) patrilineal land and economic trees growing on it; (*b*) matrilineal land (also including economic trees); and (*c*) movable property.

Social and political structure

The double-descent societies with which this chapter is concerned differ considerably from the rest of the Ibo already described by the emphasis they give to matrilineal kinship in property matters. To facilitate a proper understanding of their inheritance laws, a brief description of the structure of these societies will be given here by way of introduction. Each of them is made up of a number of major patrilineages which in turn consist of minor patrilineages. The patrilineal groupings are territorial in the sense that their members reside (in villages and compounds) within well defined areas. The chief cementing factors between the various compounds, and indeed between the individual members, are the fact of living in close juxtaposition with each other and the possibility of mutual aid in work and defence. Kinship ties within the patrilineage are loose and often of less importance than matrilineal kinship ties.

Cutting right through these territorial conglomerations are the criss-crossing groupings known as matrilineages. As Ottenberg put it, these groups (which he calls "matriclans")

> "are corporate, exogamous, non-residential groupings. . . . Each has a female founder and a traditional history."[3]

The matrilineages are descendants of a common ancestress in the female line, whatever village they were born into. The minor groups, those that were born within the confines of a given village, are exogamous, but the larger matrilineal groupings are not. In all cases these groups are non-residential. For as relationships are traced through mothers only, and as marriage is virilocal (patrilocal), the members of a given matrilineage tend to be scattered all over the town and beyond it. Nevertheless, they manage to stick together for many purposes.

It will thus be seen that while patrilineages may be called political groupings of a loose federal type, matrilineages are essentially social groups. Both systems of grouping are to be found in every Ibo society. But nowhere else are matrilineal

[3] *Op. cit.*, p. 475.

groups of any significance in relation to rights and interests in property, to say nothing of succession law. In the societies under review, however, both patrilineages and matrilineages own property, control its user and specify its lines of descent in each individual case. Hence the dichotomy into matrilineal and patrilineal land.

(3) Patrilineal land

Patrilineal land is an ambiguous term. It may mean land owned and controlled by a patrilineage, or a piece of individually owned land which descends to a man's children (or relatives on the father's side). But so long as this distinction is kept in mind, not much harm will be done by treating the two species under the same name, for in the final analysis, they both descend in much the same way. Patrilineal land arises in one of the following ways: (i) it may have been cleared from virgin forest by the individual; in that case it is individually owned by him and he has a right to determine whether it shall go to his children or to his collateral relatives; (ii) it may have been seized by a patrilineal group as a result of some dispute; in that case it is, of course, owned and controlled by the group as communal land; (iii) finally, it may have been received by the group as a pledge from another group (patri- or matri-lineal) in return for a loan or other aid;[4] here again the land is communal land and descends as such. In more recent years individual acquisition by sale, pledge, or lease has greatly increased the size and importance of land coming under (i) above. Also a man may make an outright gift of his land to a son or daughter who thereupon acquires exclusive proprietary right over it.

(*i*) *Individual land*

According to the strict letter of the law individually owned land (class (i)) is inherited by sons. The eldest son gets the largest share for he is entitled to a piece of such land by virtue of his position as *diǫkpala*. The rest is divided equally among the other sons. Chubb says the division is in " diminishing shares ".[5] But in fact the shares are as equal as the simple measurements and surveying technique of the people would allow. The choice of shares is made in order of seniority of age. The result is that the eldest son gets the largest and the youngest the smallest share

[4] Ottenberg, *op. cit.*, p. 474.
[5] *Op. cit.*, para. 40.

in practice. In the absence of sons, individual land is treated as communal land and descends accordingly. Indeed, it is not uncommon for sons to waive their inheritance rights either out of ignorance or out of magnanimity.

(*ii*), (*iii*) *Communal land*

As regards patrilineal land communally owned and controlled, there is strictly no law of inheritance to consider. It is shared out anew at the commencement of each farming season under the supervision of group elders. Each member is entitled to a share according to the amount of land available, his interest and farming skill. When a member dies his sons or at least the eldest of them will receive a share in his place. But sons need not wait for their father's death before they can receive a share of farmland for cultivation. The group's elders decide from time to time what new age-grades should be admitted to farmland rights irrespective of whether their fathers are alive or dead. It is arguable therefore that patrilineal farmland is not the subject of inheritance by the individual, and that his rights and interests therein stem from the fact of his membership of the group.[6]

Residential land, too, is strictly non-heritable. Though marriage is virilocal, children do not belong to their father's patrilineal group but to that of their mother(s). They may therefore decide to go over to the families where they properly belong, at any time before or after their father's death. But if they choose to remain in their father's place, they have a right to reside on his land. They are normally also given enough land for their farming needs, but are not entitled to this as of right.

(4) Matrilineal land

As already said, this is land which is owned and controlled by widely scattered matrilineal relatives. Land of this category constitutes the bulk of arable land in the territories under discussion. The actual control and allocation of the land are in the hands of the lineage head who through the agency of young men distributes plots to individuals at the beginning of each season. There is, however, a tendency for the same plot to be allocated to the same persons year after year. But this does not imply any notion of individual ownership, as the head retains the right to alter the *status quo* at will.

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[6] See further p. 164, *post*.

We said earlier that in the absence of sons, individual (patrilineal) land is normally treated as communal land. This situation always raises a conflict between the interests of the patrilineal group and those of the matrilineal group to which the deceased owner belonged (everyone belongs to two such groups at once). As a rule, the claims of matriliny prevail in such cases, so that the deceased's matrilineal relatives have a priority. But it must be added at once that even so, the matrilineal head has the last word on the fate of this land. Subject to this reservation, the land of the deceased is distributed among the following persons, the distribution being done by the head of the matrilineal group:

(1) brothers by the same mother, or
(2) sisters by the same mother, or
(3) the children of the deceased's eldest sister, or
(4) children of his mother's eldest brother.

Local Variations

In some places, members in each group, (1)-(4), *supra*, take to the exclusion of those of groups lower in the order of priority. But in many places, all the members of all four groups are entitled to their own shares. The result is such fragmentation of farmland that individual owners and "English" law courts alike feel quite unhappy about the customary law in this respect. As Ottenberg says, many people attempt to wriggle out of the legal web by willing their land and other property to specific persons.[7]

(5) Movable property

As in the case of land, movable property is inherited partly by matrilineal and partly by patrilineal relatives. But the dividing line here is not in the history of the property concerned but in its nature.

(*a*) *Money and trade goods*

At a man's death all his money (except for what is required for the burial) and trade goods (such as palm produce) vest in his matrilineage as communal property, and are divided equally among its numerous members. (There is an element of this practice in all Ibo societies as shown in the "second burial" ceremonies wherein the bulk of the deceased's property is made over to a number of groups and societies, among them his or her

[7] *Op. cit.*, p. 480. He spoke of willing property to *sons*, but this is unnecessarily narrow.

male relatives, female relatives on both sides, age-grades and title societies.) For the purposes of this distribution the Head of the matrilineage acts as administrator.

(*b*) *Other goods*

On the other hand, the deceased man's yams, his clothing and other personal goods are inherited by his sons, or daughters where there are no sons. These items are the only part of his movable property which are inherited on a patrilineal basis. But in the absence of children, these goods are treated as matri-estate and may be distributed among members of the matrilineal group or else divided among the deceased's lateral relatives, at the option of the matrilineage head. If he decides to distribute among close relatives only, he does so in the same order of priority as in the case of land, viz.:

(1) brothers by the same mother, or
(2) sisters by the same mother, or
(3) children of the deceased's eldest sister, or
(4) children of his mother's brother.[8]

Women's Estates

The estate of a woman is inherited in the same way as a man's, except that if she has daughters, these have a prior right *vis-à-vis* her sons whatever the ages of the sons, at all events as far as movable property is concerned.

"Bride price"

The method of inheritance to marriage consideration (popularly known as "bride price" or "dowry") deserves a word of mention. A father is entitled to a specific portion of this, and the rest goes to the mother. In the case of Afikpo, these are £3 and £2 respectively out of the usual £5.[9] If at the marriage of a girl her father is already dead, his share of the marriage consideration goes to the head of the matrilineage for distribution among the male members of the group. Similarly, if the mother is dead, her share is distributed by her elder sister (or some other female elder) among the female members of the matrilineage. A step-mother is entitled to one of these shares

[8] Contrast the position in Ashanti law where the matrilineage inherits in the first place and then elects one of its members to take over the deceased person's property and responsibilities during good behaviour.
[9] Ottenberg, *op. cit.*, p. 478.

even if she is not a member of the group by birth. In both cases the distribution is on an equal basis. As will be readily seen, this practice has much more significance as regards the mother's share. For whereas distribution of the father's share may be looked upon as a mere continuation of distribution of his money among his group members (this time among males only), female relatives come in *de novo* on the mother's property here, to the exclusion of daughters.

CHAPTER 10

VARIATION OF CUSTOMARY RULES OF INHERITANCE

The rules of inheritance discussed above may in some cases be varied by the propositus himself in one of the following ways, viz.: by—

(1) gifts *inter vivos*;
(2) nuncupative wills, and *donatio martis causa*;
(3) written wills;
(4) contracting Ordinance or Christian marriage.

(1) Gifts inter vivos

As we saw earlier on, the sole owner of any form of property—land, trees or movables—may make a gift of it to anyone of his choice during his life time, subject only to the rule against alienation of land to non-resident strangers. Similarly a person entitled to rights and interests short of ownership may grant them to anyone at all. We also saw that gifts can be absolute or conditional, depending on the manifest intentions of the donor. Two questions then arise, can a person give away his property or rights and interests therein to third parties so as to evade the customary rules of intestate succession? Or have his heirs-at-law a right to attack the validity of such a gift either during the donor's life time or after his death? The simple answer is Yes to the first question[1] and No to the second. Provided that the gift was as complete as the nature of the subject matter would allow, e.g., actual delivery in the case of movables, showing round the boundaries in the case of land—it is unimpeachable on the part of the donor's heirs. This is so even if the gift was obviously made with a view to evading the rules of inheritance, as often happens in " matrilineal " societies.[2]

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[1] See Meek, *op. cit.*, p. 182.
[2] Chubb, *op. cit.* para. 41.

The subject matter of the gift must, however, form part of the donor's *disposable* property. This rule implies that a gift of one's interests in family or in communal land must be limited to the donor's life time, for these interests die with the individual. His position, as we have seen, is not that of the English tenant-in-common but rather like that of a joint tenant whose interest is subject to *jus accrescendi*.[3] An illegal gift is voidable at the instance of any interested person. Thus an absolute gift of land to a non-resident stranger would be contrary to customary law and so voidable. On the other hand, as soon as communal or family land is apportioned it becomes absolutely alienable, and so may be the subject-matter of an *inter vivos* gift.

It is often said that witnesses are required in connection with every gift. This is rather ambiguous. For it may mean either that an unwitnessed gift is void or that witnesses are essential for proof. The relevant point here is the need for judicial proof, if required. A gift is not void or even voidable by reason only that it is unwitnessed by a third party. As a last resort, the alleged donee can establish his claim on oath, as will appear later.

(2) Nuncupative wills: ike ekpe

Meek defines a nuncupative will as a declaration made voluntarily and orally by a person in sound mind, in expectation of death, in the presence of responsible and disinterested witnesses.[4] This definition calls for one or two comments. In the first place, it postulates the presence of *disinterested* witnesses as a basic requirement of a nuncupative will. Now suppose that before he died a man called together all his sons and prospective joint heirs,[5] and before them all declared that after his death Ugbo Ukwu Oji[6] was to be the exclusive property of B, one of the sons. Will such declaration be invalid because not made before "disinterested" witnesses, as obviously there was none here? Or again suppose that instead of giving the land to his son, B, he gave it to his friend, C, who was also called in for the purpose. Will the declaration be nullified by the absence of disinterested witnesses? It is submitted that a declaration in these circumstances would be quite valid. For though in either case the proposed beneficiary might find it more difficult to establish his

[3] Rule of survivorship.
[4] *Op. cit.*, p. 182.
[5] Where all sons inherit jointly.
[6] The equivalent of Black Acre.

claim if challenged than he would if there had been disinterested witnesses, the claim could still be proved. As a last resort, the oath would be appealed to. It is our contention, therefore, that the presence of disinterested witnesses is necessary, not for purposes of validity, but for purposes of proof of the declaration. Indeed there have been cases where declarations of this sort were made to the beneficiary himself alone. If his story was challenged, he would bring his claim to court, asking for leave to affirm it on oath.

In the second place, the phrase "in expectation of death" needs a little explanation. If by this it is meant that the "testator" must have made the declaration in expectation of imminent death, then we seem to be in the realm not of nuncupative wills but of *donationes mortis causa*. But it is submitted, with respect, that Ibo law distinguishes clearly between *donatio* and a *will*, as will appear later.

Modifying Meek's definition a little, we shall define a nuncupative will as an oral declaration made voluntarily by a person in sound mind, whether in sickness or in health, to the effect that after his death certain specified items or classes of items of his disposable property shall go to certain nominate person or persons. Thus the essential elements of a valid nuncupative will are as follows:

(i) free will;
(ii) sanity;
(iii) identity of subject-matter;
(iv) disposability of subject-matter; and
(v) identity of beneficiary.

We shall now briefly consider these elements *seriatim*.

(*i*) *Free will.*—To constitute a valid disposition by an oral will it is essential that the propositus must have acted as a free agent when he made it. A testator is not a free agent for the present purposes if he acted as a result of undue influence exerted on him by the prospective beneficiary or his agent. What constitutes undue influence is a question of fact to be determined with reference to the surrounding circumstances in each case. Thus in the case of an unsophisticated testator, the use of charms or witchcraft, or the threat to invoke a curse on him, or most important of all, the threat by a son not to give his dying father the proper second-burial ceremonies unless he made his will in a certain manner would all constitute undue influence. Any interested party can attack the will on these grounds. But if he

did, the onus is on him to prove the assertion.

(ii) *Sanity.*—As in English law, a testamentary disposition is invalid if at the material time the testator was *non compos mentis*. In contrast with the rule on this point in the law of contract, an insane person cannot make a valid nuncupative will during a lucid interval. All that is required to upset a will on this ground, therefore, is proof that the testator was insane *before* the will was made, and that he never recovered his sanity or else did not do so for a considerable time after the will was made.

Insanity for this purpose is not a term of art. It means simply an impairment of the mind resulting from disease, accident or old age and is such as to deprive the testator of full use of his mental faculties. A disposition made under the influence of drink can also be upset on this ground. But in that case it must be shown that at the material time the testator was actually in such an advanced state of drunkenness that he did not know what he was doing.[7] It may be objected that people do not make their will on the spur of the moment, and so the question of making a testamentary disposition under the influence of alcohol does not arise. The answer to this is that just as under English law there is nothing in law to prevent a man from making his will while riding peacefully in a 'bus or train, or while in a great rage, provided that he subsequently gets two capable witnesses to attest it in the presence of each other, so may an Ibo dispose of any part of his disposable property while badly enraged (*bellicose*), or else greatly mellowed (*jocose*) as a result of drink.

(iii) *Identity of subject-matter.*—The subject-matter of an oral will must be specified either as an individual item or as a class of items. Ibo law knows nothing of a disposition by this means of the entire estate of the propositus. Thus a person can only dispose of his gun, musical instrument, elephant tusk and the like, by name, or else give away his goats, poultry, clothing, etc., as a class. When the subject-matter is land, it must be mentioned by name or by some other suitable description.

(iv) *Disposability of subject-matter.*—The English legal principle of *nemo dat quod non habet* is true of Ibo customary law: you cannot give what is not yours. This rule is of special significance in the case of family or other communal land. A person cannot dispose of his undivided interest in such property by will, for as

[7] The four traditional stages of drunkenness may here be recalled: they are jocose, bellicose, lachrymose and comatose.

already pointed out elsewhere, his interest therein determines at his decease.[8] This rule also precludes a member of one of the double-descent groups already discussed from disposing of his money, trade goods or land by will. For as we saw in the last chapter, these become communal property at his death. Hence the growing practice of fathers making *inter vivos* gifts of such property to their children.

(v) *Identity of beneficiary.*—This requirement involves two elements. First, the beneficiary must either be a life *in esse* or else a child *en ventre sa mere*. But in the latter case the disposition lapses if the child is not born alive. Where the will is in favour of a class of persons (e.g., " To the sons of my wife X ") and there are persons answering to that description at the material time, the will is valid. But the number of beneficiaries actually entitled to shares at the death of the testator will be determined by the number of births and deaths subsequent to the will. The share of the sons who predecease the testator will lapse, while sons born after the will but before the testator's death will also come in. Sons conceived before his death but born afterwards are entitled to shares. But those conceived and born after the testator's death, though by Ibo law his legitimate children, are not entitled to the gift. This is because, as in the general law, a will speaks from the death. The second limb of the rule under discussion concerns a class gift where there were no members *in esse* or *in uturo* at the date of the will. A gift to such a non-existent class is void *ab initio*, and no subsequent events, e.g., birth of children, can revive it. So a gift " To the sons of my wife Y " where Y was childless and was not pregnant at the material time, is nugatory. This is in contrast to the general (English) law on the point. For under English law, if a gift is made by will to the children of any person as a class and there are no such children in existence at the date of the will, then " all children who are subsequently born will take ".[9]

Effect of valid will

A nuncupative will once proved, and provided it passes the test of validity outlined above, is binding on the testator's administrator and heir-at-law. Even where the property involved

[8] The Yoruba law on this point is the same as Ibo law; see, e.g., *Taylor* v. *Williams* (1935), 12 N.L.R. 67.

[9] Parry, *The Law of Succession* (3rd Edn.), p. 130; *Harris* v. *Lloyd* (1823), T. & R. 310.

was not the testator's to give, the heir quite often gives effect to the last will and testament of the deceased out of respect (and maybe fear) for the dead.

Lapse

We saw earlier on that a gift to a specific person as well as the shares of members of a class will lapse if they predecease the testator. This is so even where the intended beneficiary was a child of the testator. This is another point of difference between English and Ibo law of wills. Under English law, a gift to a child in these circumstances is saved from the doctrine of lapse if the child in question was himself survived by issue living (but not merely *en ventre sa mere*)[10] at the date of the testator's death.[11] In Ibo law, if a gift is made by "will" to people as a class (e.g., to B's children), and one of them dies before the "testator", his share lapses, and accrues to the surviving members of the class.

(3) Donatio mortis causa

There are points of similarity as well as considerable differences between a nuncupative (i.e., oral) will and a *donatio mortis causa*. As BUCKLEY, J., said in *Re Beaumont*,

> "A *donatio mortis causa* is a singular form of gift. It is . . . of an amphibious nature—neither a complete disposition *inter vivos* nor a testamentary gift."[12]

It resembles a will in that it only takes effect, and is conditional, on the death of the donor. But it differs from an oral will in that whereas no delivery of the subject-matter is necessary for the validity of a will, some form of delivery of the subject-matter is essential for a *donatio*.

The nature and essential conditions of a valid *donatio* were succinctly summed up by Lord RUSSELL OF KILLOWEN, in *Cain* v. *Moon*, in these words, "For an effectual *donatio mortis causa*, three things must combine: first the gift or donation must have been in contemplation, though not necessarily in expectation of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and thirdly, the gift must be made under such circumstances as to show that the thing is to revert to the donor in case he should recover."[13]

[10] *Elliot* v. *Joicey*, [1935] A.C. 209, disapproving a contrary decision, at pp. 216-217.

[11] Vide s. 33 of the Wills Act, 1837.

[12] [1902] 1 Ch. 889, at p. 892.

[13] [1896] 2 Q.B. 283, at p. 286. See generally: *Williams on Executors and Administrators*, 14th Edn., Chap. 27; *Jarman on Wills* (8th Edn.), Vol. I, Chap. 2, pp. 46–48.

In traditional Ibo society, the idea of a *donatio mortis causa* is expressed in the phrase: *e jebe a nataọ* or *e jeme a logh* (" in case one goes and does not come back home "). It was made by a person who was ill and suspected that the end was near; or by a person about to undertake a perilous venture such as a raid on enemy country, tiger-hunting or a duel. Today *donatio* is encountered where people intend to undergo a major surgical operation as well as in ordinary cases of illness. There were, again, many cases of *donationes* during the second World War, when young men went out to fight overseas, half-expecting not to come back.

There is one point of difference at least between English law and Ibo customary law on the subject. Under English law, an inchoate or imperfect delivery will do, " as where the donor delivered to his wife the key of a box at the bank containing bonds to bearer . . . "[14] Under Ibo law, on the other hand, an imperfect delivery is not enough. There must be such delivery as the nature of the subject-matter will permit. Thus in the case of movable property, there must be actual physical delivery. In the case of land, the donee must be shown round the boundaries by the donor or his authorised representative.

Legal effect

A *donatio mortis causa* has the same binding effect on the donor's heir as a nuncupative will, and is subject to the same limitations. Thus all that the donee has to do is to prove (or swear an oath to the effect) that the donor intended him to keep the property if he died. Once this is done, the gift cannot be successfully challenged. All this is, however, predicated on the assumption that the property was the donor's to give in the first place.

(4) Written wills

Where a person sets out to devise or bequeath property by written will in the English form, he must of course satisfy all the legal requirements of wills of this kind, e.g., the signature must appear at " the foot or end thereof ", there must be two attesting witnesses who must acknowledge the testator's signature " in each other's presence ", and of course the testator must be legally capable, which means that he must be *compos mentis* and must be

[14] *Jarman on Wills*, Vol. I, p. 47, summarising the effect of *Re Wasserberg*, [1915] 1 Ch. 195.

either an adult, a soldier " in active service " or a sailor "at sea ".[15]

An interesting question is this: if instead of making a nuncupative will before witnesses, a person makes a written declaration of his intention in a manner which shows clearly he was not going into a will in the English form, will the new Customary Courts uphold it? The present writer's impression is that they will. After all, all that these courts ask in these matters is: did the deceased actually and genuinely declare his intention that at his death a specific item of his property should go to a named person? Prove this intention in a manifest form, and the alleged beneficiary is entitled to the property.

(5) Ordinance marriage and Christian marriage

The Marriage Ordinance of Nigeria as interpreted by the courts introduced such a revolutionary change in the rules of intestate succession to the estate of persons who come under its provisions that this book would not be complete without a brief discussion of its implications. The relevant part for our present purpose is s. 36, sub-s. (1) of which is in the following terms:

> " Where a person who is subject to native law or custom marries under this Ordinance, and dies intestate leaving widow or husband or any issue of such marriage, his personal property and any real property which he might dispose of by will, shall be distributed in accordance with the provisions of English law relating to personal estate, any native law or custom to the contrary notwithstanding. This provision to apply to any issue of an Ordinance marriage."[16]

But, and here is the rub, the section goes on to provide by sub-s. (3) that " This section applies to the Colony[17] only." The first question that arises in connection with this section is: what persons come within the ambit of its provisions? On the face of it, the answer is: two sets of people, viz, (*a*) persons who contracted an Ordinance marriage within the legal limits of the Colony (now Federal territory) of Lagos; and (*b*) the issue of an Ordinance marriage whether such issue are themselves married under the Ordinance or not. This *prima facie* answer, however, in turn raises a number of other questions. To deal with the second part first. The section expressly brings the issue of an Ordinance marriage within the English rules of intestate suc-

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[15] For details see *Jarman on Wills*, Vol. I, pp. 25–391, and other standard works on wills.

[16] *Laws of Nigeria*, 1958 Revision, Cap. 115, Vol. IV.

[17] Meaning the Colony (now Federal Territory) of Lagos.

cession so that whether he himself later married under customary or Moslem law or remained single, his undisposed of property will be inherited as if he died an Englishman in England (in 1890). Suppose then that a female issue of an Ordinance marriage contracts marriage with a Moslem, himself not an issue of such marriage, in accordance with Moslem rites; or suppose that her husband is a non-Christian native and that the marriage was done under customary law. Suppose further that she predeceases her husband, leaving a son and a daughter surviving. Will her property be inherited in accordance with English law so that her husband, not her children, gets the bulk of it? The spirit of African law recoils at the idea of a woman's personal law (for it is no more than that) regulating the property rights of her family members after her death. Why should the personal law of a girl born of an Ordinance marriage and later married under customary law to a man who was himself the product of customary marriage have an effect on her intestate estate which is denied her half-sister similarly married but born of a customary marriage? And yet this is the effect of s. 36. Is it not arguable that by her marriage according to Moslem or customary law she opted to have her succession on intestacy regulated by Moslem or customary law as the case may be? Unfortunately, the Ordinance is silent on this question, and so are the law reports.

Other questions arising out of s. 36 include the following. Does it apply to the property of persons who contracted an Ordinance marriage in Lagos wherever they may happen to live eventually, and wherever their property is to be found at death? In other words, was it intended to attach to the parties as a sort of personal law? Does it apply to Nigerians marrying under its provisions somewhere else in the country but who ultimately came to live and die in Lagos? As regards the latter set of persons, does it make any difference that their property, or some of it, is to be found outside Lagos? In other words, is this a law, not of persons, but of places—the law of Lagos? The Ordinance is silent on these and similar questions. But fortunately, or perhaps not so fortunately, the courts have answered them all, and more besides. How satisfactorily they have done so we shall see presently. But before we go into that, there is a still more fundamental question which must first be disposed of. It is this: what exactly is an "Ordinance marriage"? Is it different in any way from a "Christian marriage"? There is a popular

misconception on this matter. Many believe that an Ordinance marriage is one contracted before a Registrar or in court, hence it is called " court marriage ". The Marriage Ordinance, on the other hand, includes both " court marriage " and " church marriage " within the meaning of " Ordinance marriage ". For it provides by s. 21 that a marriage may, after the specified preliminaries have been carried out, be solemnised " in any licensed place of worship ", by " any recognised minister of the church . . . ", in accordance with the rites of that church.[18] Similarly, s. 27 provides that a Registrar may celebrate a marriage. It is these two forms of marriage that the statute refers to throughout as " Ordinance marriage ".

Now, as we have seen, the legislature limited the operation of s. 36 (1) to Lagos, but this has not been popular with the courts who have in consequence interpreted sub-s. (3) out of existence. Thus in *re Emodie, Administrator-General* v. *Egbuna*,[19] the High Court held that the property of an Ibo man who married under the Ordinance at Port Harcourt and later died in the Provinces must be distributed in accordance with English law, not customary law. In that case, the deceased was survived by a widow, a brother and an illegitimate daughter by another woman. Counsel argued that since the marriage took place outside Lagos, s. 36 (1) did not apply, and therefore customary rules of intestate succession should apply. AMES, J., agreed that s. 36 (1) did not apply to the case but said that this was not the same as saying that customary law must therefore prevail. It only meant, he said, that the court must look elsewhere for guidance on the point. The case, he continued, was covered by *Cole* v. *Cole*[20] and so the widow had exclusive right of succession.

Two years before, in the case of *Coker* v. *Coker*[1] BROOKES, J., had come to exactly the same conclusion and for the same reasons, in relation to the property of a Yoruba man who died intestate after an Ordinance marriage contracted outside Lagos, but within Nigeria. Part of the headnote is as follows:

> " Held that the intestate estate of a native who contracts a Christian or civil marriage is removed from the operation of native law of succession and brought under the common law of England . . . "

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[18] Semble, this includes marriage by Moslem rites, provided the prescribed preliminaries are complied with.
[19] (1945), 18 N.L.R. 1.
[20] (1898), 1 N.L.R. 15.
[1] (1943), 17 N.L.R. 55.

The West African Court of Appeal, too, had come to the same conclusion. This was in 1942 in the case of *Gooding and Bankole* v. *Martins*.[2] There the deceased had contracted a Christian marriage at Abeokuta (Nigeria) and there were two daughters of the marriage. After his wife's decease, he had re-married, this time under customary law.[3] There was a son by this marriage. The question before W.A.C.A. was whether the daughters by the Christian marriage or the son by customary marriage should succeed to his estate as he had died intestate. Applying the rule in *Cole* v. *Cole* the court held that the daughters alone were entitled to succeed.[4]

The position is therefore as follows. Where a person who is subject to customary law contracts an Ordinance marriage *in Lagos*, and subsequently dies intestate leaving a widow or husband or any issue of the marriage, the inheritance of his estate will be governed by s. 36 (1) of the Marriage Ordinance. This will be " in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates ". Section 36 also governs succession to the intestate estate of the issue of every Ordinance marriage, whether such issue is himself married under the Ordinance or not.[5] In this latter case, also, it seems immaterial that the deceased left no widow or husband or issue.

If, on the other hand, a person contracts a " Christian marriage "—that is, a monogamous marriage; a marriage under a system of law which enjoins monogamy on persons within its area of operation—outside Lagos and whether in one of the Regions of Nigeria or in a foreign country, then succession to his intestate estate will be covered by the decision in *Cole* v. *Cole*.[6] And the net result will be exactly the same whether s. 36 or *Cole* v. *Cole* governs the case.

What then was decided in *Cole* v. *Cole* and to what extent were the later cases, among them the three mentioned above, covered by it? The facts were as follows. The deceased who was a native

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[2] (1942), 8 W.A.C.A., 108.

[3] He ultimately went through a form of Christian marriage (with this second wife) on his death bed. But apparently this had no legal significance on the inheritance rights of existing issue.

[4] Since the W.A.C.A. decision in *Re Macaulay*, 13 W.A.C.A. 304, and the Privy Council Decision in *Bamgbose* v. *Daniel*, 14 W.A.C.A. 116, *Gooding & Bankole* v. *Martins* can no longer stand.

[5] *Bamgbose* v. *Daniel*, 14 W.A.C.A., 116 (P.C.).

[6] (1898), 1 N.L.R. 15.

of Lagos and domiciled there, was married in Sierra Leone in 1864, and returned the same year to Lagos where he lived till his death in 1897. There was one child of the marriage—a lunatic son. As Cole had died intestate, the question was whether his brother or his lunatic son should succeed to his estate. And since the answer depended on which system of law was applicable, GRIFFITH, J., said that " the real question was whether English or native law should apply as to the estate of the deceased ". After observing that there must be many people in the same position as the deceased, he said he would base his decision on " broad grounds which will cover all " cases of " native persons *in Lagos* who have since 1876 contracted Christian marriages outside the Colony ".[7] And his decision, to which RICHARDS, J., concurred without comment, and RAYNER, C.J., gladly concurred against his own judgment in the court below, was, as set out in the headnote:

> " On the death, intestate, of a Christian native who was married by Christian rites outside [Nigeria], the succession to his property is not governed by the Marriage Ordinance, which applies solely to marriage contracted locally, and the English law of succession will prevail over native customary law."

As the English law of succession stood at that date, the lunatic son was his father's heir. Before proceeding to compare and contrast the facts and circumstances of the instant case and those of the later cases said to be covered by it, let us take a look at the background to the case itself. What was it that made GRIFFITH, J., decide that customary law should give way to English law of intestate succession? Here is his own answer to this question:

> " Let us compare the position of the parties respectively in native and Christian marriages. . . . By native law a man can marry as many wives as he can afford to pay for. The wife does not take the husband's name, nor do the husband and wife become one person, but the wife remains a member of her family and often continues to live in her own house apart from the husband. The wife's property remains her own. By strict native law when a man dies his eldest brother on his mother's side takes his widow as his wife—that is the native method of providing for the widow. It is a consequence of the loose tie of the native marriage that by strict native law a man's eldest brother on his mother's side inherits. The brother is part of the man's family. The wife and her children are part of the wife's family.
>
> The position of a man and a woman who marry according to Christian rites is entirely different. Christian marriage imposes on the husband duties and obligations not recognised by native law. The wife throws in her lot with the husband, she enters his family,

[7] (1898), 1 N.L.R., at p. 20.

her property becomes his (these parties were married in 1863 and at any rate till 1876 were under the English law). In fact, a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law.

In such circumstances can it be contended that the question of inheritance to the deceased in the present case should be decided in accordance with the principles of native law and custom? I think not. Such a contention would be contrary to the ' principles of justice, equity and good conscience '."[8]

From the contrasting pictures of customary and Christian marriage relationships painted here by GRIFFITH, J., there can be no doubt that, other things being equal, his decision on the matter was the right one. But were other things equal in fact? Could it be seriously argued, for instance, that every Nigerian contracting a Christian marriage in 1863—or in 1962 for that matter—both understood the full legal implications of his conduct under English law with reference to intestate succession to his estate, and intended those legal implications to follow at his death? In particular, did the late Mr. Cole in the instant case understand and intend these legal consequences of his Christian marriage? The present writer, with respect, would say he did not.[9] Then again, was GRIFFITH, J.'s picture of " native marriage " strictly accurate? The report says that " Cole was a native of Lagos and his domicile was Lagos ".[10] It is a notorious fact that the Yoruba of Lagos are a patrilineal people. But this account seems to fit a matrilineal rather than a patrilineal society. Obviously Cole was not originally from any of the matrilineal societies in and around Afikpo in Eastern Nigeria—one would not expect to find people from these areas going to Lagos before 1864 and thence to Sierra Leone in 1864 except as slaves, and Cole was not described as a slave in that country. In any case there is nothing in the evidence before the court to suggest that Cole came from a matrilineal society or any society that fits the learned judge's description. Either therefore the learned judge was mistaken about native marriage generally, and its legal effects on both paternity and property rights, or he was thinking of a matrilineal society—a rare exception in Southern Nigeria.

It is submitted, with the greatest respect, therefore, that the

[8] (1898) 1 N.L.R., at p. 22.

[9] Note that in contrast to the law and practice in Lagos, parties to Ordinance or Christian marriages in the Regions are not informed of the effect of their act on their succession rights (see s. 36, sub-ss. (2) and (3) of the Marriage Ordinance, Cap. 115). One wonders if they were told this in Sierra Leone in 1864, the place and date respectively of Cole's marriage.

[10] (1878) 1 N.L.R., at p. 16.

learned judge did not disclose any valid grounds for brushing aside the rules of inheritance under Yoruba law as he did on the theory that to uphold the customary law in the case before the court " would be contrary to the ' principles of justice, equity and good conscience'."[11] One is happy to agree with AMES, J., when he said that the custom that a man's heir is his next male relative is *not* inequitable, as the heir becomes the new father of the deceased's children, if any. Neither is it inequitable, the learned judge went on, for a widow to become the wife of her late husband's heir.[12] If it be objected that an heir might be interested in the deceased's estate but not in his minor children or his widow, the answer is simple. It is always open to the widow to bring a case of anticipated hardship to court before the distribution of the estate. And the court, acting on the established principle that in such cases the welfare of the children shall be the paramount consideration, may grant custody and substantial maintenance allowance to their mother on their behalf. Two important practical considerations must never be overlooked. One is that there are numerous lateral relatives who do act as " new fathers " to orphaned children, and ought to be given the wherewithal to do so effectually out of the estate. The other is thus expressed by AMES, J.,

> " Where this custom prevails [i.e., where the nearest male relatives inherit] Native Courts follow it. . . . If the learned Administrator-General is correct [in condemning it as inequitable] it means that the Native Courts are daily giving effect to an unfair and inequitable custom."[13]

Even assuming that *Cole* v. *Cole* was rightly decided in 1898, are Nigerian courts of today right in following the principle laid down there? The automatic merger of a wife's property with her husband's under English law is now a matter of legal history. So it is in Nigeria. The issue of a customary marriage are regarded as members of their father's, not mother's, family in all patrilineal societies in Nigeria, and always have been.[14] Matrilineal societies too, are rapidly advancing in the same direction. Wives by Christian marriage do not throw in their lot with the husbands any more than wives by customary marriage do today; both types can and do own separate property from their husbands.

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[11] (1898) 1 N.L.R., at p. 22.
[12] *In re Agboruja* (1949), 19 N.L.R. 38.
[13] *Ibid.*
[14] Except for one or two areas in the southern Regions where the principle of " Big " and " Small " dowry marriages held sway.

In any case the Coles lived and married in Sierra Leone (presumably Freetown where there were hardly any indigenous societies with their own customary laws in the 1860's, and where, therefore, English law was the only law recognised). Why then should our courts today insist on English law regulating succession to the estate of an intestate in the absence of (*a*) general education of the people on the subject—many "Christian natives" are illiterate and unacquainted with English law or thought; (*b*) a statutory provision to the effect that this matter must be drawn to the attention of the parties to a Christian marriage in clear and simple language everywhere, not just in Lagos? Why should the courts disregard, or circumvent, the express provision of s. 36 (3) of the Marriage Ordinance to the effect that sub-s. (1) thereof shall apply to Lagos only, this being a cosmopolitan and sophisticated society? If the legislature wanted native law to give way to English law on this point, it would have said so; or rather it would not have gone to the trouble of inserting sub-s. (3) in s. 36 in 1914. This seems to be a clear case of judicial repeal of a legislative enactment. But why is this, in view of the fact that the legislature must be presumed to know the state of the law at any given time? If then it knew of the decision in *Cole* v. *Cole* made in 1898 and yet inserted sub-s. (3) in s. 36 in 1914, was this not evidence of its intention to limit the effect of that decision to persons and property in Lagos? Let us take a brief look at the facts of indigenous social life. A young Ibo man is brought up and given the benefit of modern academic or technical education by the concerted effort and sacrifice of his brothers, uncles and other kinsmen. He later enters into a Christian marriage, fully aware of his responsibilities to his younger brothers, cousins and the like. He dies intestate while some of these youngsters whose educational expenses he dutifully bore are still in school. There are no children of the marriage, and his widow decides to go back to her own people or to remarry. She refuses to pay another penny towards the education of these children, and as the law of England provides, inherits practically every penny of her husband's disposable estate, sells his houses and goes away. Where is the principle of "justice, equity and good conscience" in her case? The picture as here presented is not the result of pure imagination. It is drawn from the hard facts of Nigerian life as it is led today. Many students have had to abandon their courses or else work their way through university, simply because

their sponsors died intestate in the middle of their courses, and the widows refused to co-operate.

One is inclined to agree with VAN DER MEULEN, J., in *Smith* v. *Smith*[15] when he held that contracting a Christian marriage is no more than evidence, *which is by no means conclusive*, of the parties' intention that their lives and succession rights should be governed by English law. The facts of that case were these. The deceased had contracted a Christian marriage, again in Sierra Leone, in 1876. He later died in Lagos leaving his widow, a son and two daughters. After the widow's death, the son (ultimately) claimed exclusive ownership of their home on the ground that, under English law as it then stood, he was heir-at-law and entitled to it. Counsel for him argued forcefully that the case was covered by *Cole* v. *Cole* and should be so decided. On this point the learned judge said,

> " I do not consider that (*Cole* v. *Cole*) goes further than to decide that in such cases[16] it *might* be inequitable for the native law and custom as to succession to property to be applied . . . [Christian marriage may be] very strong evidence [of a man's] desire and intention to have his life generally regulated by English laws and customs, but it is by no means conclusive evidence."[17]

Rather, he concluded,

> " . . . the question as to what law it is equitable to apply in any given case can only be decided after an examination of all the circumstances of the case . . . "

He therefore held that all three children inherited the property jointly, and that, as it could not be partitioned, it must be sold. This view of internal conflict of laws is, if we may say so, the correct one in the circumstances of Nigerian social life. But this is a minority view.

To summarise, s. 36 (1) of the Marriage Ordinance provides that persons subject to customary law who marry under the Ordinance and die intestate shall have their personalty and disposable realty inherited in accordance with English, not customary, law, if there is surviving a spouse or issue of such marriage. A person marries under the Ordinance if he marries before a Registrar or a minister of religion in accordance with the rites of that religion.[18] Sub-s. (3) of s. 36 restricts the opera-

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[15] (1924), 5 N.L.R. 102.

[16] I.e., where the deceased had contracted a Christian marriage.

[17] (1924), 5 N.L.R., at p. 104.

[18] *Prima facie*, this includes Moslem marriages, as already pointed out at p. 213, *ante*.

tion of this rule to Lagos. But the courts have time after time held that its spirit, though not its letter, applies to all Christian marriages wherever contracted. We shall therefore proceed to examine the provisions of this section in a little more detail.

It begins with the words, "Where a person who is subject to native law or custom." This excludes peoples of European or North American origin. But it probably *includes* persons from several Asiatic and tropical African countries. The section applies only to cases of persons dying intestate, and so has no effect on the parties' capacity to dispose of their property by will. It applies wherever the deceased left a husband or widow[19] or "any issue" of such marriage. Apparently "any issue" was intended to mean "sons and daughters alike". Does it also include grandchildren? In other words, will a man's property descend on intestacy in accordance with English law merely because he is survived by grandchildren, either through sons or through daughters, even if his widow and all her children are already deceased? Perhaps this point will one day come before the courts. The section only governs succession to that part of the deceased's real property which he "might dispose of by will". This phrase cuts off his rights and interests in family and communal land. But does it also exclude his rights and interests in land which he occupied under a "kola" or "showing" tenancy? For as we saw earlier, land of this kind does not necessarily pass to the heir at his death, and the deceased cannot hand it down to him by will.[20] Finally, the section applies equally to persons who contract an Ordinance marriage, and to the issue of such marriage whether such issue themselves marry under the Ordinance or not. Thus, if there are a son and a daughter by an Ordinance marriage, their disposable property must be distributed in accordance with the provisions of English law in the event of their death intestate: it is immaterial that they married under customary law or died single.

What, then, is the exact nature and magnitude of the change resulting from the fact of contracting an Ordinance marriage, from the point of view of intestate succession to the estate of the parties thereto and their issue? This change is so revolutionary that it may be of advantage here to recapitulate the salient rules of the customary law on the point.

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[19] On the meaning of "widow" see *Coleman* v. *Shang*, [1961] 2 All E.R. 406 (a Ghana case).

[20] All the heir gets is a right to apply for renewal of the grant in some cases.

1. In matrilineal societies, the order of priority in the case of a man's heritable personalty is as follows:

(*a*) children of the deceased (sons before daughters) or
(*b*) brothers by the same mother, or
(*c*) sisters by the same mother, or
(*d*) children of eldest sister, or
(*e*) children of eldest maternal uncle.

2. Also in matrilineal societies, succession to a woman's estate is in this order of priority:

(*a*) children of the deceased (daughters before sons), or
(*b*) brothers by the same mother, or
(*c*) sisters by the same mother, or
(*d*) sister's children, or
(*e*) children of eldest maternal uncle.

3. In patrilineal societies, succession to a man's estate is as follows:

(*a*) Sons, according to the principle of primogeniture, or
(*b*) Brothers of the whole blood; or
(*c*) Father, or
(*d*) Other paternal male relatives.

4. In patrilineal societies, succession to a woman's estate is as follows:

(*a*) children, both sons and daughters coming in as regards certain items; or
(*b*) husband, or
(*c*) husband's heir or nearest male relative.

All this is swept away in one fell swoop by the simple fact of being married in church or before a court registrar or being issue of such a marriage. Instead, inheritance is in accordance with the provisions of the Statute of Distributions, 1670 (the law in force in England in 1914 when the Marriage Ordinance was enacted). Under this Statute, succession to the estate of an intestate is on the following lines:[1]

1. Where there are issue of the marriage, the widow inherits one-third of the deceased's net estate. The residue is distributed among his children (male and female alike) in equal shares, the issue (of any degree) of deceased children taking their parents' share.

2. If there are no children or other issue of the marriage, the Statute, as amended by the Intestates' Estates Act, 1890,

[1] For the Western Ibo, see the Administration of Estates Law (Western Region), 1959, especially s. 49.

provides that the widow shall be entitled to a moiety (one-half) of the net estate should it exceed £500, plus another £500 charged on the estate, plus interest at 4 per cent. per annum from the husband's death. The rest of the estate is divided equally among the deceased's next-of-kin, viz.: his brothers and sisters or their issue. If the net estate does not exceed £500, the widow is absolutely entitled to it.

3. Where there are children of the marriage but no widow, these children share the net estate equally among them, the issue of any deceased children taking what should be their parents' shares.

4. Finally, a husband is entitled to his wife's net estate absolutely whether or not there are children of the marriage.[2]

The most spectacular change resulting from the adoption of English rules of intestate succession in preference to Ibo customary rules on the subject is, therefore, in the inheritance rights of a widow. For whereas under the customary law she inherits nothing from her husband, English law gives her at least one-third of his net[3] estate. The husband too has a big boost in his legal rights, for he now has pride of place, as against the children of the marriage, as regards the estate of his wife. The principle of primogeniture disappears completely, since all children share equally. Also the prejudice against daughters, *vis-à-vis* their brothers or other male relatives goes by the board. A long list of matrilineal and patrilineal relatives gives way to surviving spouses and the children of the marriage as heirs on intestacy in matrilineal societies. In a word, a wife is made a fully fledged member of her husband's family, and the loose traditional " family " of African law is broken up for good. Such is the law. Whether it is a sound social policy is an entirely different matter.

[2] See generally *Williams on Executors*, Vol. II, pp. 891–899.
[3] I.e., after funeral, testamentary and administrative expenses.

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