SUCCESSION TO RIGHTS IN LAND UNDER IGALA CUSTOMARY LAW OF KOGI STATE

BY

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APRIL, 2000

SUCCESSION TO RIGHTS IN LAND UNDER IGALA CUSTOMARY LAW OF KOGI STATE

A THESIS SUBMITTED TO' THE POSTGRATUADE SCHOOL, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M.).

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DECLARATION

I hereby declare that the realisation of this work is a record of my own research. It has not been published or presented anywhere for a higher degree. All quotations and references have been acknowledged accordingly.



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CERTIFICATION

This thesis entitled SUCCESSION TO RIGHTS IN LAND UNDER IGALA CUSTOMARY LAW OF KOGI STATE by **S.C. Ogala** meets the regulations governing the award of the degree of Master of Laws of Ahmadu Bello University and is approved for its knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to my loving and caring husband, Professor W. N. Ogala, and my dear children, Laruba, Eke, Eleojo, Ojodale and Iye, without whom this work could not have been possible.

ACKNOWLEDGEMENT

With much gratitude to almighty God for His infinite Mercy and Grace upon me during the period of this work. I wish to express my profound gratitude to all those who have in one way or the other contributed to the success of producing this dissertation.

My sincere gratitude goes to Dr. Y. Aboki, my able supervisor, who found time to supervise this dissertation in addition his tight schedule arising from his official capacity as the Head of the Department of Public Law. His critical examination of some facts of Law as contained in this dissertation, his suggestions and advice have helped greatly to improve the quality of this work.

I would also like to express my gratitude to Professor .M. G. Yakubu for his contributions toward the success of this dissertation. His fatherly advice was a source of encouragement to me.

Finally, my sincere thanks go to Andrew Akume Esq., a colleague, for his continued encouragement.

ABSTRACT

Igala land in Kogi State is richly blessed with fertile soil. This makes the people predominantly farmers. Crops grown in this area comprise yams, rice cassava, millet, maize, guinea corn and beans. There are few cash crops such as palm oil, palm kernels, rubber and timbers.

The area covered by this dissertation includes the six Local Government Areas, Ankpa, Bassa, Dekina, Idah, Ofu and Olamaboro with the population of about one million people. This puts Igala people as the majority tribe in kogi State.

In the past the Igalas did not place much importance to their land despite the fact that it is the sustenance of life. But now the economic value of land has been recognized so much so that the Igalas engage themselves in fighting for the ownership. Some villages in Igala land fight each other for ownership of land.

Under customary land law, land is owned by communities or villages and the title to the communal land is vested in the community or village as a whole. In some cases, the management of the communal land is vested on the village head or chief as the case may be. He is referred to in loose terms as the owner of the land. He allocates and collects tributes and all proceeds arising from the management of the communal land. Secondly, land is said to be owned by a family jointly and not by individual members. It is the responsibility of the family head to see to the management of the family land. He acts in consultation with the principal members of the family just like the village head or the chief, the family head also allocates land and collects tributes that might arise from the

management of the family land. Thirdly, individual ownership of land is said to be foreign under native law and custom. Therefore, land is never owned by an individual.

From the aforementioned, succession to right in land by an individual under customary law is not possible because a person cannot give out what he does not own. However, a child may inherit his father's farm land if he is of age otherwise his uncle can serve as a trustee for his benefit. It is customary law among the Igalas that on the death of a founder of a family, the eldest surviving child (if any) succeeds to the headship of the family. If there is going to be any important dealing with family land, other principal members of the family must be consulted.

It is worthy of note here that land acquired by an individual as absolute private property under customary law will devolve upon his children as family property. This system whereby an individual has an absolute title to land vests in him with proprietary rights and not possessory or occupational rights as in the case of communal or family ownership. The need for individual ownership is to provide incentives which members under communal or family ownership do not have and which posses a stumbling block against economic development and use of land.

There are lots of advantages of an individual ownership such as alienation, mortgage lease, sale, etc, which will no longer require consent of both the principal members and the family head. An individual can obtain capital to develop his own land. This is an economic advantage which every person in a

community should seek. The management of land will be much more effective and the decision concerning the land will be quicker and definite. Finally, individual ownership of land promotes freedom of action, which is in keeping with the goals of a democratic society.

Under this system, an individual can only have what he can cultivate, unlike in community or family ownership where some communities or some families owned more land than others. However, succession rights which give an individual power to deal with his land should be controlled.

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LIST OF ABBREVIATIONS

A.C.	-	Appeal cases
ALL E.R.	-	All English Report
E.C.L.R.	-	Eastern Customary Law Report
F.N.L.R.	-	Federation of Nigerian Law Report
F.S.C.	-	Federal Supreme Court
L.L.R.	-	Lagos Law Report
M.L.R.	-	Monthly Law Report
N.M.L.R.	-	Nigeria Monthly Law Report
ORS	-	Others
W.A.C.A.	-	West African Court of Appeal
W.R.N.L.R	-	Western Region Nigeria Law Report

CHAPTER ONE

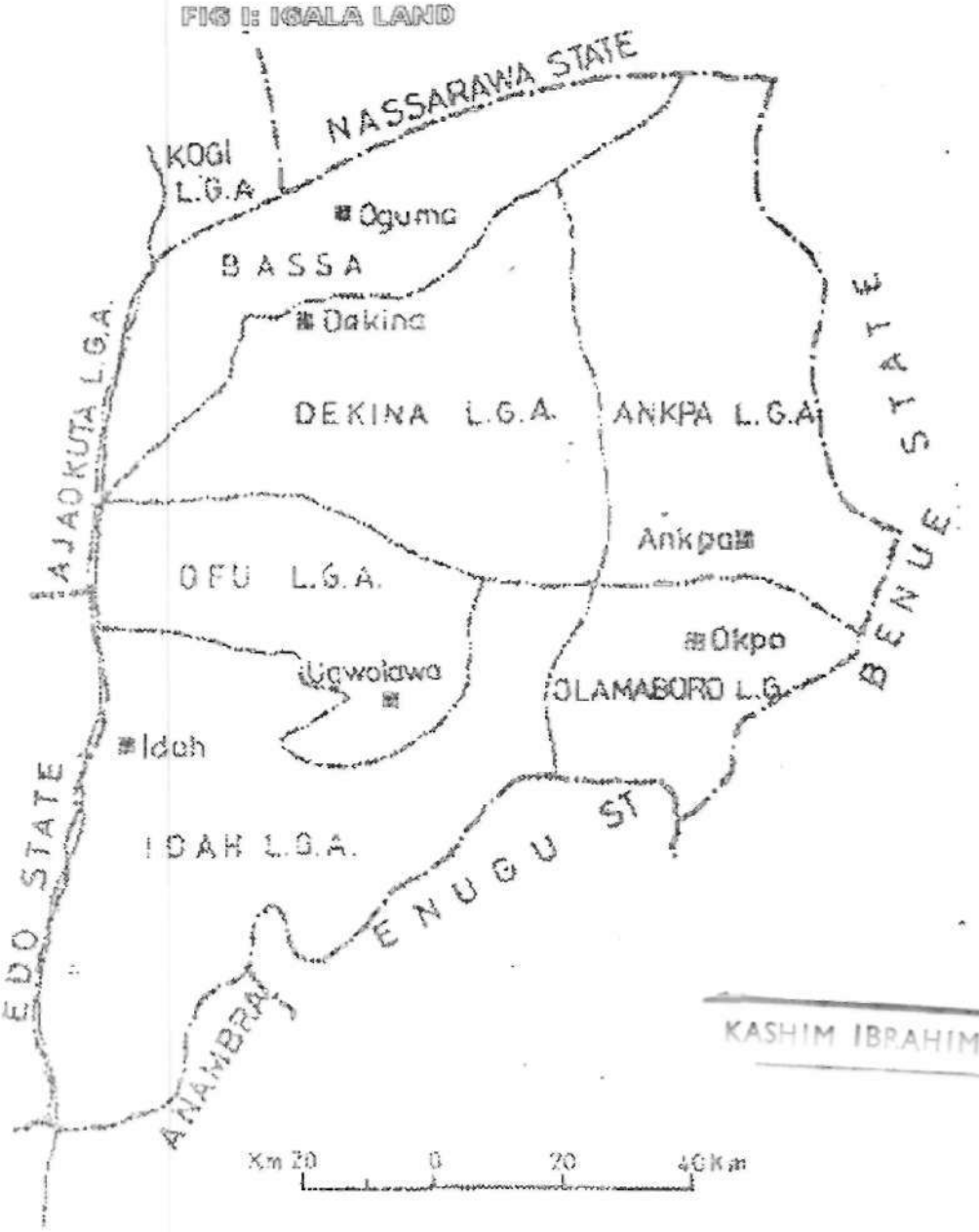
1.1 THE DESCRIPTION AND HISTORY OF THE IGALA LAND.

The area which is known today as Igala Land is occupied by one of the four major tribes of Kogi State. It is made up- of six Local Government areas as shown in figure 1. It is bounded on the north by the Benue River, on the west by the Niger River and on the east and south by Benue, Anambra and Enugu States respectively.

Igala Land covers an area of approximately 13,150 square kilometers i.e. 1.5% of the total land area of Nigeria.

THE MAP OF IGALA LAND.

FIG I: IGALA LAND



LEGEND

STATE BOUNDARIES	
LOCAL GOVT. BOUNDARIES	
LOCAL GOVT. HEADQUARTERS	
RIVER NIGER	

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According to the 1991 National Census, the population of Igala Land is 969,276. The distribution of the total population according to the Local Government Authority is contained in Figure II. The official language of the people of Igala Land is Igala although Ibara is spoken in Bassa Local Government Authority.

IGALA LOCAL GOVERNMENTS-POPULATION 1991

	Local Government	**Population**
1.	Ankpa	240,281
2.	Bassa	85,620
3.	Dekina	201,682
4.	Idah	214,765
5.	Ofu	112,697
6.	Olamaboro	114,231
	Total	969,276

Figure II

Source: national Census, 1991

The Igalas have a long and interesting history with a powerful kingship vested in the "Attah" ("Father" in Igala language). The Attah was at the head of a large and powerful Kingdom which probably reached its Zenith at the close of the 18th century'[3]. By that time, however, the area of "colossus" was not as small as the Igala Local government Area of today, but included the greater

part of what are now the administrative divisions of Idoma, Nsukka and Onitsha, the whole of Ebira of today consisting of Koton Karfe and Lokoja.

Igala Land today lies within the deciduous forest belt of Nigeria which was hitherto covered by great stretches of virgin land most of which has now been destroyed by the wasteful system of shifting cultivation. The surviving forests now yield valuable timber. These survived the shifting cultivation system of agriculture because they are protected by law.

The main occupation of the Igala people is agriculture, the major crops being yams, rice, maize, guinea corn, millet, cassava and beans. The people in the most southern part of Igala land, who are mainly of Ibaji district are about the most productive farmers. They cultivate mainly yams, rice and maize, often enough to feed the whole Igala people. But unfortunately, their produce are transported across the Niger River to Edo State for sale due to lack of access road to the hinter land of Igala Kingdom. Fishing is also a major occupation in Igala Land. Again, this is more pronounced among the ibaji people in the south where the area is mostly riverine.

The soil around Dekina (in the North-West) is very dark, far more fertile and believed to be derived from local rock. Throughout the Igala area, except in the south, there are latetrite soil and hills covered in some cases by poor shrub and in others by thick bush. The people used to plant economic trees such as citrus, cocoa and coffee.

However, this is gradually dying out because of lack of motivation from both the ministry of Agriculture in the state and the local government within the area.

The land for which the Attah was master as we shall see in his statement in the next chapter was from the beginning of the history of the Igala people, divided into fiefs each given to a fief holder on whom was conferred a title by the Attah. These fief holders invariable fell into one or other of the following five broad classes.

1.1.1 **The Igala-mela class.**

The Igala mela class of fief holders comprised the nine Igala king makers with the Achadu Attah (the traditional "husband" of the attah) as the president. Their job is basically that of appointing an Attah constitutionally and wisely. But the events of history deprived them of taking part in the administration itself.

1.1.2 **The Ani Omala (Royal Descendants)**

This class also has nine members all of the whom are "Royal descendant" and therefore includes the Attah himself. With the Odoma-attah as head, they constitute the traditional advisory council to the attah. Unlike the Igala-mela, whose status is retained for life, individual titleship for the Ani Omala fief holders ceases at the death of an Attah, the new Attah appointing a new cabinet from his family members.

1.1.3 **The Royal Titled Women**

This class is headed by the Iya-Attah (mother of Attah) and its members are very close female relatives of the Attah e.g sisters of a reigning attah. Traditionally, not all members of this class are given fiefs to rule over. Moreover the women may marry if they so wish.

1.1.4 **Honorary Chieftains.**

These are men who have been given titles for some special duties they have to perform for the Attah. Examples are Onu-Odu and Onu-Abocho, both being Attah's hunters, and Ohioga Attah and Atebo both of whom are Attah's diviners.

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1.1.5 **Original Founders**Of clan or village (Om'onu ane Akpatakpa) e.g. the Och'Imane of Imani District. Their descendants inherit their title. The administration of their area was usually left in their hands for which they pay tribute to the Attah.

Some of these fief holders, the classes of which have been described in the foregoing, are absentee landlords and so have created sub fief holders who are placed in charge of the fiefs which are usually units to enhance easy collection of tributes. Others are resident landlords some of whom have not been absorbed by the present administration as District Heads ("Onu" in Igala). "The fief holder

received the title 'Onu' and with it the beads of office which to this day are the outward sings of authority".

For the possession of a fief, tributes are collected in kin. Hitherto such tributes represented a tax, as no system of formal taxation existed before the introduction of British administration.

1.2 CLASSIFICATION OF LAND

In Igala area, land other than building lands, fall into one of the following five main geographical classes:

1. Virgin forest land (Oko ERURU)
2. Open grassland (egbili)
3. Fallow land (Ikpo)
4. Sacred and Taboo land (oko elifo or oko ina)
5. Marshy land (echa)

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1.2.1 Virgin Forest Land (oko Eruru).

Because of its richness in plant food, a virgin land that is, land that has never been touched or cultivated (oko eruru), is under the shifting cultivation system, regarded as the most valuable land. In Igala land, virtually all such lands have been cleared over the years and what remains today apart form local government authority forest reserves, is secondary afforestation which has probably been left untouched for a period of fifteen to twenty years only.

In the north districts of Ankpa, Imani, Ofugo and Ojoku, virgin lands are still found although scarcely along the sides of little streams and the Anambra river. Virgin land is naturally the most sought for , the tenure of which on the long term is acquired on behalf of the other members of the village by either the village head or by a group of farmers representing each family unit. Heaps of earth are made along the edges of the forest to indicate that it is already owned. What determines the village to which a particular stretch of forest land belongs, is not so much its nearness to the village as the first group of persons who have put heaps as marks around it. It is usually the group of farmers who need new farm land who arrange with the village head (oni'Onu ane); or if he be unavoidably absent, the oldest of the farmers deputizes for him. This kind of land is vested in the Attah of Igala.

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1.2.2 **Open Grassland (egbili).**

This class of land is becoming increasingly large in the area as a result of the shifting cultivation system. Comparatively, it is less cultivated in the central districts of Okura, Alloma and Odoru. But in the northern districts of Ife, Bassa-Komo and parts of Dekina where it forms the greater part of the natural vegetation, the soil is good for yams and cereals such as beans. In this area just like any other parts, the tenure of grassland does not present any complicated problem. It

is usually acquired on short term for two to three crop seasons after which it is abandoned.

Usually, farmers do not contest their right of possession of land in a grassland area when it reverts to bush. But where such land is bordering on a man's farm his permission to use it must be sought. When in an open space, this type of land forms part of the "common land", its acquisition does not need the permission of anybody except where someone can prove that he had earlier acquired it for future use. This again is usually indicated by mounds of earth to show the desired. Though basically, the type of land I vested in the Attah.

1.1.1 **Fallow Land (Ikpo).**

Areas of abandoned farmland, which have reverted to bush, fall into this class. The period of fallow may be form land which the area in again covered with secondary forest. After this, the land becomes sufficiently rich again to produce crops. The period of afforestation has been greatly reduced by a new type of wild weed, "supaterium" (or egbe abilewa) which grows very rapidly and is considered by the Agricultural Department as having the power of enriching a poor soil within a very short period of time. It must be pointed out here that in the past there was no other method of improving farm land when it became exhausted other than letting it go fallow. This type of land as can be seen from the description above, is vested in the original owner, except of course, if

the land has been given out as a gift. This system no longer exists because of the advent of the use of fertilizer introduced by the Agricultural Department. This fertilizer can be purchased either through the local government at the controlled price of form the open market at an exorbitant price.

1.2.4 **Sacred and Taboo Lands (Oko ina).**

In Igala area, there are considerable patches of forest land declared and prohibited for either farming or settlement purposes. This is based on religious beliefs and this plays a great a part in the control of the land. They are found usually surrounding the villages.

Taboo land is the class of land over which no individual right has yet been exercised and although fertile no one dared think it fit to cultivate it.

Both sacred and Taboo lands, though not for cultivation, are under the control of the Attah. In case of the sacred land, no permission is sought before the dead are buried.

Sacred lands are reserved for two Purposes:

1. There are graves to protect "juju" shrines such as is obtainable in Egwume (egbe), Ejule, Ojoku (Okula) and some parts of Ibaji where they are called "Ayabi".
2. Patches of sacred forest land enclose the burial places of chiefs as for example "Ojaina" where dead Attahs are buried in Idah and "Unoja" in Imani. Juju ponds such as "ofeli" in Ejule have considerable pockets

of sacred land around them. In Ibaji districts, some sacred land portions are strictly reserved for burying villagers who died under mysterious and traditionally unacceptable circumstances such as suicide and women with pregnancy. Some were kept for defense purposes. It was not uncommon of fighters to hide in these forest fringes and fire at enemies in the event of a village being attacked.

Nowadays however, a few such lands are found, there be none in Imani, Ogugu and Ankpa districts where shortage of forest land is very acute while in Egume and Alloma areas, they are left to keep domestic animals from the farms. Only vestiges of it are found in Ibaji where they are still used for some purposes as discussed above.

1.2.5. **Marshy land Echa).**

Areas or land bordering the Niger and Benue rivers which are subject to annual flooding fall into this class. After the flood, agriculture-rich alluvial deposits from the rivers are left behind. Marshy lands are most abundant in Ibaji district. The rich quality of this class of land in addition to among other things, its comparative scarcity probably gave rise to the hitherto unknown system of pledge which will be discussed in the next chapter.

1.3 OBJECTIVES OF THIS WORK

The aim of this thesis is to look critically into the difficulties or the conflicts which families are being subjected to in inheriting family land. It shall also aim at identifying the causes of the problems which may

lead to disintegration of family members and the present laws governing such conflicts and their regulations.

1.4 METHODOLOGY

Initially the thesis will review the existing laws and the administration of succession to land among Igala people. This will be based on research through the relevant books, journals, monographs treatises, tribunal reports.

A questionnaire will be drawn and distributed at random to the elders who are conversant with the customary law of the Igala tribe on the succession.

1.5 SCOPE

The thesis shall cover customary rights in land among the Igala speaking community of Kogi State. There are more than one method based on different religious beliefs (e.g. Islamic and pagan worshipers) as to succession rights among the Igala people. The research will also examine the development arising from the colonial days to the present as regards succession rights in the area.

8. Notes and references.

1. Area of Kogi State – 10,953, See federal Office of Statistics, Lagos, 1961.

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2. Igala population was approximately, 1,062,276 1991 National Census.
3. Braimah and Idakwo, Igla Land Tenure (Unpublished) Institute of Administration, Ahmadu Bello University, Zaria (1963) Pages 5 – 12.

CHAPTER TWO

CUSTOMARY LAND OWNERSHIP IN IGALA LAND

2.1 The position of Attah.

Traditionally, the "Attah Igala" is the absolute land trustee. He maintains this position not so much by conquest but by divine right and custom of the Igala people. Although it has been said that the Attah is the traditional owner of the land in Igala, the term "ownership" has been applied in a rather loose sense. Absolute ownership of land by an individual comparable with the English system of fee simple is quite alien in Iglala land. The position of Attah is that the land yielded crops in abundance because of his sacrificial rites, a service for which he received tribute from his subjects.

It is therefore more correct to say that land in fact belongs to the community, the family, and the individual. There is an inalienable right to the use of land by all members of the community. The village chief or in case of the family head has the ultimate charge of the land. The traditional chief is said to be the "owner" or the original founder or the successor to the original founder (O'onu ane Akpalakpa) or the Attah's title man (oni'ajata) who is usually from the royal blood. In certain cases however, the original founder is given a title by the Attah, but at other times, the original founder and the Attah's titled man act side by side in exercising control over the land.

2.2 The concept of ownership.

According to Osbom's Concise Law Dictionary the right to the exclusive enjoyment of a thing (Austin). Strictly, it denotes the relations between a person and any right that is vested in him (Salmond). Ownership is absolute or restricted. Absolute ownership involves the right of free as well as exclusive enjoyment including the right of using, altering, disposing or of destroying the thing owned. Absolute ownership is of indeteminate duration. (Land is in strictness not subject to absolute ownership because it cannot be destroyed and because of the theory that all land is ultimately held of the crown).

Restricted ownership is ownership limited to some extent, as for example, where there are several joint owners, ort a life tenancy, or where the property is charged with the payment of a sum of money, or subject to an easement. Beneficial ownership is the right to the enjoyment of a thing as contrasted with legal or normal ownership. Ownership is always subject to the rule that a man must so use his own property as not to injure his neighbour.

In Black's Law Dictionary ownership is defined as "collection of rights to use and to enjoy property including right to transmit it to others. It is the complete dominion, title or proprietary right in a thing or claim. The entirety of the powers of use and disposal allowed by law. The right of one or more persons to possess and use a thing to the

exclusion of others. The right by which a thing belongs to someone in particular to the exclusion of all other persons. The exclusive right of possession, enjoyment, and disposal; involving as an essential attribute the right to control, handles and disposal.".

There are three types of land "ownership" in Nigeria, these are communal, family and individual. These will be discussed in details later in this chapter. The "owner" of land under native law and custom is entitled to the exclusive right to possession, right to use, right to reap the income, right to capital, right of devolution on death, right to transfer, right to unlimited duration, right to manage or control and right to bear the burden of all liabilities arising from the land. In COKER v. ANIMASHAWUN[3] and KABIAWU v. LAWAL[4],

A piece of land belonging to family E. was divided into two branches. One branch purporting to act for the whole family conveyed the land to C for an estate "on fee simple absolute and possession". A few years' previously a member of the other branch had purported to sell the land as being his own to A the questions for disscussion were wether tenure under native and customary Law can be converted into a fee simple estate and who has a better title C or A

Held (1) A conveyance in English for of land held under customary tenure purporting to convey an estate in fee simple and using words of limitation appropriate thereto may properly convey a fee simple estate.

(2)Although C's title was voidable and defensible at the instance of the new existing branches it was better than A's which was completely void.

It is well settled that a purchaser of land held under native law and custom can acquire an absolute title equivalent in all respects to a fee simple estate.

it was held that "ownership of land by native law and custom is as well known absolute ownership".

In the celebrated case of AMODU TIJANI V. SECRETARY SOUTHERN PROVINCES,[5] the Privy Council emphasised the ownership of land by the community, the village or the family. The origin of communal ownership is not quite easy to identify on a precise basis as such ownership is usually enveloped in traditional history which at times is not easy to come by. Any traditional history worth the trouble and authenticity must touch on the origin of the community itself. A community land or communal ownership may arise from the initiatives or decisions of the founders of the land. The founders of the land or its original settlers may decided to designate the land to entire community and it remains so. This is what most founders made of new settlements, a good number of which were as a result of conquest.

There are three types of land ownership in Nigeria, these are communal, family and individual. These will be discussed in details later in this chapter. The "owner" of land under native law and custom

is entitled to the exclusive right to possession, right to use, right to reap the income, right to capital, right to devolution of death, right of transfer, right to unlimited duration, right to manage or control and right to bear the burden of all liabilities arising from the land.

2.2.1 Community of village ownership

Under native law and custom the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family never to the individual.

In AMODI TIJANI V. SECRETARY SOUTHERN PROVINCE case, certain lands situate at Apapa, in the colony of Lagos, were taken by the colonial government for public purposes. The plaintiff as Head Chief of the Oluwas family claimed as owner of such lands to be entitled to conpensation as provided by the public lands ordinance.

Speed, C. J. Held that as the plaintiff had since the cession of 1861 exercised by virtue of his chieftaincy a kind of seignerurial right of control and management of the land in accordance with the well – known principle of native law and custom and had received payment of nominal rent or tribute from the occupiers, and as the exercise of such rights must have come to the notice of the Government, compensation should be paid to the plaintiff on that basis and not on the basis of absolute ownership.

On appeal to the full court this decision was affirmed. The plaintiff there upon appeal to the judicial committee of the privy council.

Held that the terms of the ordinance did not preclude the exercise which had been made of the prerogative of the Crown to give special leave to bring this appeal.

Paragraph 6 of the public lands Acquisition Ordinance, 1903, which says that where lands required for public purposes are the property of a native community, and that "The Chief of such community may sell and convey the same for an estate in fee simple", means that the Chief may transfer the title to the community.

The Appellant, for the purpose of the public lands Acquisition Ordinance No 5 of 1903, is entitled to claim compensation on the footing that he is transferring to the Governor the land in question in full ownership, excepting so far as such land is unoccupied, along with his own title to receive rent or tribute.

In Igala community or village land there are patches of land known as "Oko eruru" or "Egbili" which means where nobody has ever touched or has ever exercised the right of usage. This type of land is reserved for future use and any member of the community whether a stranger or a settled member has the right of use over it. Palm trees and other useful fruit trees on such land belong to the community but are controlled or harvestable by the village heads where it is customary to pay tributes. Usually a ban (enaba ekpe) is place on the cutting or

the harvest of such trees. For example, palm trees, the first fruits harvested after the ban if lifted are processed and the oil given out as a tribute to the appropriate persons e.g. members of the elder council of a village or town. Thereafter anyone is free to harvest the fruits for his own use.

M.G. Yakubu[6] has defined communal to mean a group of people. This group of people may be a tribe, a town, a village or an extended family. The group may speak the same language, share the same culture and form a distinct social and political entity. It may also be a single autonomous unit or a parent village with a number of off-shoots. He also gave another kind of a community as that which is free from all kinship factors and based solely on geographical contiguity-common residence on the same soil serving to bind its heterogeneous elements into a single society in which every individual has an equal claim to a share of the common land for cultivation, building and grazing. In a community land is held as by an individual and is expressed to be vested in the head. The rights are exercised through headmen of villages and ward-heads who may be hereditary of appointive offices who distribute lands to those who need it, control the common pastures and supervise the admission of non-member strangers.[7]

Under native law and custom a piece of land may be tagged as "communal land". This means that the land belongs to the community

which may be a form of a tribe or group of tribes with common ancestor. Under this type of land holding, the title to communal land is normally vested in the community in general as a corporate group. Such a group has the right to deal with the land as it wishes, subject to such limitation as it may be imposed by any law. It is the corporate group which has the ownership of land with all its attributes. That is to say that the community has the right to alienate subject to concurrence of agreement, the right to use and enjoyment of the land. It has the right to possess and the right to reversion.

Under the communal ownership of land, no member has a separate title of ownership of the whole or any part of the land. He simply holds the land together with the other members of the community. But where a portion of communal land has been allocated to a member of the community, such a member becomes the "owner". He can maintain an action for trespass against a community member who enters into the land wrongfully.[9]

Thus in the case of OKON v. OLOTU[10] the plaintiff had been in possession of land belonging to a certain quarter for at least 12 years and planted trees around it and acquiesced. The defendants who were members of the quarter came on the land and destroyed the trees planted by the plaintiff, and their defense was that the land had never been given to the plaintiff. The plaintiff agreed that the land belonged

to the quarter. He had incurred expenses in planting the trees and growing them on the land, of which he was in possession.

It was held that the plaintiff was and had in fact been in possession for 12 years and had incurred expenses to the knowledge and acquiescence of the quarter owning the land. He therefore maintained an action for damages against the defendants, though they were members of that quarter, for their trespass of destroying his trees.

Under the communal ownership of land, no member has a separate title of ownership of the whole or any part of the land. He simply holds the land together with the other members of the community. It is said that "a member of the community holds nothing by himself in the communal land and yet holds the land together with the other member of the community".

In the Igala communal land for example, in Ibaji district, the control of land is in the hands of the villages or towns. In the past it was by the clans, whereby each family was allotted its portion to farm or build. Note that still, the chief or head was regarded as a trustee. This trusteeship position over the community land was clearly stated in the celebrated case of AMODU TIJANI v. SECRETARY SOUTHERN PROVINCES.[11] The court held, "... to some extent, the position of the chief with regards to community land is that of a trustee and as such he holds the land for the use of the community....."land

In a community land is held by an individual and is expressed to be vested in the head. The rights are exercise through headmen of villages and ward heads who may be hereditary or appointive officers who distribute land to those who need it, control the common pastures and supervise the admission of non-member strangers.

Memeondes C. J.,[12] in his evidence before the Northern Nigeria Lands committee described this system of landholding in the following words,

"The idea underlying tenure in the native community is that land is the property of the people, and that their chief is a trustee of the people and that every free man in the community is entitled to as much land as he can reasonably require to support himself and his family and is entitled to keep that land as long as he uses it for the purpose for which it was granted and as long as he behaves himself".

Communal landholding does not necessarily mean that the land is cultivated or tilled together, crops planted harvested and stored together in one or more granaries from which all members of the community feed. As Y. Aboki [13] notes, it means that there is for instance a tract of land which belongs to all members of the community by virtue of being born free in that coummunity. Each member is entitled to a portion to build a house or farm and he is absolutely entitled to all profits accruing from that land as a result of his direct

personal labour. Also as of a right, an individual member is entitled to share the proceeds arising from such of the communal land.

Communal land as the basis of ownership or title to land has received some judicial pronouncements. Thus in AMODU TIJANI v. S. S. NIGERIA (supra) it was stated thus "The next fact which is important to bear in mind in order to understand the native land Law is that the notion of individual ownership is quite foreign to native idea. Land belongs to the community, village or family."

Also in OTOGBOLU v. OKELUWA and ORS[14] the plaintiff's action against the defendants was for declaration of title, perpetual injuction and general damages for trespass. The 5th defendant put up a building on the land in dispute, which was found to be that of the plaintiff. Relying on OKON v. OLOTU and ORS (supra)[15] The learned counsel for the plaintiff argued in the supreme court that following the order of perpetual injunction made by the trial court, the 5th defendant cannot go to the land in dispute where the house is situated. He said it follows therefore that the 5th defendant cannot claim the benefit of his trespass and submitted that the possession of the house should be restored to the plaintiff.

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Uwais JSC held that: "The maxim Quicquid plantatur solo solo cedit is now an established principle of our land law. Applying the maxim therefore, it should be said that the 5th defendant has forfeited the house since he was found to be a trespasser."

In Igala land, the position is the same, land belongs to the community, village or family. The only situation where an individual can say that land belongs to him is where such land has been given either for farming or for building by the head of the family in case of family land or the chief in case of the community or village land.

2.2.2 **Family ownership.**

Family means the desendants of a common ancestor. Lloyd16 defines family as a corporate body created upon the death of the founder holding an interest in land. It includes all his or her descendants in the male line (in case of agnatic lineage) or in both male and female lines (in case of cognate descent group). New members of the group belonged to it by virtue of their birth.

According to M. G. Yakubu, [17] under customary law, the usual type of family is the extended one. This, he says, includes, cousins, their wives, children and grandchildren. Similarly, T. O. Elias[18] defines a family as the smallest social unit in the indigenous policy, is variously composed of a man, his wife or wives, their children, their grown up sons and wives, and children of these, the man's brothers or close cousins and their wives and children. Y. Aboki [19] states that in the Middle Belt, in most communities, the extended form of family is the one obtainable. He gives examples of the Tiv community as a well organised type of the extended family system with several members who a time may constitute a town or a village. Also in the Ebira native

law and custom the word "family" may mean the descendants of the founder i.e. his children and grandchildren. To James and Kasunmu20 the term family has primarily two different meaning under customary law. Firstly in its narrow view, it means immediate family i.e. the children of the person whose family is in issue. Secondly, in the wider sense of the term, means the descendants of a common ancestor.

Under the native law and custom of the Igalas, a family comprises father, mother, brothers and sisters. When a man talks about a land belonging to him, the original ownership is traced to his great grandfather down to his own father.

Land, probably the most important source of wealth in a developing country, can always be the subject of a great many interests and derivative rights. Actual physical control of native lands is vested in the families and speaking generally, only in the sense that it is an aggregate of the constituent family groups could the community or tribe be said to own the land. Although the king or chief is said to be the head of the tribe or community, he has no power by himself to sell or alienate the lands at his own disposal. He is bound by native Law and culture to allocate to several families for their own use, portions of such land.

According to T. O. Elias the chief is everywhere regarded as the symbol of the residuary, reversionary and ultimate ownership of all

land held by a territorial community. He holds on behalf of the community in the capacity of a caretaker or trustee only, but he allocates portions of land to family heads according to need and these in turn reallocate among their members."[21] The rights possessed by the members of the family over its land are more often confused with the rights of the family as a corporate entity and, worse still with those of the chief or the head of the family as a caretaker in the comprehensive structure.

Therefore, native law and custom does vest ownership in the strict sense in the family but ascribes to the family the aggregate of the rights which could be described as ownership. To all intents and purposes, the family is the owner and in modern conveyancing the family is usually recited as possessing an estate of inheritance.

2.3 THE NATURE OF FAMILY PROPERTY

Title to any family land is vested in the family as a corporate body or entity. This principle was amply and briefly stated in the case of OGUNMEFUN v. OGUNMEFUN,[22] the facts of which are stated briefly. The grandfather of the parties to the action died intestate leaving real property to which he was seized in fee simple. He left children, a boy and a girl surviving him. When the girl died she made a will giving her relatives her share in the property of X. It was held that upon death intestate of Thomas Williams Davies, the founder of the family, the property devolved on his children as family property. The

court held that the devise was invalid because, "Title to the family land vests in the members of the family as a corporate group. It is joint and indivisible, no grant capable of being alienated absolutely by an individual member even if it has been allocated to him without the consent of the other members of the family".

In the case of COKER v. COKER,[23] family property which a father of a family sets apart for his wives and children to occupy jointly after his decease. All his children are entitled to reside there with their mothers and his married sons with their wives and children. No one has any chargeable or alienable interest in the family property that it can be mortgaged or sold.

In OGUNDAIRO v. ABEJE,[24] family property was defined as the property which devolves from father to children and grandchildren under native law and custom and which no individual child or member of the family can dispose off by his or her will, until the property is partitioned and each child or member of family has his or her separate share of the whole. According to M. G. Yakubu,[25] family land holding represents one of the main forms of landholding throughout Nigeria. The ownership of the family land lies in the family as a corporate entity. The legal power to control and mange the affairs of the land vests in the family as a whole. All the members of the family own the rights and liabilities in the land. No act of one member can affect or change the legal position of the land unless there was an agreement to that

effect. Prima facie therefore, the legal position of the family land makes dealings with it very difficult. In the case of OGUNMEFUN v. OGUNMEFUN[26] it was held that the ownership is joint and indivisible unless partition takes place. No part is capable of alienation by any individual member acting single handed.

From the above statement, one can see that family ownership is a basis of land ownership and this statement is true of Igala people. Land is held by numerous families which constitute village and community.

In Aboki's[27] view, the idea of land being in the hands of fixed families may presuppose that no new families are created any more or when they are created they may not have land, since land is in fixed hands already. He went further to say that when a member of the family needs a new portion of family land to farm or build a house and there is none to be given to him from the "family pool" the affected member, with the head of the family would approach the village head or chief for a portion of uncleared communal land. If finally an allotment is made, the person to whom the allotment was made becomes the owner of this land. If he dies, the land will devolve to the children of the grantee but not to the general members of the family. This is the process by which operation and expansion of family land takes place.

1.1.1 Individual ownership.

In the ancient times, individual ownership of land was a phenomenon which was unheard. According to Raynor C.J.,[28] "The next fact which is important to bear in mind in order to understand the native land law is that, the notion of individual ownership is quite foreign to native idea. Land belongs to the community, village or family, never to the individual.

In the Middle Belt of Nigeria, within the Igala, Idoma and Tiv communities of the kogi and Benue States, the concept of individual ownership is a phenomenon.

In the past, however, in Igala land, personal farm land possessed by an individual was small. The reason being that the people practiced shifting cultivation. A man's landed property was not more than the land on which his small hut was built upon. At present, the struggle for building land and economic significance of agriculture are causing much value to be attached to landed property. Many people are now acquiring land in greater quantity as compared with the past especially for building in urban areas and also for economic tree crops. This has caused a lot of land disputes amongst the Igalas themselves and their neighbours. For this reason, it is not uncommon nowadays to find a man at Idah having landed property at Ejule, Ajaka, Anyigba, Dekina and Ankpa.

Personal land is a land which an individual has inherited or otherwise acquired and which is at his personal disposal and not subject to family sanctions. This holding includes a man's "Ikpo" (fellow land) of which his permission is sought and he in turn from members of his family before its use by another man. For as long as he lives, the land is in his permanent possession and he can give it out to any person he pleases on request and with the consent of members of his family. Note that each member of a family may be farming for himself but it does not mean that the land he farms is his own but the family. Therefore, individual labour or farm does not mean individual ownership of land.

With the evolution of cash economy in recent times, land is now seen in Igala as a subject of commercial transactions. In the urban centres where the values of land are higher, people speculate and acquire land for the purpose of re-selling it or building a house for lease, pledge or mortgage. To do this quickly, individual ownership of land tenure was employed since customary and tenure constitutes a stumbling block against easy transfer of land or dealings in land in these manners.

According to Aboki[29] in the modern time, the need to practice individual system of land tenure has been made more important than before. Today an individual's responsibilities have increased manifold. Thus, an individual has to pay for the school fees of his children,

provide medical care, better clothing and housing. He wants to live a more decent and meaningful life, not always in object poverty and squalor.

The idea of individual ownership of property as a result of this tended to cause the disintegration of the traditional system of landholding in favour of the individual system. Thus, the traditional system of land ownership began in many areas to crumble gradually giving way to individual ownership.

2.4 METHOD OF ACQUISITION.

In discussing the methods of acquiring land in Igala local government areas, two factors must be borne in mine:

i. The first factor is the indigenous system of obtaining land by way of using money to acquire land. Nowadays, the practice still exists in Igala land.

ii. The second factor is the influence of Ibo and Nupe customs of pledging in certain parts of Igala land. The Eastern and Southern Districts of Odoru, Alloma and Ibaji have been considerably influenced by Ibo tenure system, the North-Westernn area inhabited by the Bassa-Nges has hitherto adhered strictly to Nupe land custom.

Therefore, selling and pledging of land in Igala land is largely practiced In those areas. It is not unusual to find these two types i.e.

selling and pledging existing side by side in other districts of Igala land. This is a latter development.

2.4.1 Pledge of land.

A pledge of land under native law and custom has been defined as "A kind of indigenous mortgage by which owner-occupier of land in order to secure an advance of money or money's worth, gives possession and use of the land to pledge creditor until the debt is fully paid or discharged".

In other words, it can be defined as a delivery of possession and custody of a piece of land by the pledgor to the pledgee to hold and use until the agreement is determined or dishcharged. Where this is done, it means that the pledgee has acquired an interest in the said land. Therefore the rights of the pledgor will be taken over by the pledgee. This is one of the oldest ways of customary acquisitions of land.

Pledging in Igala land was common in some areas such as Idah, Adoni, Ibaji and Gboloko in the past but today other areas have joined the practice. Land pledging in this sense is mainly on farm land and is not done in order to incure favour from an overlord. It is an informal way of hiring land (acekpe) for which rents are usually paid in kind.

In case of a pledge of land by the pledgor the land is to be used buy the pledgee until the pledgor pays back the loan or debt. Or when the payment of the loan is the use by the pledgee of the land for a particular period of time usually for one season or a year. As soon as the season is over and the pledgee has harvested the crops then the land reverts back to the pedgor and this ends the transaction. It does not matter whether the harvest was able to satisfy the amount of the debt or not. Therefore the fundamental principle of a pledge under native law and custom is that it can always be redeemed by the pledgor or his representatives. The maxim is that 'once a pledge always a pledge'.

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The principle of redemption of pledge exists almost throughout the native law and custom of land tenure in West Africa. Among the Yoruba of Nigeria, even the grandchildren of the pledgor can redeem the pledged land.[31] The same also exists in Ghana.[33]

The generally accepted view of the pledge under native law and custom is that a pledge transaction vests in the pledgee only a right to possession of the land and the enjoyment of profits thereof. The title in the land remains witt the pledgor of the land. This accepted view also appliess under the Ghanaian customary law of land tenure. Since it does not vest the title in the pledgee, on the principle of "nemo dat quod non habet" in the general law of contract, the pledge cannot

transfer a valid interest to a third person without the consent of the first pledgor.

A pledge under native law and custom is determined on either the agreement of the parties or as soon as the parties discharge their obligations. It is an established custom, however, that the right to redeem must be exercised reasonably. The pledgor in some cases cannot redeem the pledge in the middle of the rainy season when the pledgee has already planted his crops for the year. The pledgor in this case has to wait until the crops are harvested.

2.4.2 Sale of land.

Sale of land as a form of alienation here denotes an outright purchase for money from the grantor by the grantee. By the sale, ownership over the land is no longer with the grantor. Therefore, sale of land means a permanent transfer of rights over land for a monetary consideration.

In Nigeria, land was regarded as God-given for sustenance of man and not to be made the subject of commercial transaction. It was on this basis sale of land was not known to customary law of the people. Land was considered to be the property of the family or community as earlier pointed out in this chapter. Therefore, there was no need for anyone to buy it. This was revealed in the case of LEWIS v. BANKOLE.[34] In that case speed C.J said, "it is perfectly well known

that by strict ancient native law and custom all property was family property and all real property was inalienable. Family property can be leased though it cannot be sold by strict native law and custom even if all members consented....".

Also in OKIJI v. ADEJOBI[35] the plaintiff averred that he bought the land in dispute from the defendants' ancestors 200 years ago. The defendants claimed that the land in dispute was a family land and based their ownership on traditional evidence. The judge, Ademola Adetokunbo, C.J. of the former Wester Region held: "Much as I realize how difficult it is to prove a transaction of this nature so many years ago, I do not believe the plaintiff's assertion that there was a sale. It is most unlikely 200 years ago that land would be sold at all. A stranger could be given land on payment of the usual tribute but on out and out sale was rare, if made at all".

On appeal to the supreme court, Brett F.J. delivering judgement of the court affirmed judgement of the trial court without any hesitation. He further said "I am not prepared to dissent from this finding which is in accordance with the general trend of judicial decisions or dicta about the sale of land among the people of West Africa".

From the above submissions, one can see that sale of land was forbidden. The reason probably was that land was considered to be the property of the family or community and therefore a man is given land to live on or farm. However, it is now a well-established principle of

native law and custom that land can now be sold, if the consent of the principal members have been sought. This principle was established in OSHODI v. DAKOLOR.[36] The only way that proper creation of interest in land could take place was by securing the consent of all the members of the family or the community. This was illustrated in the case of OSHODI v. BALOGUN.[37] In that case the defendant, a member of a family, had purported to create interest in land in favour of the third without the consent of the plaintiffs who were other members of the family.

The court held that no interest could pass since there had been no prior consent of the whole family.

One is not surprised about the above submission because the largest proportion of land was held under the family or community system. It was even held that a person who buys a piece of land without obtaining the required consent of the other members of the family would be defeated by the rule of CAVEAT EMPTOR, (buyer beware) because he was supposed to know.

With the socio-economic development and the tendency towards individual or private property, transfer of land by sale came to be recognised by both the native law and custom and the government.

It is interesting to know that in the past sale of land was prevented and therefore, there was not market value in the land. Religion played a great part in the control and use of land in Igala. The

average Igala man regarded land as having the power of life and death, this being manifested in the crops it yields and the great number of dead persons buried in it. It was an abomination under such circumstances to sell or try to sell part of the land, hence the popular belief and saying "Ef'ane ta, ane f'e ta" meaning literally "if you sell the land, the land will sell you" i.e. you will suffer and die without mercy.

Nevertheless, the realisation of the economic importance of land today and the eager desire to make money on and from it has led to the selling of buildings plots in Idah, Ejule, Dekina, Anyigba, Egume and Ankpa. In many cases such are done secretly in order to avoid falling into disrepute.

Sale of land today in Igala is mainly for building of houses and industries. Farm land is sold on very rare occasions. It occurs only where the seller has no other land other than his farm or probably he is moving from there to another place for settlement.

From the above observation in Igala, sale of land is no more a new thing. It is done, especially in urban towns of some local government such as Idah, Dekina, Ankpa, etc. However, in the rural areas the practice is known especially in Ibaji district. What is mainly in practice in borrowing which will be discussed.

2.4.3 Gift of land.

A gift of land is a gratuitous transfer of land from the owner to another, with the intention that the interest of the donor shall pass to the donee when the gift is made. The important requirement of a gift are that it must be free from any undue influence, it must be voluntary and unbargained. Therefore, where a gift is made and is proved that it was done involuntary or with force or bargain, it would be declared null and void.

A gift may be outright or it may be conditional depending on the terms of the gift. For instance, a gift of land may be made to a stranger as a mark of gratitude or as a reward for being industrious or for being well behaved as the case may be. Such a gift is of a permanent nature and the donor may not call back the gift he has made. In a civil case in the Area Court Mubi,[38] Sule, a stranger came to settle in Mubi. Ahmadu gave him a piece of land and Sule used it for building a house and used the rest for growing crops. Ahmadu wanted to get the land back and asked Sule to quit. Sule refused and Ahmadu sued him.

The court held that since Ahmadu made a gift to Sule, he could not retract the gift afterwards.

Also in AGBLOE v. SAPPOR[39] a part of family land was given as a gift to Sappor in appreciation of his generous efforts in redeeming family property which was pledged by a previous Head of

the family, who could not redeem it. It was held that a gift of land is permanent in nature and it is irrevocable.

2.4.4 Outright or absolute gift of land.

Y. Aboki[40] defined absolute gift as that gift which is not dependant on any condition. That means the gift is of free will and without any attachment. Therefore, an absolute gift of land is as good as a sale because in either case, the land is permanently transferred to the grantee.

In JEGEDE v. EYINOGUN[41] it was held that a family could make absolute transfer of its land by way of gift. This decision is in contrast wit the decisions in OLOTU v. DAWODU[42] where it was held that native land cannot under any circumstances be transferred or given out absolutely. But in view of the Privy Concil's decision in OSHODI v. BALOGUN[43] and OSHODI v. DANKOLOR[44] it is now a well established native law and custom that family land could be transferred by any means absolutely on the concurrence of agreement of the principal members of the family.

In Igala area of Kogi State, absolute gift was known and practiced and was used as a token of appreciation of someone's good deeds. Such a gift has the same legal effect as sale. It confers absolute title or ownership of land with all it incidents.

2.4.5 Conditional gift of land.

Conditional gift is the opposite of Absolute. That is to say, a conditional transfer from the donor to the donee. In other words, it is a temporary transfer of ownership with the grantor reserving the right or reversion. Its incident is that the grantee acquires the right of user which endures for specific or indefinite period of time and may be transferred to his descendants.

It has been argued whether gifts of land under native law and custom can be conditional. According to M.G. Yakubu,[45] there is nothing like conditional gifts. To him all gifts of land under native law and custom are absolute and could be recalled by the donor if the donee subsequently misbehaves. He said once a gift made is subject to the good behaviour of the donee, it was no longer a gift but something else.

According to C.O. Olawoye[46] a gift of land under native law and custom can be conditional "and where such is the case customary tenancy is said to be created". Mr. Justice Ollenneu[47] in his lectures declared that "a gift of land validly made is irrevocable". But Bantsi-Enhill[48] holds a contrary view. He said:

"For with us gifts appear to be made on the basis of a general assumption of continued good relations and gratitude, ... the view that gifts under the indigenous law are revocable on serious grounds can be said to be the prevalent one....."

In the early days, gifts of land under the native law and custom required no writing, but could be witnessed. The reason being that customary law is unwritten. This is to say that gifts of land mostly are done orally with witnesses around. It was therefore quite lawful for a family or community to make a free gift of a piece of land to another party for any purpose as long as he behaved himself.

There is no lay down rule or definition as to what amount to good behaviour. To my mind it might be that which is acceptable to the donor and which does not deprive him of his reversionary title. For instance, under Igala native law and custom if a donee should commit adultery with any wife of the members of a family donor, such gift would be revoked if it was absolute one. This is because it is an insult or a slap on the face of the donor. It is regarded as an abomination to do such a thing in such environment with the people who out of love gave him a land either to live in or farm on as the case may be.

Also an act of theft or constant quarreling will deprive the donee of his gift of land. Any other character that is not expected of him will rob him of his gift.

In Ibaji district of Idah local government, a gift of land was mainly from community to community during the time of migration of the people. Such land is both for building houses to live in and for

farming. It is a gift absolute and never taken back even if any member of the community to whom the land was given misbehaved.

It is interesting to note that such community practice is no more in existence, it is only either by family or by an individual. A donee could show his appreciation by taking some kolanut and drinks of any kind to the donor with a few relations from both sides.

2.4.6 Borrowing or loan of land.

The word borrow or loan means to take or receive something for a certain time and with intention to return. Therefore to borrow a land means to acquire a grant of an interest for a short duration of time for the purpose of enabling the borrower to put the land for a particular use. Owning to the shifting of fallow system of agriculture, it is naturally to be expected that a family head, whose family land reserve is in fallow and therefore has no land to meet the interim demands of rising adolescent members of his household, would approach other members of the community for a temporary loan of the needed land.[49] From the above statement one could deduce that there are factors responsible for the borrowing of land and such are the type of agricultural system that are in operation e.g. fallow or shifting, over-population, economic value and infertility of soil among others.

In case of over-population of a family the family land may become inadequate and therefore the head of the family will be forced to borrow land from another family who may have plently.

Similarly, the high economic value of a particular crop which grows well in a particular land may necessitate some people to get that type of land. So such people would go to those who have plenty of such land and take a loan of it for cultivation.

Land borrowing may carry some food stuff to the land owner or it could be in form of drinks just to thank the land owner for his kindness.

Another reason which may necessitate the borrowing of land is the infertility of soil. The owner of such land would go and borrow land which is fertile to farm. If the borrowed land is far from where the borrower resides, he would move down to the place together with the members of his family and live there temporarily till the expiration of the period the land is borrowed for.

Under the native law and custom of the Igala people of Kogi State, a person who intends to borrow land for farming does not need to deposit anything in advance. In case of loan some form of consideration may be agreed upon. Though there is no standard form of consideration, the borrower might agree to work in the farm of the lender or share the produce. This was the past practice. At present some money may be accepted because of the economic value.

Where land has been borrowed and the borrower could not effectively work it; what becomes the liability of the borrower? According to T. O. Elias,[50] the lender may recall off the land borrowed, and the borrower dispossessed of it and the deposit if paid the lender returned to him.

Normally, if the land borrowed is under utilized, it is not the concern of the lender. He can only recall the land if he (the borrower) has a need of it or waiting until the expiration of the period.

Where there are economic trees on the land borrowed, the right of the borrower may not include to reap the fruits of the economic trees. In such a case, the borrowed would have to keep off the trees and concentrate in cultivating it only. But where the right is given, the borrower may harvest such fruits and share with the land owner, e.g. palm trees, local beans, mango trees, etc.

It is a strict rule that the borrower should plant crops which may be harvestable yearly. He would not be allowed to plant economic trees since trees are of permanent nature.

Finally, borrowed land terminates at the end of the harvest or at the agreed time.

2.4.7 Settlement.

This is one of the methods of acquisition of title to land. It is a way by which a person can create interest in land and deal with it. Under the native law and custom settlement is one of the traditional

modes of acquisition of land. It means that the original founder or the first occupant of the land acquired no grant from anybody. In other words, his motives for the discovery, of occupation of land could be for settlement, fishing, hunting, farming, etc. In order for the first settler to claim his right over a piece of land by way of settlement he must show some signs that he has settled on the land. Such signs might be putting up a building on it, which maybe temporary or permanent in form or fence.

Secondly, the first founder of land can cultivate the piece of land either by planting crops on it or economic trees. All these is to show that such a person is the first to settle or discover the land and he is in possession.

In **AJALA v. AWODELE**[51] The plaintiffs claimed a declaration of title and injunction to restrain the defendants from entering into a parcel of land. The plaintiffs argued that their ancestors were the first people to settle on the said disputed land. The court after a thorough consideration of the historical evidence in the case, decided in favour of the plaintiffs and remarked viz.

> Settlement is one of the traditional modes of acquisition of land and it irrelevant to argue that the title is defective because his ancestors has no grant from anybody.

From the above statement, if a party who is seeking for a declaration of title to land can establish to the satisfaction of the court

that his ancestors were the first settlers on the land in dispute, automatically he will be entitled to such declaration.

But where a party goes for fishing or hunting or collecting fruits, he may not have exclusive right over the land. This was the authority in the case of **AMECHREE v. KALIO**,[52] where a village clan claimed an exclusive right of fishing to the exclusion of other clans around the river. The Full Court in reflecting the claim held that to allow only one clan to fish in a natural river would be contrary to public policy and natural justice.

However, where evidence can be shown that a settler has developed the bush or pond purposely for hunting or fruit collection and fishing he will allowed exclusive right thereto. As already mentioned earlier, the basic principle of land acquisition by settlement is that every activity on the land by the settler and his family brings the land under their control.

Under Igala native law and custom the law of settlement is the same as above.

2.4.8 Conquest.

This is one of the various ways by which interest or title can be created in land. This happened when the powerful tribes or communities by way of force of arms conquered and subdued the weaker tribes or community then became the conqueror's own automatically. For example, when the British conquered the Fulanis

between 1902-3 and their (Fulani) rights in land were taken away form them, Lord Luggard made a declaration in these terms, "The Government in future holds the rights in land which the Fulanis took by conquest from the people and if the government requires land it will take it for any purpose".[53]

The statement above shows that the Fulanis had earlier conquered the same land from the Habe in Northern Nigeria in 1804 before the British took over the same land form them.

This further shows that which ever tribe or community that is powerful to the extent of conquering another tribe or community takes the ownership of the land. And this is to say as soon as the conqueror established effective control over the conquered land, he is free to use the land in any way he deems fit.

According to the history, there occurred wars between the Igalas and the Jukuns over ownership of land where the Igalas are occupying at the moment. The Jukuns wanted to raid the Igalas and take over the land but they were not powerful so the Igalas resisted the attack and overpowered the Jukuns. Today the Jukuns are referred to by the Igalas as their (Igalas') slaves probably because of the way the Igalas dealt with them.

2.4.9 Cession.

This is also one of the methods of acquisition of title of land. This type of acquisition is very rare under the native law and custom.

Cession is a bilateral agreement between two parties whereby one of the parties renounced his rights and title to land or territory in favour of another.

The famous cession in Nigeria was that of 1861 when King Dosunmu ceded the former colony of Lagos to the British Crown, :his heirs and successors for ever, the port and Island of Lagos, with all the rights, profits territories, and appurtenances whatsoever thereunto belonging.[54] The most important legal requirement is that the ceding power has the right to enter into agreement.[55] The legal effect of cession is that the root of title of the land comprised in the treaty thereby passed to the party for in whose favour the treaty was entered into.[56]

In deciding the legal effect of cession of Lagos in 1861 the Privy Council held that the crown was by the cession, the owner of Lagos (lands).

In Igala land little is known about cession. What was the practice of the people then was as I stated earlier in this chapter.

2.5.0 Reclaimed Land

Whether an individual has right to claim ownership of family land because he has reclaimed the Land.

In BASSEY V. COBHAM"[57].

The land in dispute was the property of the family of the defendant. The plaintiff claimed a declaration of title on behalf of himself and the Egbo eyo family of lower cobham.

The defendant replied that the land had been given to his late mother for the use of her dependants, by her husband who was the then the Head of house of Cobham that it was swamp land. That it was reclaimed by his mother form the swamp. That recliamed swamp land becomes private and not family property.

Held that accordingly to native law the act of reclaiming swamp land becomes private, not family property.

Held that according to native law the act of reclaiming swamp land does not confer any special property in the land reclaimed on the individual who reclaims it, as against the communal title of the family.

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CHAPTER THREE

SUCCESSION TO RIGHTS IN LAND (CUSTOMARY LAW)

3.1 INTRODUCTION:

According to M.G. Yakubu, 1 "Succession or inheritance means the entry of living persons into the possession of a dead person's property. It exists whenever the institution of private property is recognised as the basis of the social and economic system. Strictly, it does not apply to land or right in land, held jointly by the family or community because an individual deceased person has no personal or private rights which may devolve on his successors"

From the above meaning, succession can only be ascribed to property owned personally. The succession we are concerned here with is that relating to rights in land. With regard to succession to rights in land as this thesis is only concerned the nature of the subject-matter has necessarily compelled the establishment in all societies of peculiar and local rules of law. For this reason the law of succession varies form place to place and indeed from time to time. Hence it is intended to refer to succession only in so far as family property is concerned.

KASHIM IBRAHIM LI

3.2 TESTATE AND INTESTATE SUCCESSION

3.2.1 Testate Succession

Testate succession regulates the devolution and distribution of the property of a person who dies having left binding directions as to

how it should be distributed. Testate succession in customary law is regarded as exceptional. Testamentary disposition of property in customary law is not popular. One of the roles of customary laws of succession is to keep the family together. There is no doubt that disputes among the successors of a person who dies intestate may bring about disunity in the family, yet a father would not like to sow the seeds of dispute in his family after his death. Another reason for the few instances of testate succession in customary law is the fact that most people do not like to face up to the fact that they will die some day. However, it is feared that testamentary disposition of property may attract death.

Testamentary successions arise when a person wishes to reward a child who has been obedient, dutiful or hardworking. A father may love a child because he cheerfully runs errands for him or because of the child's intelligence and sense of responsibility. Even without these attributes, a father's love for a child may derive form his love for the child's mother. This is common in polygamous families. There are cases where a father with many children has benefited some more than others. For example, he might have assisted some of his grown-up children to get married and have settle them in life by building houses for them and giving them some education or professional training. There may be some of his children whom it has not been possible for him to establish in life on account of the

children's tender ages or the father's poverty at old-age. A father may compensates such children by means of testamentary succession.

It is pertinent to know that testamentary succession is concerned inter alia, with the disposition by a person of his personal property rights taking effect only after his (the testator's) death. This desire of a father for his children is to have the best in life. No father will give a stone instead of bread to his child nor a snake instead of fish to his child. It is for this reason that testamentary succession in customary law is effected in two ways: i.e. by nuncupative wills and by donatio morits cause[2].

Testamentary succession is a method whereby a person can in his lifetime, direct how his property is to devolve after his death. This is known in legal terms as a will. Until death the directions contained in the will confer no right on the person or person's named there as beneficiaries. During the life time of the testator, he can at any time alter, modify or even revoke the will. Therefore they will takes effect on the death of the testator.

A Nigerian who is subject to customary law or Islamic law may make a will in accordance with the English wills Act of 1837 so long as the requirements of the statute are observed. This was the decision in APATIRA v. AKANDE.[3] In that case the suit was brought by the plaintiffs for probate of the will of the late Raji Thompson. The defendants had entered a "caveat on the ground that the will was not

properly attested. The testator was a native of Nigeria and was born, lived and died a Moslem. The will was in English form but did not, so the court found to be the fact, comply with the requirements of the wills Act as regards signature and attestation. It was argued (inter alia) for the plaintiffs that the will should nevertheless be admitted to probate as a will in Moslem form, it being sufficiently attested under the requirements of Moslem law.

Held that the will was intended to be a will according to English law, and that, that being so, the fact that the deceased was a native of Nigeria and a Moslem did not make any difference to the necessity of complying with the requirements of the wills Act.

3.2.2. **Intestate succession**

Intestate succession regulates the devolution and distribution of the indisposed of property. This means that a person died without leaving a will. It is normal and common for a person to die intestate.

According to E.I. Nwogugu[4] the non-customary law of intestate succession in Nigeria is in a state of utter confusion. In many cases, the applicable rules are difficult to discern, and even where they are known, the provisions are not readily subject to precise interpretation. The result of this state of affairs is that sometimes it is difficult to determine whether there are any precise applicable rules.

The above statement is true, in the sense that under customary law in Nigeria intestate succession varies form one ethic group to another, just as

there are many ethic group. What is applicable is the native law and custom of a particular tribe as regards the issue of intestate succession in Igala land, they applicable law of intestate succession is the customary law of the people.

3.0 NUNCUPATIVE DECLARATION

3.1 DEFINITION

Nuncupative will is defined as "a declaration by the testator without any writing before a sufficient number of witnesses".[5]

Meek[6] has defined 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 persons. Meek's definition includes declarations made by a person in respect of:

a. The disposition of his property

b. Disinheritance and nomination of family heads and

c. The administration of other aspects of his business and family generally. All these constitute the "last words" of a person.

From the above definitions, it is clear that nuncupative wills are well recognised under the native law and custom. This statement is normally made by elderly persons in the expectation of death otherwise known as a death-bed declaration. Because of its nature, it must not be made to deprive the legitimate successors.

However, a nuncupative will may be made before interested person, the beneficiaries and other members of the family and

relatives. Furthermore, a nuncupative will may be made in sickness or in good health. The importance of this declaration in the presence of witnesses is to afford a proof of it with legality. Therefore Meek's definition of nuncupative is not totally true to some extent.

3.2 ESSENTIALS OF NUNCUPATIVE DECLARATION

3.2.1 Free Declaration:

To constitute a valid disposition by an oral will, it is important that the propositus must have acted as, a free agent when he made it. A declarant is not a free agent for the present purposes if he acted as a result of undue influence executed on him by the prospective beneficiary or his agent. What constitutes under influence is a question of fact to be determined with reference to the surrounding circumstances in each case. Undue influence or fraudulent misrepresentation, which induces a person to dispose of his property in a way he would not have disposed of it, had acted of his own volition, is enough to avoid a disposition of the intervention of any aggrieved successor.

3.2.2 Sanity

A testator must be in such a condition of health that he is taken to be responsible for his conduct in the community. The concept of insanity is ill-defined in customary law. By a person's behaviour, his family or community is able to say whether he is suffering from mental

abnormality or not and whether the effect of any illness is such that the person has lost his normal mental capacity.

As in English law, a testamentary disposition is invalid if at the material time the testator was 'non campos mentis' (not sound in mind). In contrast with the rule of this point in the law of contract an insane persons cannot make a valid nuncupative declaration 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.

According to S.N. Obi[7] insanity means simply an impairment of the mind resulting form disease accident or old age and in such as to deprive the testator of full use of his mental faculties. A disposition made under the influence of alcohol can also be upset on the ground. This means 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.

In Igala land, word from a drunken person are not to be taken serious. According to an Ibo man, utterances by drunken person are not to be acted upon. The reason for this, is that the drink must have robbed the person of his mental capacity to the extent that only those who are dealing with him will know that he is no longer responsible for his conduct. Under customary law, whether a person has lost his

mental normality by drinking is always determined by the evidence of non-medical witnesses who observed his condition at the time he made the dispositions. Again under customary law, a persons who has lost his mental normality may regain it up to the point at which his family and the community consider him responsible for his actions. For example, he may get married, borrow money from his friends etc. He may also dispose of his property while in this condition.

4. DISPOSABILITY OF SUBJECT – MATTER

A person is required by law to dispose of what belongs to him. He cannot give out what does not belong to him. The Roman legal principle of "nimo dat quod non habte"[8] is true of Igala customary law. That is to day, you cannot give what is not yours. This rule bars a person from alienating family or communal property before it is partitioned. The interest enjoyed by a person in family or communal property terminate with his death. A person cannot dispose of them by will. Any rights which his successors may have in the property after his death accrue to them by the fact of their birth into the owning group.

It is pertinent to note that family land cannot be disposed off by any member of the family without the consent of all the other members. An individual can dispose off the property he personally acquired by will either under customary Law or under English Law which ever one he so desires.

5. IDENTITY OF THE BENEFICIARY

The beneficiaries must be either living persons or children en ventre sa mère (in the womb of its mother). There may be a disposition of property in favour of a class of people. For example, a person may instruct that one of his buildings or houses be given to the members of a named social club or to the children of one of his wives in case of polygamous family or of a relative. In this case, the member of beneficiaries includes the unborn child. Since a will speaks from death, members of the class who predeceased the testator or who are conceived after his death are excluded.

It should be noted that the principles of English law of willls such as the rule against indefinite or words of limitations etc, have no counterpart in customary law. Bed declaration in customary law is founded on less complicated rules than those of English law of wills.

Under Igala native law and custom, the beneficiaries of the testator are usually his children in case of the personal property and the family in case of land.

6. THE LEGAL EFFECT OF REDUCING A NUNCUPATIVE DECLARATION INTO WRITING

Where a declarant merely wishes to reduce his oral declaration into a permanent form and did not intend to be a written will under English law, if the contents of the document were genuine, will be

adhered to in the administration of the testator's estate in accordance wit the customary law of succession.

But where a testator decided to make a written will in English form, the validity and construction of the will must be governed by English will of 1837. On the other hand where the testator intends to make a customary law will but adopts the strict technical form prescribed by the wills Act 1837, the document will be treated by the counts as an English will. If however the will is written but does not comply with the requirements of the Wills Act, it would be treated as valid under customary law.

In APATIRA v. AKANDE (supra) the testator a native of Nigeria who was born and lived his entire life as a Moslem, died leaving a will in English for which did not comply with the requirements of the Wills Act as regards signature and attestation probate of argued in favour of granting probabte of the will that in spite of the statutory deficiencies it should be treated on a will in Moslem form which like the one in question, does not require any writing or attestation. Ames J. refused to grant probate of the will on the ground that the testator intended to make a will in accordance with English law but failed to comply with the statutory requirements. Evidence of such intention was found in the fact that the testator purported the rules of Moslem law. It is submitted that the case was wrongly decided. There are no compelling reasons of policy why such a document should not be treated as a valid

customary law disposition if it conveys the testator's intention as in a valid nuncupative will.

1. INTESTATE SUCCESSION AND INHERITANCE

The terms "succession" and "inheritance" are used interchangeably because there is not much practical or utilitarian difference as both relate to the taking over of property of a deceased by a person alive.

According to Oxford Advanced Learner's Dictionary[9] succession is defined as the action process or right of succeeding to a title, property etc. while inheritance is the action of inheriting from.

While the law of succession and inheritance under the received English law is certain and reasonably settled, not only varied and diverse, but largely not settled. And what is more, there is a notorious diversity of customs and practices amongst the different tribes. The point should be noted that a number of legislation recognise the customary aspect of law. For example, the High Court laws of Nigeria provide for the application of customary law so far as it is not repugnant to natural justice equity and good conscience. There are specific provisions in others statutes on the same issue, as it relates to succession and inheritance, but we are not concern with such provisions or laws here.

8. IGALA INTESTATE SUCCESSION COMPARED WITH OTHERS

8.1. THE PRINCIPLES OF PRIMOGENITURE

The principles of primogeniture in which the eldest son inherits the property of the deceased father exclusively is an off shoot of the patriarchal system. It is said that "the principle of primogeniture governs intestate succession in the predominantly patrilineal Ibo society, that on the death intestate of an Ibo male, the eldest son will succeed to his estate. In the first instance, he steps into his father's status as the head of the family. He is entitled to occupy his father's dwelling – house and farm and compound or the immediately adjoining lands. The remainder of the real property is held by the eldest son as a trustee – beneficiary for himself and his brothers". [10] In Ibo custom only sons to the exclusion of daughters of the deceased, can inherit his landed property"[11] With regard to movable property the eldest son is usually entitled to the personal effects of his deceased father including his gun, dresses, elephant tusks and farm implements."[12]

In Igala native law and custom, the principle of primogeniture does not apply. It is true that the eldest son succeeds his deceased father as the head of the family but does not take all the property alone. He shares with his other brothers.

A number of writers on Ibo law have stated the correct rule that sons of a man and not his eldest son alone succeed to his property. According to Jones no matter how many the sons and how little the

land, each male descendant is entitled to demand his share of his father's inheritance". [13] Chubb has stated that "so far as many researches show, personal land is normally inherited by sons"[14] but Meek[15] like Basden[16] has commented that the law of primogeniture or inheritance by the eldest son. To my mind, the above statement is contrary to the well established customary law that family land belongs to all members of the family both living and dead. However, Meek's (supra) description on the same page of the detailed of the distribution on intestacy makes it clear that he eldest son is entitled to the whole of the estate.

The customary law of family property is that, the man's property is shared by all his sons. If other wise there would have been no need for eldest son alone were entitled to the state.

Under Yoruba customary law, the principle of primogeniture does not apply, children including females inherit land to the exclusion of other relations of the deceased.

8.2 PER CAPITA

It is where distribution of the property of an intestate is divided amongst all entitled to it equally shares. [16]

This is where the property of the deceased father is divided into as many portions as there are male children. This is to say that female children are not included. Under Igala customary law, the rule of per capita applies to the distribution of the deceased father's property. This includes the family

land which is supposed to be held in trust for the benefit of other members. Any male child that is of age i.e. matured to farm or build a house, will be given a piece for that purpose. No matter how small the land or property is, every male child must have his share/portion. Nevertheless, unmarried matured daughters are entitled to family land either for farming or for building a house.

Under modern Yoruba customary law of intestacy, the children of the deceased are entitled to his real property to the exclusion of other blood relation"[17] On the death of the intestate, his landed property devolves on his children as family property. This includes property acquired by the deceased, whether under English form[18] or by customary law and family property under his control.

In LEWIS v. BANKOLE[19] while all the children of the deceased have rights to the family property, its management is under the control of the eldest surviving son. All the legitimate children of the deceased are entitled to succeed to his landed property. These include children born of customary law marriage and those legitimate in accordance with the prevalent customary law, for instance, by acknowledgement.

In SALAMI v. SALAMI[20] the plaintiff and the defendants were the only surviving children of one Salami Goodluck, a native of Abeokuta, who died intestate leaving a house and farm land in Abeokuta. Soon after the death of the father in 1927, the plaintiff, then was about seven years old, was taken to the French Camerouns by her mother and did not return to Abeokuta until

1953. Apart from some clothes and two chairs allocated to her at the time of her father's death, she had received no benefit from the estate. In an action for an account and partition brought by the plaintiff against her two brothers, Irvin, held that the plaintiff's right to inherit under Yoruba customary law could not be affected by her absence, minority or sex and that the Dawodu (i.e. the eldest son) was not entitled to a greater share than the other children.

The above statement showed that under Yoruba customary law, the children share equally irrespective of sex or age.

In Re ABIKE[21] Lambo, J. (as he then was) picked on Ori-Ojori custom. The applicants who were the wives of the deceased were granted letters of administration of the estate of the deceased. They applied to the High Court for an order for direction as to the manner of distribution of the estate of the deceased among the beneficiaries who were his seven children. There was a dispute as to how the estate should be distributed. Of the three applicants two were in favour of distribution on the per capital or "Ori-Ojori basis, whilst the third favoured the per striples or "Idi-igi" method of distribution. There was no Head of family to whom their problem could have been referred.

Held (1) The "Idi-igi"[23] custom is subject to a qualification, namely, that where dispute arises the head of the family may, in the interest of avoiding litigation, decide that a division according to "Ori-Ojori" (supra) should be adopted in lines of "Idi-igi" (supra) and that should the Head of family so decide, the decision prevails. (2) in this case, in order to avoid any possible litigation that may arise as a result of continued difference between the

applicants, the court directed that the estate of deceased should be distributed on per capita "(supra)"

8.3 PER STIRPES

Per stripes is a division of the property of an intestate according to the number of wives with children.

This is the principle where the deceased property is distributed equally amongst the number of wives he has. The principle of per stripes is not known under Igala customary law of inheritance. The only thing known is that the wife or wives of the deceased could live in the family house or personal house build for her.

This rule too does not apply to Ibo customary law. But in Yoruba customary law there are some court decisions that applied the rule. In DAWODU AND ORS v. DANMOLE AND ORS[24] It was held that (1) "Idi-igi" (supra) is the Yoruba native law and custom where by the estate of an intestate whose wives have pre-deceased him, is distributed according to the number of the mothers (wives of the intestate) of the children of such intestate.

2) "Idi-igi" (supra) is an integral part of the Yoruba native law and custom relating to the distribution of intestate estate; and is in full force and observance and has not been abrogated.

3) "Ori-Ojori" (supra) a Yoruba native law and custom, whereby the estate of such an intestate is distributed according to the number of children, is a relatively modern method of distribution and may be adopted only

at the discretion of the head of the family for the avoidance of litigation.

4) "Idi-Igi" (supra) in its application to the distribution of the estate of an intestate who left children by his four wives, is not contrary to the principles of natural justice, equity and good conscience.

In SALAKO AND ORS v. SALAKO [25] when Adefarasin J. (as he then was) was faced with similar problem, held: "I have no difficulty in finding that Idi-igi is the system of distribution applicable notwithstanding the unfairness which this system involves. I am bound by the decisions of the supreme court and the privy council in the case of SUWEBATU DANMOLE v. YISA DAWODU reported in F.S.C. 1956, page 46.... My personal view is that distribution by the Idi-igi system is unfair and leads to great hardship! Nevertheless it is the accepted Yoruba custom which applies in this case. I have no alternative but to order that the distribution in the matter herein be in the Idi-igi system". It is obvious from this passage that the learned judge was not in support of the "Idi-igi" (supra) but had no choice than to follow it. He was tied down by the doctrine of stare decides. It is submitted that the position he took on the Idi-igi custom is correct. It is really unfair and that is the truth.

In ADMINISTRATOR-GENERAL v. LUBANMIWO[26], where the Administrator Gneral refused to accept the "Idi-igi" (supra) custom of distribution of the property of the deceased on the ground that "it is inequitable", Lamb, J. (as he then was) rejected the contention. He held the

view that the decision in DAWODU v. DANMOLE (supra) was valid and that the Idi-igi custom was not repugnant to natural justice, equity and good conscience. It is suprising that throughout the judgement, the learned judge did not refer to his earlier decision in Re Abike (Supra) to justify his sudden change of mind two years after. It would be noted that the facts of the two cases are generally similar. In Re-Abike (Supra) the deceased left two wives and seven children, and in Olubamiwo the deceased left two wives and six children. It is difficult to see the basis for the difference in opinion in the two cases.

In ADENIJI AND ORS v. ADENIJI AND ORS[27], the supreme court reaffirmed its earlier decision in Dawodu v. Danmole to the effect that the idigi-igi (supra) custom is not repugnant to natural justice, equity and good conscience.

But in a more recent case of OLOWU AND ORS v. OLOWU AND ORS[28] the court held that generally, under Yoruba customary law, the children of a deceased person, and not his relations succeed to his properties upon intestacy and it is the son, the "Dawodu", who becomes the head of the family and who takes over the management of the estate of the deceased for himself and other children, and also decides which system of distribution should be adopted, the "Idi-igi" (supra) or "Ori-Ojori" (supra) system.

To sum up, in Igala customary law, the applicable law or system of "Ori-Ojori (supra) i.e. distribution of the estate of the intestate according to the number of his children.

9. POSITION OF FEMALE CHILDREN AND WIVES

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9.1 Wife:

A wife has no personal rights in land to inherit under native law and custom. This is the position under Igala customary law. A wife's rights in land are derived through her husband. Her only right is to use the land for farming and if she desires to build her own personal house she will be given a piece of the land. On the death of her husband, the wife or wives may be allowed to use the land, which she used before, and a live in her husband's dwelling house. She can ever re-marry any member of the deceased husband family, and in that case she is still a member of the family and has right to use the family land. This choice is hers. If she decides to leave the family, she loses the right to use the land.

The above statements are true in some parts of the country. For instance in Yoruba customary law, wife/wives do not inherit their huband's property as stated in SEBERU v. SUNMONU[29], the Federal Supreme Court held that by Yoruba custom, a wife cannot inherit her husband's property. In the absence of surviving children, the property which the intestate inherited will devolve on the members of the family from which it came. Thus, if the property came from maternal ancestor it goes to his maternal relations and vice versa.

Under Ibo customary law, the same principle applies. Wife or wives do not inherit their husband's property. IN NEZIANYA v. OKAGBUE[30] the

Supreme Court held that in accordance with Onitsha an Onitsha customary law, the widow cannot succeed to her husband's property if the husband dies without a male issue, his real property descends to his family. The family here means his uncles.

9.2 Female Children

Under the Igala native law and custom, female children have no personal rights in land, therefore do not inherit. But this rights of female children to inherit their father's rights in land is like many other aspects of native law and custom. Changing in some parts of Nigeria. For instance, under Yoruba native law and custom, female children now have equal share with those of the male children in the distribution of their deceased father's property irrespective of age or sex. This was the decision of SALAMIv. SALAMI (Supra) Also LEWIS v. BANKOLE (Supra) It was held that all the children of the deceased have rights to the family property, and its management is under the control of the eldest surviving son.

But this is not the case under Igala native law and custom. Female children do not have rights to inherit their deceased father's land. The only right they have is rights to use the land for farming. Also in Ibo customary law, female children do not inherit their father's land.

Under Igala customary law both male and female members do not have personal rights to inherit. A founder of a family has property to leave for his children. If he inherited it, it passes to the family as a corporate entity. This

family members can inherit family property as corporate body. There are two kinds of inheritance under native law and custom.

i. Inheritance of rights in land e.g. the right to a portion,

ii. Corporate inheritance: The entire members of family inheriting family property on corporate body.

10. THE POSISION OF STRANGERS, DOMESTICS SERVANTS AND SLAVES

Under Igala native law and custom, strangers, domestic servants and slaves have no legal rights in the family land. The rights they have is to use the family land for farming and to build houses to live in. when it comes to the question of succession to family land, they do not qualify as they themselves are subject to be inherited. The reason being that, biologically, they are not members of the family. They can hold on to the family land given to them for farming, as long as they want including their descendants. Since they do not have legal right of succession, they do not also have legal right to dispose off the family property by will.

11. THE POSITION OF ILLEGITIMATE CHILDREN

Under Igala customary law, illegitimate children are entitled to any share in the intestate of the deceased. The illegitimate children

can have rights to inherit in their fathers land only when they have become legitimated by way of acknowledgement by their father. That is to say, the legitimated children will be brought home and introduced to other members of the family. Hence forth the illegitimate children will have equal rights as the other legitimate children.

But in a situation whereby the mother of the legitimated child died intestate, her real and personal estate will be shared equally amongst all the children. It does not matter whether they are legitimate or illegitimate children of the intestate. While there are reasons for policy which exclude illegitimate children generally from intestate succession in respect of the estate of the father, it is submitted that in case of the intestate of the mother an illegitimate child should be entitled to a share even if there are other legitimate children also.

The same rules apply if illegitimate children died intestate, their fathers do not inherit or succeed the. But in a case where their fathers have acknowledged them, then they can succeed them (the legitimated children) if no issues, so also their mothers.

Notes and References

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13. Jones, Op cit P. 315.
14. Chubb, Op cit para 39.
15. Law and authority in a Nigeria Tribe (1937) PP. 320 – 321.
16. Basden, Op cit P. 268.
17. Adesoye V. Taiwo (1956) Vol. I.F.S.C., 84
18. (1931) 10 N.L.R., 82; Salako V. Salako (1965) L.L.R., 136
19. (1957) W.R.N.L.R., 10; Lopez V. Lopez (1924) 5, N.L.R., 43
20. (1969) 2, ALL N.L.R., 126
21. Ori-ojori – Means head is equal to head i.e. sharing of property equally.
22. Idi-igi – Means sharing of property according to the number of wifes rather than the number of children. Mother share equally regardless the number from the other mother.
23. (1962) 1, ALL N.L.R., 702
24. (1965) L.L.R., 136 – 137
25. (1971) 112, ALL N.L.R., 77
26. (1972) 4, S.C. 10
27. (1985) 3, N.W.L.R., 372.

CHAPTER FOUR

SUCCESSION TO LAND

4.1 Introduction

A research was conducted by me amongst the Igala elderly people between the ages 50 and 53 in Zaria environs to ascertain how land is succeeded to in Igala land as regards family land. ALL of them spoke in one voice that, succession to land in Igala land is by the most senior male member of the family who holds the land in trust for the benefit of other members of the family. He is regarded as the family head and as such takes over the affairs of the land including the distribution of the land to other older members of the family for farming and for building of houses.

4.2 FAMILY LAND

4.2.1 Definition

The word family under native law and custom has been defined in various ways. According to Elisa T. O.[1] the family under customary law consists of a man, his wife or wives and their children their grown up sons and the wife or wives and children the man's or husband's brother or close cousins and their children.

According to James and Kasumu[2] the family is defined as a descendent of a common ancestor.

According to Lloyd,[3] a family is a corporate body created upon the death of the founder holding an interest in land.

According to E. I. Nwogugu,[4] family is the smallest unit in the social structure of every society. It is generally accepted that the family is the basis of every human community and the family may be regarded as the nucleus of society.

The various definitions above have not actually satisfied the term 'family'. Elias T.O. inclusion of wife or wives is not satisfactory because it has narrowed down what a family should be under native law and custom. Also the use of the word ancestor in a singular form by James and Kasumu means that the term family is narrowed to either paternal or maternal instead of both. Lloyd says that family includes all the founder's descendants in the male line in the case of agnatic leanage or both male and female leanages in the case of cognate descent group. This cannot be said to be true of the term family as it does not start with one's descendants only but oneself and one's descendants. Secondly, the notions of the family does not necessarily need to be connected with land.

The term 'family' does not lend itself to easy and precise definition. The family may embrace a large body of persons related by blood to a common ancestor. The relationship may be traced through male, as in patrilineal societies or through females, as in matrilineal societies. Sometimes, 'family' is referred to as the 'extended family a concept which is prevalent in Nigeria.

Green[5] aptly defines the 'extended family' as:.....a group of closely related people, known by a common name and consisting usually of a man and his wives and children, his sons wives and children, his brothers and half brothers and their wives relations .....

According to Y. Aboki[6] an extended family as it is usually called is a complex group of people which may not necessarily be closely related to one and another. It is complex, corporate unit consisting of those who are living and countless number of those who are dead. For this reason, under customary law one's family will consist of all blood related members from paternal or maternal; sides how high or low what so ever, this is to say the one's family consists of two leanages i.e. ascendants e.g. father, grandfather, greatgrandfather, mother, grand mother, great grand mother how high so ever descendants e.g. children, grandchildren, greatgrandchildren how low so ever, sisters and brothers, aunts, uncles and their children, ground children and great grand children how low so ever.

In case of succession or inheritance, priority is often given to immediate heirs whether ascendants or descendants. Therefore in this context wife is excluded in accordance with strict and ancient customary law. Perhaps, this is the reason which made C.O. Olawoye to say the answer to the question: "who are those entitled to claim as heirs of the founder of the family at the material time?" He went on to say "if the heirs are those who are related to the deceased by blood, it

appears that the founders wife is not a member of family since her relationship with the founder is by affinity".

Under the Igala native law and custom, a family is known as a clan. That is members of the same blood relation. Since the Nigeria family is paternal in nature i.e. patrilineal succession to family land is by the eldest male members of the family. He is in charge of distributing land to other adult members of the family for farming and building of houses. Minors are excluded from this benefit until maturity.

In families, a piece of land is reserved for the use of the whole family collectively including fishing ponds. Any produce of sale from this land or pond is kept for the use of the family. Such money can be used to train some children in schools whose parents are poor and can be used to buy something that is beneficial to the whole family e.g. another piece of land. On no account should the head of the family give out land either as a sale or gift to a member in another family without calling for a meeting of adult members.

4.3 FAMILY LAND CREATION

There are three ways in which family land can be created in Igala native law and custom.

4.3.1 By the deceased person dying interstate:

This is a case where a person died without leaving a will. In OGUNMEFUN v. OGUNMEFUN,[7] the grandfather of the parties died

intestate leaving behind certain real property of which he was seized in fee simple. Only two of his children survived with issues. One was the father of the defendant and the other was the mother of the plaintiff. At the time of her death, the female child was found to have bequeathed to her relatives her own share in her father's land.

It was held that the grandfather's fee simple on his death intestate becomes an estate under native customary tenure, and that the testator therefore had no separate and alienable interest which she did devise.

In CAULCRICK V. HARDING,[8] the defendants were two daughters of a deceased testator and the plaintiff was the husband of a third daughter. On the death of the father, his real property vested in his third daughter. The third daughter who was married to the plaintiff also died. The plaintiff sough to have the property partitioned and claied wanted share as husband by vature of his deseased wife's right to one third share. The claim failed. This is because once family land is partitioned it ceases to be family land.

In OLOWOSAGO AND ORS. V. ADEBANJO AND ORS[9] the land in dispute formerly formed part of the land owned by one Aigie, a Yoruba man and native of Ikorodu under native law and custom. On his death intestate the property devolved on his children as family property.

Held: Where a land owner whose estate is governed by customary law dies intestate such land devolves on his heirs in perpetuity as family land.

4.3.2 **By outright purchase of conveyance inter vivos.**

Family land can be created by a conveyance inter vivos, where land is purchased with family money belonging to the family.

In NELSON v. NELSON[10] a family land was acquired by the government and compensation was paid to the family through the head of the family with the intention of using the money to purchase another land in replacement of the one acquired by the government. The head of the family accordingly bought another land but instead conveyed it through a fee simple in English law to an outsider. The rest of the family members brought out this action contending that the replaced acquired land is a family property and thus its sale without their consent makes the transaction violable and ineffective. The family head contended that since the land was conveyed in the manner of the English Land Tenure System as opposed to customary Law tenure such property could not be invested as a family property . the court rejected this contention.

4.3.3. **By creating a will that a family land should be left undisturbed.**

In **COKER V. COKER,** [11] a deceased in his will, which was made in English form, made the following bequest of his dwelling house which was situated in Lagos "I leave and bequeath my present

dwelling house to the whole of my family or blood relative and their children's children throughout and can not be sold for any debt or debts that may be contracted by any of them, but at present the house should be occupied by my grandson Nath and my son Edward (deceased) subject to the approval of my executors or otherwise ....." The will was approved by the executors and the said dwelling house was subsequently sold by Order of court and a summons was brought to determine who were entitled to share in the proceeds of the sale.

HELD: That the intention of the testator was to make his dwelling house a family house, following Yoruba custom, and that consequently those entitled to share in the proceeds of its sale were those of his descendants entitled under the custom to reside in the premises at the time of sale.

In **GEORGE V. FAJORE,**[12] a testator devised certain real property in his will to 12 named persons and "their heirs" and assigns forever as TC without any power, right to alienate, the same or any part thereof". Plaintiffs were the surviving executors while defendant was the testator's widow. One of the 12 named beneficiaries was allotted a portion of the premises and he was a son of the defendant. He died leaving a window and a son who also died. After the death of the child, the defendant took possession of the portion which had been allowed to her son the beneficiary. The plaintiff sued for its recovery. It wasn't proved that his widow had died.

HELD: The not withstanding the use of the worlds "TC" the intention of the testator as it appeared form the will was that the property, should be held in accordance with native law and custom and that the defendant did not therefore acquire any interest upon the death of his son.

4.4 THE RIGHTS OF FAMILY MEMBERS OF FAMILY LAND.

Under Igala native law and custom each member of the family is conferred with the following rights to exercise in the family land.

4.4.1 Right to a portion of family land.

It is the duty and responsibility of the head of the family to allocate a portion of family land to adult member of the family for farming and for building a house. It is of right for a family member to have a portion of land for sustenance of life for as he lives. In **OGUNMEFUN V. OGUNMEFUN**[13] the court said that "each individual member of the family has in addition vested in him or her what may perhaps can be described as the right of user during his or her life time. That individual right of user is purely and simple a life time interest".

This means that after the death of the owner, the title to the land reverts to the family if he has no heirs. If the deceased is survived by heirs, the heirs will inherit or succeed him.

A member while in possession has the right to deal with his portion of land in the manner that will not jeopadize the interest or

ownership of the family. He should not make a grant to an outsider, e.g. gift, pledge, loan without the consent of the family. He has exclusive right to all things he has brought to the land. He has the right to economic trees unless other wise stated during the time of allocation.

4.4.2 **Women and land**

The traditional position of women in Igala land as regards succession to land was a clear-cut one. It was that a woman by virtue of her being a woman had no claim to land whatsoever. But if a woman is not married or is a divorcee, she has the right to occupy family land, she can be given a portion to farm and to build a house on her own to live in. However, she cannot will it to her children or husband. On her death the family land reverts to the family automatically. In case of a house, any member of the family will be allocated the house by the head of the family if such a member is in need of a living house. Therefore a woman in occupation family land or house has to observe all conditions of the customary land tenure.

4.4.3. **Minor.**

In Igala native law and custom, a minor has right to inherit his land. should his father die while still a minor, an eldest member of the family would look after the land until such a minor has the right to inherit the family land on equal terms with adult male members of the family.

Minors like women in every community form the bases upon which the growth and the future of the society depends. As such they occupy and represent some special interest in every society. Minors are full members of every family and as such they are co-owners of family property. They are entitled to inherit family property as a right by virtue of their birth. Minors should be involved through their next of kins in matters affecting family property.

In **BUKAR FALATU V. YA DOWOMA,**[14] the plaintiff/respondent sold a family house to the defendant/ appellant. The plaintiffs mother, a widow brought an action to set aside the sale on the ground that her son was too young to convey the property. The trial court decided in favour of the defendant/appellant purchaser but the upper Area Court reversed this decision on appeal. And the purchaser further appealed to the High Court.

HELD: That Islamic law applies which determines that the boy or seller was capable of executing the conveyance by virtue of the fact that maturity is determined by physical maturity of 15 years.

And the Upper Area Court reversed the decision of the trial court in favour of the purchaser in error without seeing the said boy himself but only relied on the statement made to the court by his mother. Thus, the seller is an adult and not a minor. Decision was in favour of the appellant buyer as the sale was rightly executed.

From the above decision of the High Court, on the legal point of view one may find the decision enormous because it seems that the legal capacity of the minor was not taken under consideration. Perhaps the appellant was seen as a matured person by physical appearance because under native law and custom, determination of maturity is based on physical and appearance of hair at certain parts of the body and change of voice in case of boys and menstruation in case of girls.

4.5 THE ROLE OF THE HEAD OF THE FAMILY

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4.5.1 ALLOCATION OF FAMILY LAND

One of the primary duties of the family head under Igala native law and custom is the allocation of family land to family members, like I said earlier, he is given the right by virtue of his position as the eldest member of the family to allocate land for farming and building of houses. This responsibility has for long accorded with judicial recognition. In the case of AMODU TIJANI V. SECRETARY SOUTHERN NIGERIA,[15] the Privy council quoting from the report of the West African land committee (1898) said, "Land belongs to the community, village or family, never to the individual. But in every case the Chief or Head of the family ..... has charge of the land ..... And every member who wants a piece of it to cultivate or build a house upon goes to him for it ....."

From the above quotation, it means that where allocation is made, the interest acquires is that of the allotee (beneficial) user only. In other words the allocate merely has the possessory right or interest in the land so allocated to him. He is not the owner but the family of the portion so allocated to him.

Therefore in Igala land this responsibility of the family head is still practical. That is why when a member needs a particular portion of land to farm or to build a house of himself, he would first consult the head of the family. Where a family has abundant of land, a family member has the right to request for as much land as he wants. But where there are many members who are interested to farm on the family land and the family has not enough, the little it has will be shared among the needy members of the family. No members of the family should be denied of his right to portion of family land. nor should any member of the family cultivate or farm on the family land without consulting the head of family. This is the rule under Igala native law and custom so as to avoid family clash or usurpation.

The head of the family is referred to as a trustee of the family property. This means that the head of the family holds the family property for the benefit of the entire members of the family. And it is in this capacity he allocates land to needy family members.

Under English law the concept of trust is that a property could be owned by two separate persons. One as a trustee who has the

legal ownership of the trust property, while the second is the beneficiary who has the equitable ownership or interest.

Under the native law and custom, this difference is not there. Both the head of the family and the rest of the members hold family property as legal owners jointly and inseparable. Therefore the relationship between the head of the family and the members of the family vis-à-vis the family property is not that of the trustee and the beneficiary as in English law. It was because of this difference that the Privy Council in the case of **OYEKAN v. ADELE**[16] cautioned against "the fallacy of seeking to apply English concepts of legal owner and equitable beneficiary to case which are quite incapable".

4.5.3. ACCOUNTABILITY

As a trustee, the head of the family has an obligation to account for **ALL** his dealings with family property to the members of his family. Under the English law of trust, there is an obligation that the trustee must render an account and furnish the beneficiary with ALL reasonable information concerning the management of the trust property. This obligation is enforceable against the trustee at the instance of nay person with interest in the trust property, and if the trustee refuses, unreasonably, to render an account he may be held liable for the cost of action to compel him to account. Thus in the case of **ARCHIBONG v. ARCHIBONG**[17] It was held that the family head was liable to account for the management of his family property.

In **OSURO v. ANJORIN**[18] the plaintiff claimed that the property which was placed under the management of the defendant was a family property and therefore he should account his management of the property to the family.

It was held that a family head was liable to account for the management of family property to the members of his family, and any member who was dissatisfied with the account could go to court for further clarification.

Under the Igala native law and custom, such above action is not possible. If there is mismanagement of family property by the head of the family, a meeting of all adult members would be called for discussion. It is a taboo to take such matter to court. It will be settled amicably amongst themselves. This head of the family might be warned only but cannot be removed. This is because once a person becomes a family head by virtue of being the eldest child of the founder of the family, he has come to stay as such. The allegiance paid to the head of the family is hereditary and based on blood relation.

If the head of the family is not physically fit, the rest members could decide on the next person to him to act on his behalf for the family in any matter relating to the family property, e.g. allocating a family land to a need member. The head of the family will not be removed because he is bad or incompetent. His position as an eldest

child of the family cannot be substituted. It is the position that is regarded as God given.

4.6. COMMUNAL OR VILLAGE LAND

4.6.1. Definition.

Communal land is the tract of land which every member of the community or village has right or access to its use and enjoyment. It is the land which belongs to the whole members of the community or village. The land is for all and sundry. There is no restriction as to the classes for the people who are to use and enjoy the land.

In **AMODU TIJANI v. SECRETARY OF SOUTHERN NIGERIAN**[19] it was held that land belongs to the village, community or family and never to an individual. And that the concept of individual ownership is foreign to native ideas.

4.6.2 The village or community head.

Under native law and custom, the management of communal land is usually entrusted in the hands of the village Head or Chief who by virtue of his customary reverence and pre-eminence is for all intents and purposes regarded as the owner of the communal land.

In Igala land, the Attah of Igala is the "owner" of the land by virtue of his position as the first class Chief. But in the community of village the King (which is know as Onu) or the Chief is the "owner" of that community or village land by confirmation of the Attah of Igala, as

the trustee for the benefit of the people. Control and management of communal land are vested in the village or communal head.

4.6.3. **His appointment**

Under Igala native law and custom the position of a King (Onu) of the village house, the ruling house is usually recognised by the founder of that house who might have been one of the fist settlers in that community and must have contributed greatly to the development of that commnunity. Such founder's ancestor must have been a free man and not slave.

In case of the chief or the head of the community, it is by election by other members of the council of elders of the community or village. Whoever they choose is on behalf of the entire case of the family head, it is not the eldest in the community that is elected the village head but one who is regarded as being trustworthy, clever, sharp and above all reasonable. He should be physically fit and respected.

The village head is the person who in some cases control and manage commnunal land. His authority with regard to the management of communal land is by virtue of his officials position as a chief or village head. In other words the chiefs or village head can exercise his power only after consultation with the elders of the community of the village.

Under the native law and custom the village head can allocate land to a member of the community who is in need of land. in **AMODU TIJANI'S**[20] case the court said that "though land belongs to the village or community or family, in most cases, any member who needs land goes to the village or community head for it "This allocation is of a right not a privilege. This is because communal land is a land in which all members hold interest jointly. Therefore the village head cannot refuse them allocation of land especially for farming because refusal will amount to deprivation of the inalienable source of their livelihood.

4.7 THE IMPACT OF THE LAND USE ACT ON SUCCESSION TO LAND IN IGALA LAND:

4.7.1 Introduction

After Nigerian independence in 1960, the Government of Northern Nigeria in 1962 enacted a new land Law called the Land Tenure Law, 1962. The new Law improved and modified the then pre-existing Law in accordance with the sociopolitical and economic development of region. For example, the powers of the Government to manage and control land under the Land and Native Rights Ordinance was vested in the minister(Now commissioner) for Land and Survey under the Land Tenure Law. The Land Tenure Law reigned in the North until 1978 when the Land Use Act was enacted.

The Land Use Act came into effect on 29th March, 1978 The major achievement of the Act is that it has unified the Law relating to land tenure in Nigeria. It has to a great extent done away with the various state land laws governing land tenure system in the country. It has made the work of a lawyer and the courts easier in determining the applicable land law.

In recent years in Nigeria, the consequences of the population pressure, urbanization and socio-economic growth have social and economic problems connected with land issues. Due to urbanization, many people are moving from the rural areas into urban areas where modern facilities are available. Population pressure in cities and towns have made residential accommodation in particular a problem. The congested urban places are in need of expansion but land where this expansion is to be made is scarce. Land has become of great marketable value and no longer the "ordinary land" known to African tradition as a gift of nature to mankind. The guarantee of land by the law to every member is a mere rhetoric. We will now examine the provisions of the Land Tenure Law as related to succession in Igala Land.

4.8 SUCCESSION UNDER THE LAND TENURE LAW 1962:

4.8.1 Section 30 Land Tenure Law, 1962 provides that :-[21]

"The devolution of the rights of an occupier upon death shall be regulated in the case of a native by the native law and custom existing

in the locality in which the land is situated and in the case of a non native, by the law or custom of such non-native at the time of his death relating to the distribution of property of like native to a right of occupancy:"

The proviso to the devolution of property of a native and a non-native upon death means that:

i. Upon the Death of a native property shall be regulated by the native law and custom existing in the locality where the land is situated (lex situs).

ii. In the case of a non native, his personal law applies. The section further provides:

a. No native law or custom prohibiting, restricting or regulating the devolution on death to any particular class of persons of the right to occupy any land shall operate to deprive any person of any beneficial interest in such land (other than the right to occupy the same) or in the proceeds of sale thereof to which he may be entitled under the rules of succession of any other native law and custom: It further provides:

b. A statutory right, of occupancy shall not be divided into two or more parts on devolution by the death of the occupier except with the consent minister. Also it further provides:

c. A non – native whose mother was a native may succeed his mother in title upon the death of the mother upon the grant to such non – native

by the commissioner of a certificate of occupancy in evidence of the title of such non – native:-

This statement is quite clear. section 2 of the Land Tenure Law also stated that where the deceased is a native that is a person whose parent was a member of any tribe indigenous to Northern Nigeria, the law which will regulate the devolution of his rights in land is the Law regarding such dealings in the area where the land is situated(lex situs). For example if A Moslem Ibira from Okene dies and leaves a property in Idah in Kogi State where Igala Native law and custom applies the property in Igala will be regulated by the native law and custom of Igala regarding such matters.

The proviso shows that females shall have the right to inherit proceeds collected from the Land through sale, mortage, lease, pledge, and crops grown on the land, but may not have the right of occupancy. This is repugnant to natural justice equity and good conscience. Under the Igala customary Law, females are not included in the sharing of proceeds of the sale of land. They could be given a piece of land to farm or to settle if desire. This is to support the argument that where the lex situs and personal law deny these rights another form of law may be introduced. Again the proviso appears to accept that the right of occupancy can be denied by the lex situs or the personal law of the non-native which appears not to have appeared in the main proviso.

IN OCHOKO MARMARA V. ALHAJI IBRAHIM YAYE [22]

In the trial Area Court, Alhaji Yaye (a Moslem) sued Ochoko (a Christian) for the enforcement of the purchase of a house which the latter sold to a third party. The court applied Moslem Law and procedure. Alhaji Yaye called three unimpeachable witnesses to support his claim. Judgment was given for Alhaji Yaye without giving Ochoko an opportunity to enter upon his defence by giving evidence or calling witnesses. On appeal Ochoko argued that the trial court erred in entering judgement for Alhaji Yaye without calling upon him to make his defence.

Held:

1. Applying section 21 (2) of the Area courts Edict, Moslem Law is the native law and custom applicable in the place where the house is situated, and therefore applied.
2. As Moslem law applied, it is a "Moslem case" within the meaning of part 1 of the Area Courts (Civil-Procedure) Rules, 1971 which has the same effect with S. 30 LTL 1962, Northern Nigeria.

IN GARBA SAKIN IBO V. ALHAJI YA'U MAKERA[23]

In 1963 the Zaria Local Authority granted a plot at Kakuri under a customary tenure to the Appellant. He made some improvements. In 1971 the Authority discovered the plot had belonged to the respondent under customary tenure at the time of the grant to the appellant. The Authority revoked the grant and restored the plot to the respondent.

The Appellant refused to vacate. The respondent sued for its recovery in the Upper Area Court. The court awarded the plot to the respondent and ordered appellant to vacate. The court silent on the improvements made by the appellant. In his appeal, the appellant contended that he had a valid grant and that he is entitled to the land and improvements.

Held:

That by virtue of section 21 (2) of the Area Court edict, the law applicable to land is the native law and custom in force in the area where the land is situated:

According to Prof. M.G Yakubu[5], the application and the interpretation of this provision looks easy and straight forward, but the result of its application may bring an undesirable result into the law. I would agree with the Prof. on the above statement because strangers and other people who are not entitled to occupy land under native law and custom would be introduced to the land that means the personal law of the deceased will be the law that will determine the devolution of rights in the land on death. This simply means that if the deceased is a non-native where the peronsal law of the deceased is different from the law of the place where the land is situated, the former prevails over the latter.

In YUNUSA V. ADESUBOKUN[24]. The testator in this case was a Moslem born at Omu Aran, a town in Kwara State, but educated and brought up in Lagos. Subsequently, he moved to Zaria where he died

in 1965. He made a will under the will Act, leaving to his first son, the plaintiff, only N10 and to his two other sons a house each both situated in Zaria. He further devised a house at Mushin to his other two sons jointly and in equal shares. The plaintiff then brought this action to set aside the probate granted to the defendant on the ground that the testator, being a Moslem was incapable of making a will whereby he disposed his properties in accordance with the wills Act, 1937. He contended that in any case the testator was not entitled to dispose of his properties under a will contrary to Moslem law.

It was held that a Moslem of Northern Nigeria was capable of making a will under the wills Act. But the testator had no right to deprive by the will any of his heirs under Moslem law who were entitled to share the testators estate, of any of their respective shares in accordance with Moslem law.

As can be seen from the above, there was a plurality of laws regulating rights in land under the land tenure law. The plurality of might have created a lot of problems in administration of justice.

The intention of the provision was that lex situs was always the prevailing law on the question of who was to take over land. But the introduction of a foreign law could over-ride the law of the land. For instance, where personal law permitted right of occupancy by women, who later dies female children would inherit the right of occupancy in the land.

4.9 POSITION UNDER THE LAND USE ACT OF 1978

4.9.1 Section 24 of the Land use Act provides, [25]

The devolution of the rights of an occupier upon death shall:

a. In the case of a customary right of occupancy, unless non-customary law or any other customary law applies, be regulated by the customary law existing in the locality in which the land is situated; (Lex Situs) and

b. In the case of a statutory; right of occupancy unless any non-customary law or other customary law applies be regulated by the customary law of the deceased occupier at the time of his death relating to the distribution of property of like nature to a right of occupancy. (personal law)

S. 24 (a) of the Land Use Act.

The phrase "unless non-customary law or any other customary law applies" mean in my opinion.

i. English law or any other law e.g. Islamic law.

S. 24 (b) of the Land Use Act

In the case of a statutory right of occupancy the governing law is personal law, unless non-customary law applies e.g. Islamic law. In some quarters it wan said that Islamic law is not customary law or English law.

The above provision governs succession to rights of occupancy in Land. That is to say, a person who dies and leaves a customary

right of occupancy, the law that will govern the succession to such right is the customary law existing in the locality where the land is situated. But if the deceased left a statutory right of occupancy, his personal law applies.

Applying this law to succession to land in Iglala land, we found that the law is the same. That is to say if a deceased Igala man held Statutory Right of Occupancy his personal law applies to the devolution. If the deceased held customary right of occupancy (C.R.O), it is the lex situs which applies.

The provision is somehow confusing. The clear way of stating the law is, if it is customary right of occupancy the governing law is the one exiting in the areas where the land is situated. If the rights are derived from the statutory right of occupancy, the governing law is the personal law of the deceased at the time of his death. However, the above law will apply only where there is non-customary law chosen by the deceased before his death. This means that a holder can choose under what law his right of occupancy can be inherited.

As can be seen, S. 24 of the Land Use Act is not different from S.30 of the Land Tenure Law. The application of both the customary law existing in the area where the land is situated and the personal law of the deceased will apply only when there is non-customary law chosen to govern such devolution after the death of the deceased. Lex

situs and personal law, in any view, are now exceptions rather than general law as it existed under the LT.L., 1962.

In Igala Land, the current practice of succession is the application of the native law and custom of the people except otherwise. Therefore the Land Use Act never set out to abolish the Land tenure Law in anyway.

ABIOYE AND OTHERS V. YAKUBU OTHERS[26]

The first plaintiff is the village head of Basanyin village in Ifedapo Local Government Area of Kwara State and the other plaintiffs are his chiefs. About sixty years ago, the plaintiffs ancestors permitted the defendants ancestors, who were nomadic Fulanis, to settle on the land as customary tenants for farming and grazing purposes. Their ancestors and the defendants were paying tribute to the ancestors of the plaintiff and to the plaintiffs from the time they had been allowed to settle on the plaintiffs from the time they been allowed to settle on the land until they stopped paying the tribute about ten years before the action was instituted. In 1981, without the consent, permission or authority of the plaintiffs, the defendants erected three big sign-boards bearing the inscription "GAA IRAPA IDERO IFEDAPO" in three separate places at the settlement. It was because of the sign-boards suggesting that the land in dispute was known as Gaa Irapa, that the land belongs to Irapa village and that the defendants had been put on the land by the people of irapa village that the plaintiffs who call the

land in dispute. Gaa Kekere of Gaa Oke, instituted the actions, seeking for a number of declarations and injunction.

The learned trial Judge, after a reviewed and appraisal of the evidence adduced by the parties, gave judgment to the plaintiffs. Reacting to the submission of learned counsel for the defendants, that by virtue of section 24 and 36 of the Land Use Act 1978, the defendants has the right to hold the land in dispute because they has been using it prior to the said Act, the learned trial Judge held inter alia that:

"Neither section 34 nor section 36 of the Land Use Act, 1978 attempts to rob Peter to pay Paul. It is not intended to rub a landlord to pay a tenant ..... before a person can claim that a land is vested in him it is implied that he is clothed with lawful title which the defendants herein did not possess as the holders immediately before the coming into force of the Land Use Act, 1978, for they are the tenants of their landlords (the plaintiffs").

The defendants, dissatisfied with the judgment of the learned trial Judge, appealed to the Court of Appeal, on the ground amongst others, that he misdirected himself in law and in fact in holding that the defendants could not avail themselves of the Land Use Act, 1978.

The court of Appeal upheld all the findings of fact of the learned trial Jude but reversed this decision granting declaration of title to the plaintiffs. In doing so, the court held, inter alia, as follows:

"It is obvious to me that, going by the totality of the evidence adduced before the trial Judge, before the Land Use Act came into force in 1978, the appellants were occupying the land in dispute under customary rights, they being customary tenants of the respondents and were also using the land for agricultural purposes. I hold the view that they are entitled to continue using the land as if a customary right of occupation had been granted to them by the appropriate local government or the state government ... The position however is that under the Land Use Act, if a customary tenant has not forfeited his customary tenants before the Land Use Act came into force, he would be entitled to a customary right of occupancy by the local government if the land is in rural area or statutory right of occupancy if the land is in urban area. He becomes, as it were, a tenant of the local government or the military governor. By section I of the act, the entire land in the territory of each state is vested in the military governor of that state from 29th March, 1978.

The plaintiffs, not being satisfied with the decision of that Court of Appeal appealed to the Supreme Court. After the conclusion of address at the Supreme Court of Court realised that the appeal raised a very important question of Law of great public interest.

Therefore, for the purpose of resolving the issue raised in the appeal, the Supreme court invited all attorneys – General in the federation and five senior Advocates of Nigeria to appear and

address the court as amict curiae on the issue. They fully did. The Supreme Court, unanimously allowed the appeal and granted declaration of tittle to the plaintiff.

It only came into effect to unify and to modify the state laws as stated earlier.

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CHAPTER FIVE

PROPOSALS FOR REFORM

5.1 Introduction

From the foregoing chapters, I have tried to analyse succession to rights in land under Igala native law and custom and in companion to other communities. Therefore, it is pertinent to highlight some aspects of native law and custom which require some reform in one way or the other. However, these proposals are not conclusive reformation of the native law and custom but to make succession rights in land meet the socio-economic change brought about by modern developments.

5.2 Individual ownership of land

Individual ownership means that one person has an exclusive and absolute ownership of land. This system of ownership is sought to replace group ownership which has been said in several occasions that the nature of customary land holding, namely, communal or family ownership (group ownership) is not conducive for modern development! This system whereby an individual has an absolute title to land vest in him with proprietory right and not possessory or occupational right as in the case of communal rights or family ownership.

The need for individual ownership is to provide incentives which members under communal or family ownership don't have and which

poses a stumbling block against economic development and use of land. Hence it was said that in the system of landholding which is based on a conception of a collective rights in the land, the most conspicuous deprevits is lack of incentive for economic development as a basis for progressive individualization of holding.

There are lots of advantages for an individual ownership of land.

a. Alienation, mortgage, lease, sale etc will no longer require consent of both the principal members and the family head. This is because, it will be faster and definite for an individual to take decisions in connection with his land than a situation where such individual has to go round consulting all principal members and the family head.

b. There will be a positive incentive to the improvement of fertility of land. to achieve the above, the occupier of the land must be the real owner. It is said that "the idea of a farmer owning his farm, improve it by his own efforts in the certain knowledge that he will reap the full benefit of his own improvements and hand the property on to his descendants in better condition than he received it, is a tempting one: Therefore, the customary land holding where the occupier is not the owner goes to see the demise of this temptation. However, it is my submission that its undue acceleration may hasten the disintegration of the present social structure[2].

c. It will be a beginning for obtaining capital by an individual land owner since capital is hardly given to holders of communal ownership of land.

It is easier for an individual with a valid title to land to obtain loan to develop his own land. This is an economic advantage which every person in a community should seek for.

d. The management of land will be more effective and the decision concerning the land will be quicker if the land is owned by an individual. The reason being that some families or communities do not management properties well.

e. Finally, it is my submission that individual ownership of land will bring to an end, clashes between the communities which is a common feature in Igala land especially in Ibaji Local Government Authority. It is conducive to rapid economic development in a technological age since it is the individual acting alone who can take quick and business like decisions. Also individual ownership of land promotes freedom of action which is in keeping with the goals of a democratic society.

5.3 Distribution of land

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Under Igala native law and custom, there is no single tract of land which is not owned either by communities, villages, or families. This tract of land is controlled from one territory to another by a chief or a king as the case may be who claims the ultimate right of ownership to it.

However, one of the problems of the customary land distribution is how much land should a community or a village should

own. The reason being that there is no general rule of distribution of land within the area of community, village of family land. In the past, the much land which a family, community or village could own depended on how much land it could conquer form the enemy through fighting wars upon wars. Today, it is a common sight to see some communities, some villages or some families having much land than others. The point is that, there is no specific number of hectares of land which an individual, family, village or community is entitled to hold. The much owned hectares of land are not put in use at the same time.

There are various reason why distribution of land under native law and custom has become a common features in Igala land, so much so that it poses problems in the area.

a. A farmer may hold three or more large farms for the purpose of crop rotation. Where there is abundance of land and the demand is few the method of crop rotation farming will be an ideal one.

b. A farmer who holds quite a number of farm land will have some under cultivation while others are lying fallow. In Igala area, many farmers hold large land for cultivation of various crops, such as rice, yams, cassava etc.

Therefore because of these reasons there are tracts of land lying waste neither occupied or cultivated. In chapter one, I have discussed the classification of land under Igala naïve law and custom. They are known as sacred or taboo land, virgin land etc. Unfortunately,

however, there are some group of people in the community who suffer serous shortage of land for farming. These type of land are left idle by their owners for some reasons best known to them. To some it is a means of preservation for their grand children and great grand children with the hope that when these children are of age, they would make use of such lands.

In view of the above, it is suggested that these vast idle and unoccupied land should be surveyed and their owners be notified so that they can be used for agricultural resettlement schemes. With this type of arrangement, communities or villages or families whose areas are over-crowded or no land to farm due to population explosion can migrate and settle in these vast idle lands. If this suggestion is accepted. It will alleviate the suffering of the farmers who wish to move from inadequate farming land to a more fertile virgin land.

Agriculture is the life wire of a nation and in a developing Country like ours, land should not be left uncultivated where possible. In Igala land, about 99% of the people are farmers and if land is left idle, what will happen to those who have none? It is pertinent to note that Igala land is among the food basket of the nation.

5.4 Distribution of Intestate succession

In chapter IV of this dissertation, we discussed succession rights in lands in Igala land we compared it with others under native law and custom. Mostly, male children have succession rights over

that of the female children. The eldest male child usually is the head of the family in case of family land. He holds land as trustee for the benefit of other members of the family.

A female member can be allocated land for either farming or building of a house such a female member has reached the age of maturity. This discriminate nature of the traditional system of succession, in which only males have succession rights in land should be reformed. Intestate succession should recognise females rights in land either on equal basis with males or on a ration 2:1 as under Islamic law. Land is the sustenance of life and for an un married female to be allocated a piece of land to cultivate is not enough. What happens if the eldest son for one reason or the other decides to withdraw the land from the sister? There will be no other family to run to. But if she has her own share of land, she can do whatever she likes with it.

The children that are so young to manage the land, and elderly member of the family (which is likely to be their brother) can be entrusted with the property until such young ones are of age. In this case, there must be law guiding the entrustment so that the elderly will not abuse the trust.

5.5 CONCLUSION.

From the foregoing discussions about succession to rights in land under Igala native land and custom in Kogi State of Nigeria, the general rule that under customary land law, land belongs to the community, village or family and that the concept of individual ownership is foreign to native idea is still in force. Under Igala customary law, land is held by community or family as a corporate entity, in other words land is owned in communal or family bases. Thought land is held by community or family, the farming of the land is done individually there is nothing like community or family farming. The fact that individual family is the system under Igala customary law, it does not mean that the ownership of land is vested in individual. This is not individual ownership of land but individual or family land. The title to the land still remains in the community or in the family. Therefore an individual has no separate portion of land to claim ownership. On the death of such an individual the ownership or title of land reverts to either the community or the family as the case may be. The children of the individual will be allowed to farm the land as their parent did but cannot claim absolute title or ownership to the land.

Succession to rights in land is one of the areas in which land tenure law must be reformed. This is necessary to meet the socio-economic development in Igala land. The capacity of women to

succeed should be recognised and accepted by the native law and custom. This is because, in some cases female members of the family have equal responsibilities with their male counterparts. As regards leadership, native law and custom should accept the ability of female members of the family when appropriate to become heads of the family and to act responsibly with the family property. See LOPEZ V. LOPEZ. (supra) ARCHIBONG V. ARCHIBONG. (supra) In Igala land, women cannot be heads of the family neither can they succeed in land left by their parents. In most cases, all matters relating to land are dealt with without consultation of the female members of the family. The idea of relegating female members of the family to the background in all matters relating to family property is contrary to natural justice, equity and good conscience and should be stopped.

Again, succession rights in land of the descendants of the slaves under Igala native law and custom have never been considered. The reason being that they are considered not to be blood members of the family. The Igala look at the position of the slaves as part of the family property. They have no say in any issue relating to the family property even if they are present during the discussion. Despite the fact that slavery and slave trade have been abolished long time ago,[5] the Igalas today are yet to forget and regard it as a thing of the past. Similarly, strangers are not part of the family therefore have

no succession rights in the family property. They are not of family blood, therefore not needed in any matter relating to family land.

As regards rights in family property, their interest is always taken care of in all matters involving family property. In Igala land, minors are always under the care of the elderly members of the family, therefore whenever they are of age their own portion of the family land will be allocated to them. In Igala land a piece of land used to be left to fallow but due to increase in population and the demand for land, the system of leaving land to fallow has become a thing of the past.

In Igala native law and custom, in the past transactions affecting land were very few or none at all. But today, because of its economic value, transactions are entered into and are made under native law and custom. Sometimes they are reduced in writing as it is required under English law6. Loans and pledge and still very much in practice. Sale of land, especially for building has also become popular and is evidenced in writing as it is required by the English law (Supra).

The general conception that land was owned by Attah of Igala is found not to be correct. The position of Attah and land is that he administers land for the benefit of all the Igala people. The Attah has no proprietary right or power over the land within his territorial jurisdiction. The tributes paid by the occupiers of land were on the farm produce and not for the use of land per se.

It is submitted that the problem with succession rights in land under Igala native law and custom of Kogi State is that land is owned by the community, the village or the family and never by individual. Therefore individuals farming on the land or occupying it has limited power of exercise. For instance, individual member interest in the group land should be redefined and clearly spelt out. Individual member should be allowed to mortgage, lease and assign their allotted parcels of group land to enable those interest to raise capital for investment. Government should look into the customary law of ownership and if possible by legislation, limit the amount of land that community or village or family or an individual should hold to be neither too small nor excessively large to avoid mismanagement and wasteful use of man-power. Also members should be permitted to register their portions of land in their own names. This will prevent frequent clashes between communities, families and individuals. Finally, succession that gives an individual independent power to dealings with his property should be controlled.

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