

LAND LAW

HISTORICAL BACKGROUND

The first people to acquire land in Zambia were mineral prospectors and they acquired land through two sources firstly, through mineral concessions with chiefs, and secondly through the decentralisation of North Eastern Rhodesia as a protectorate. In North Western Rhodesia the land use the land was acquired through mineral concessions with Traditional Authorities, and the first to come was made that he be entitled to mine in land authorized, and in exchange, he had to offer British protection and pay loyalties. The British South African Company bought the concessions from H. Ware but because they weren't happy with H. Ware so they sent Frank Lochivar to negotiate and many of the concessions were incorporated in Lochivar concession because the traditional authorities had hoped that the British government would send soldiers to help in the protection against enemies from the south. The B.S.A Co. however alienated the land although they had no such rights.

In North Eastern Rhodesia on the other hand the company claimed titles to the land through the declaration of North East Rhodesia as a protectorate under the **1899 orders-in-council**. The question is whether the declaration of the protectorate conferred of the administrative authority in the ownership of land, and this was finally resolved in the Southern Rhodesia [in the application of 1919 act 211-law report].

And in this case the Privy Council held that the declaration of the protectorate did not vest land in the crown. So if the crown wanted land it would have passed legislation to that effect and hence it was only in **1928 when the order-in-council** created reserves was passed that the crown owned land (Crown Land).

COLONIAL LAND POLICIES

The land policies were passed on a belief that there would be lots of white settlers hence certain land was reserved for the anticipated settlers and the other land for Africans. However, the settler farmers relied on Africans for their labour, they were few and there was competition between African farmers and settler farmers. All this resulted in the BSA Co. handing over administration power to the British colonial office including the rights over land although rights over minerals remained with the

company. In 1928 an order-in-council was passed which created **native reserves**, and **crown land**. Although the land was meant exclusively for native use pressure from settlers especially missionaries forced the government to make allowances for non-natives to be granted leases in these reserves. The settlers favored this move because they did not want to have neighbors who had no knowledge of using the land.

PROBLEMS CREATED BY ESTABLISHMENT OF RESERVES

1. Insufficient access to the rail line – this meant that Africans could not produce excess for sell
2. Most areas were inhabitable due to the absence of water supply and the presence of tsetse flies as a result there was congestion and overcrowding. As for the land left for the natives was largely unoccupied, this becomes vacant for the settlers were fewer than anticipated hence land with rich soils was left uninhabited whilst natives occupied small reserves with generally poor soils.

The problems created by reserves led to the formulation of a new land policy in 1938, under which trust lands were created. The native trust land was vested in the colonial secretary of state and it comprised land set aside for the exclusive use of the natives. The native trust land is differentiated from a native reserve by the duration of an interest to a non-native. Non natives in reserves can be granted an interest up to 5 years only where as in trust land such an interest may be up to 99 years such an interest in the trust land is a right of occupancy whereas in reserve land it is called reserve lease. The land policy was finally implemented by the 1947 order-in-council.

CROWN LANDS

These were the lands available for non-native settlements and mining and covered all land with rich soils and all land along the line of rail as for the tenure (conditions under which land is held) the choice was between lease hold and freehold. The two systems of land tenure, freehold and lease.

FREEHOLD TENURE - The period for holding land is not prescribed and the rights continue forever under freehold to the owner.

LEASE HOLD – The period of tenure is fixed for a certain period of time and the rights ceases after that period of time.

Advantages of freehold tenure

- 1) It gives greater tenure security, in lease hold one cannot make long term investment.
- 2) Lending institutions give more loans to freeholds than leaseholds
- 3) Leaseholds describe terms which have to be followed whereas with freehold there is complete freehold ownership

Disadvantages

- 1) The government does not force any development initiatives and hence the land held under freehold may not develop their land waiting for it to increase in value so that they can sell it at a higher profit
- 2) The question of land fragmentation – a piece of land is divided into smaller unviable portions and as a result families on these portions cannot do any project or programme on very small pieces of land.

In 1924 the then Northern Rhodesia governor, he was for freehold arguing that settlers would be prevented from exploiting the soils fast before going back to their homes, however, the successor was for lease hold and his argument was that freehold was not conducive for agriculture development in that freehold. Freehold title give the holder the right to deal with the land in any way without restriction. The Northern Rhodesia legislative council supported Maxwell's policy and hence from 1931 the land along the line of rail could be alienated on leasehold tenure only. Other recommendations were that the term for

leases should be as long as freehold title and hence agriculture leases were to be of three types.

- a) long term leases for 99 years
- b) Short term leases to be for 30 years

Leases for small holdings to be for 99 years – As for long term leases the provision was to be made for minimum amount of development to be carried out within a specified time. So in 1947 the trust lands order-in-council was passed to set the trust land policy in motion.

THE CONCEPTS OF TENURE AND ESTATES

Tenure comes from '*tenere*' which means to hold, and estate is a piece of land however in this context it means the length of someone's interests in a particular piece of land. In English law the concept of absolute ownership of land (*dominion*) does not exist. The crown owns all land and everybody else has a lesser interest.

Land Ownership has various sides to it. Important among the various facets is **Title** to land, a term indicating the legal right to land. Tenure refers to the conditions upon which land is held. The duration of a tenancy of land (i.e. the maximum time before which the tenancy must come to an end) is termed as **estate** for which the tenant holds the land. The conditions or services in return for which land is held tells the nature of tenure by which the tenant holds the land. Under freehold estate there exist 3 types-:

- 1) **Fee simple estate**
- 2) **Fee tail estate**
- 3) **Life estate**

Fee relates to interests that can be held and capable of being inherited.

Fee Simple: a fee without limitation to any class of heirs; they can sell it or give it away.

Fee Tail: a fee limited to a particular line of heirs, they are not free to sell it or give it away.

Estate Pur Autre Vie- this refers to **life estate** but here the measure doesn't count on the life of tenant but on a condition that it will be granted to a person as long as another one lives.

ESTATES

Estates can be held in three types of ways

- 1) **Estates in possession** - here there is entitlement to immediate possession although not ownership
- 2) **Estate in remainder** – here you get the remainder after another interest has expired
- 3) **Estate in reversion** – here the land reverts to the owner after another's interests have expired

ALIENATION: To alienate property means to transfer to someone else.

LAND OWNERSHIP: A simple and not uncommonly assumed use of the term ownership is to describe a relationship between a person (the owner) and a thing (the object of ownership) in which the owner has every possible right in the thing in the most absolute degree.

Various schools of thought define ownership differently. The Roman Law based systems consider ownership in a concept known as *dominium*. This is where the relationship between the owner and the object of ownership in which the owner has every possible right in the item in the most absolute sense.

The English Law based systems on the other hand are generally characterized by the consideration of ownership as consisting of a bundle of rights over land of which any selection may be detached and given to a person other than the owner.

However, despite the differences in conceptual approach certain tendencies in behavior as regards ownership remain constant in both the Roman and English Law systems. For instance an individual who owns a pen will have the right to write with it or lend it out but at no time has he the right to poke it into another person's eye. This illustration of ownership rights and restrictions are universal, and shared by most legal systems whether being Customary, Common Law based, Roman Law systems.

A.M. Honore' in Oxford essays in Jurisprudence suggest a liberal concept of ownership as a series of rights and incidents as follows;

1. **Right to possess**
2. **Right to use**
3. **Right to manage**
4. **Right to income of the thing**
5. **Right to capital**
6. **Right to security**
7. **Right to incident of transmissibility**
8. **Absence of term**
9. **Prohibition of harmful use**
10. **Liability to execution**
11. **Incident of residuary**

(Right to possess: This is the privilege to hold or keep property by the owner. This is the right to exclusively control the land i.e. exclude other people from entry. This right may be exercised in a physical way to prevent other people from entry on property.)

Honore' further comments that the above listed may be regarded as necessary ingredients in the notion of ownership. But they are not individually necessary though they may together be sufficient conditions to designate ownership of an item in a given system.

Objectively speaking land is not capable of being owned in the most absolute sense. That is, you cannot own land and do as you wish with it without regard to other living beings. In this respect even the English system smartly avoids the direct connotation of owning land, but rather uses owning an estate in land.

'Ownership' is a word derived from a very simple term 'own', defined by the pocket oxford English dictionary as: **Not another's**

The Roman legal based systems correctly defines ownership in dominium as the unrestricted, and exclusive control which a person has over an item of ownership. However, whether this concept can be extended to be used over land is a matter of serious debate as land is a universal property which cannot be subject to absolute private ownership. It belongs to all living things, plants and animals. By virtue of their existence, all living things are entitled to some space, somehow, somewhere on earth. And it is not necessary that for any living being to exist it must first own some space to live on, on the face of earth. Nature has never acknowledged absolute private ownership of land, it is in actual fact is based on

interdependence of systems. The fact the living exists naturally gives them a right to live somewhere on land, and their existence does not depend on whether they own land or not. They cannot be excluded from land and get thrown into outer space for instance if the world gets completely owned by limited people. Land like fresh air and water, as necessity of life is *fungible* (not capable of being owned) and as such it falls into a category of thing that are common to all (*res communes*).

Land as a shared property will always create condition where other living beings will constantly impose restrictions onto the so called '*land owners*'.

NATURE OF ESTATES OF FREEHOLD

In practice the fee simple owner is the actual owner of the land although his legal rights are less than those of the absolute owner. This is shown by:-

- a) the right of alienation , i.e. the right to transfer to another the whole or any part of the interest in land
- b) the right of ownership to everything in, on, or over the land

THE RIGHT OF ALIENATION

The fee simple owner has the same right as the actual owner and hence independent to dispose of his land to anybody he deems fit. He is under no obligation to any third party apart from those he contracts with there is however a regulatory limitation vested in the state which tempers with freedom of the owner In the land e.g. a statute may prohibit him from building a home somewhere on his land.

THE RIGHT OF EVERYTHING IN, ON OR OVERLAND

The general rule is that he who owns the soil is presumed to own everything up to sky and down to the centre of the earth *cujus est solum ejus est usque ad colum et ad inferors*. He is entitled to possession of any chattel not the property of any known person which is found under or attached to his land. But this does not apply to temporary chattel merely resting on the surface.

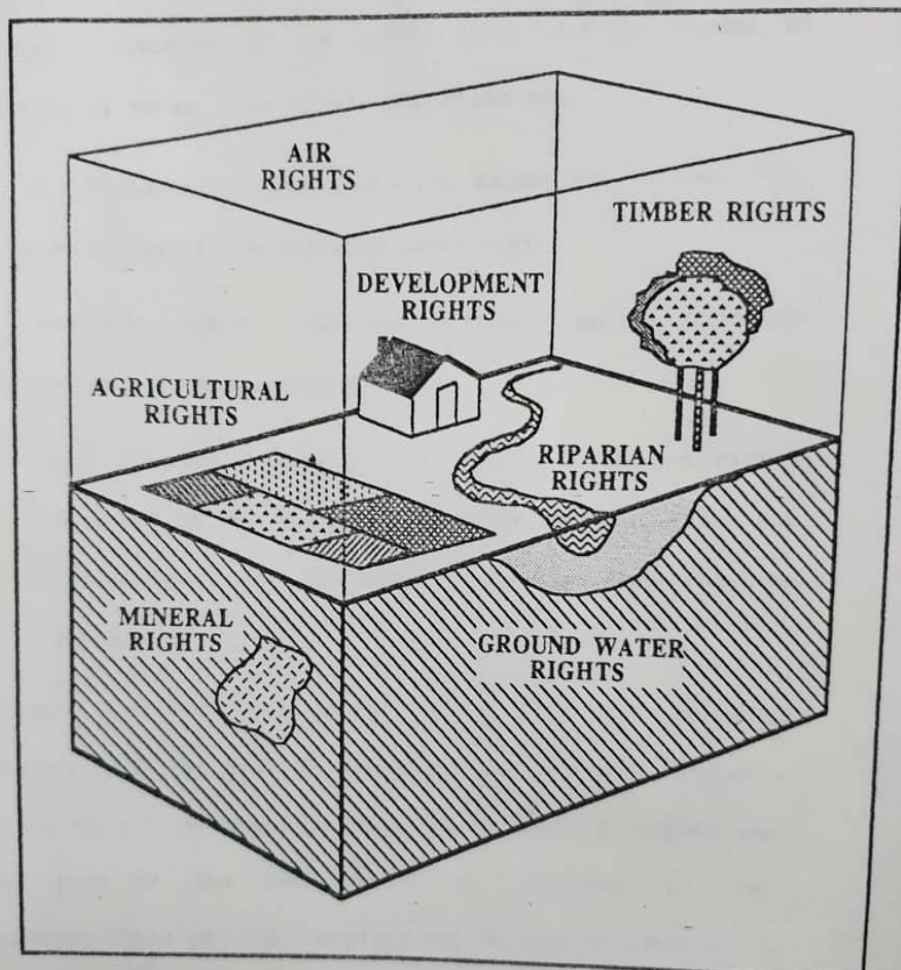


FIGURE 7: LAND PARCEL (based on platt)

Source: Dale and McLaughlin, 1988.

EXCEPTIONS TO THE GENERAL RULE

- 1) **AIR SPACE** – Intrusion into the air space above land is a trespass and often also a nuisance. Aircrafts enjoy a wide dispensation under the civil aviation act Cap 704 Section 7 of the act provides that no action shall lie in respect of trespass or nuisance by reason only of the flight of aircraft over property at a height which is reasonable under the circumstances, otherwise there must be previous notice to the owner or occupier of the land.
- 2) **MINERALS** – These are vested in the president by mines and minerals act Cap 329.
- 3) **WILD ANIMALS** – At common law wild animals are not subjects of ownership, the owner has a qualified right in them in that he has the exclusion right to hunt and put them to his own use but as soon as they fall dead they belong to the land owner even if killed by a trespasser. Under the national parks and wild life act cap 316, they belong to the president
- 4) **WATER**- Act common law a fee simple owner has no property in water whether it percolates under the surface of his land or of percolating water the land owner may draw off, any or all of it without regard to claims of neighbors. In case of water flowing through a defined channel, the riparian owner can always take all the water but he has certain variable rights first of all he has the sole right to fish in the water he is entitled to the ordinary and reasonable use of the water flowing over the land. Under the water Act Cap 312, Section 5 vests ownership of all water in the president provided the land owner has the right to take free of charge the water he may need for his own primary, secondary or tertiary use. Primary use refers to domestic purposes and annual life. Secondary use is for irrigation of land. Tertiary use is for mechanical and industrial purposes or for generation of power.

THE EXTENT TO WHICH THE DOCTRINE OF TENURE & ESTATE APPLY

Under section 4 of land conversion of Titles Act 1975 all land in Zambia is vested in the President. However, 99% of land had already been vested in the head of state under the orders-in-council.

Section 31-2 of the Lands and Deeds Registry Act Cap 287, abolishes the existence of fee tail in Zambia.

Section 5 of the Lands Conversion of Titles Act converts all freehold estates of a term beyond 100 years to statutory leases of about 100 years. Under customary land tenure chiefs have interests in the control, whilst individuals have interests of use.

FIXTURES

The maxim '*Quic Quid Plantatur Soloso Credit*' which means what is fixed or attached to the land becomes part of the land. There are two elements which have to be considered, firstly is the degree of annexation, there must be substantial connection with the land or building on it. Secondly, is the purpose of annexation? This infact is the main factor in that the degree of annexation is regarded as being of an importance as same as evidence of purpose. The rule is that articles not other wise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances show that they were to be so. On the contrary articles are fixation. To the land even slightly are to be considered as part of land unless there is evidence to the contrary. if the purpose of fixation is to improve the land then they are fixtures but if the purpose is for decoration or enjoyment then it's a mere chattel. if the removal of the thing may cause damage either to the thing itself or to the land then one can safely say it has been attached as part of the land even if the person who fixed the thing is the land has no titles to the land itself it will still be considered as a fixture and cannot be removed. The general rule is that all fixtures attached by the tenant, become the landlord's fixtures however there are certain exceptions to the rule.

- i) If it's a chattel the tenant can remove it anytime but if it is a fixture you cannot have the right to remove it.

- ii) Trade fixtures -: These attached for the purpose of trade or business may be removed at anytime during the term but not long afterwards
- iii) Ornamental fixtures -: if they are for the purpose of improving the land, then they are irremovable but if they are there for ornamental purposes, they may be removed e.g. flower vessels and certain paintings etc., these are also removable.
- iv) Agriculture fixtures -: These are treated like trade fixtures

These exceptions were intended to encourage industrialisation.

LAW AND EQUITY

CONCURRENT INTERESTS

This can take various forms namely joint tenancy, tenancy in common, corporeal and tenancy by entities.

JOINT TENANCY

The distinguishing factors of a joint tenancy are as follows-:

- 1) The right of survivorship i.e. *Jus accrescendi*- it means that on death of one joint tenant his interests in the land passes to the other joint tenant and does not pass to the deceased descendants. The joint tenant who survives becomes the sole tenant and the right of survivorship operates notwithstanding the existence of the will. The only way a joint tenant can alienate his interests to another is by reversing the tenancy by inter vivos (= transfer of an interest in land whilst you are alive) [converting the interest of a joint tenant to interests of tenants in common to allow your interest to pass to somebody upon death]
- 2) There must be the four units in existence namely (*vis a vis*) unity of interest, unity of possession, unity of time and unity of title.

- **Unity of interest-** Both a joint tenant and the persons who acquire interests in the tenancy must have the same interests
- **Unity of possession-** The property must be vest in possession to both of the parties at the same time. Common also to tenancy in common
- **Unity of time-** Both of them must be able to take possession at the same time so as a major and a minor can not have a joint tenancy although they will vest it in possession. Minor – below 21 and above –major)
- **Unity of title-** They must both claim title from the same document. Note that neither a corporation company nor a ltd. Company can have a joint tenancy with a natural person. Reason is because a coy never dies and hence a natural person never dies and hence a natural person could have no effective right.

Note: Reversing the tenancy by intervivos is a person transferring his interests to another person, say while alive say X but X doesn't become a joint tenant but a tenant in common since the unities of title and time are not present.

NATURE OF JOINT TENANCY

The two partners are basically one and the same. As a separate individual he does not own anything at all but together with the other partners they own everything the result is that any joint tenant can occupy the whole premises or can be able to rent. Under the Particulars Act (1540) any joint tenant not happy with the way the joint tenancy is operating can bring an action to have the tenancy partitioned and thus destroy the joint tenancy.

TENANCY IN COMMON

A tenant in common holds any undivided share in a tenancy. It is differentiated from a joint tenant in that a tenant in common has undivided shares whilst a joint tenant has nothing at all or has everything. A tenant in common has no right of survivorship which a joint tenant has.

In a deed if the expression joint and severally is found the word joint is much adversed to, but it is a will it is severally which is given word.

The interests can exist both at common law, there was an inclination towards joint tenancies rather than common tenancies, the reason was because joint tenancies had certain advantages as regards land owners e.g.

1. It was easier for a landlord to collect the rent i.e. only from one tenant.
2. Only one payment was made by the joint tenants whereas in common Tenancies the tenants paid separately and hence tend to pay more for one property.
3. There was a problem of conveyance. It was easier to investigate one title in a joint tenancy rather than titles of every one who was a tenant in common. The importance of investigating titles of tenants in common was because whereas in joint tenancy there was unity of title, tenants in common had no such unity. Equity however created exemptions in this respect. Tenancy in common existed not only in those circumstances which tenants in common at common law existed but also in certain exceptions firstly, in money contributed is unequal they can not be joint tenants and tenants in common. If they contribute equal share equity presumes that they are joint tenants. Secondly, which refers to Partnership Act, they are held by both parties as joint tenants and not as tenants in common. This is so irrespective of how much they contributed and it does not matter what the partnership is formal or not.

As regards determination of joint tenancies and tenancies in common this may be by partition, sale of premises, and union in a sole tenant, the release by deed, and alienation by one joint tenant.

LEASES AND LICENCES

A lease can mean the document or actually the interest that is being transferred. At common law there was no duration for the existence of a lease. In Zambia however, Section 5 of the Land (conversions of titles) Act 1975 converts all leases for the period over 100years to statutory leases of a 100years but the President can grant a lease for over 100years if it is an international interest relations.

TERMINOLOGY USED IN LEASES

A conveyance is a transfer of a free simple estate

An assignment is a transfer of a leasehold estate. It is not all transfers which amount to leases sometimes. it may amount to a mere license whereas a lease will bind successors in title as far as the land is concerned a license will be bound at all.

The test used to find out if it's a lease or license is one of exclusive possession. In a lease the tenant has the right to exclude the landlord from the premises in his possession. The landlord may have the right to inspect the land but if there is no such reserved right in the lease itself he becomes a trespasser. The exclusive right is derived from the construction of the document itself.

A license is a right or permission granted to a person to do certain things in the premises in the absence of which his business transactions whether or not a person was tenant or license depends entirely on existence of exclusive possession. In family relations the question of exclusive possession is not crucial or if mere fact there is exclusive possession does not make the landlord – tenant relationship.

Where a servant occupies his master's premises because that is regarded by the nature of his duties there is merely a service occupancy and the occupant is a license.

TYPES OF LICENCES

1. **BARE LICENCE:** This is one where a consideration has been given. It's always revocable and the revocation does not amount to a breach. However, the licensor has to give reasonable time to the licensee to clear off. It does not bind successors in title to licence.

2. A LICENCE PROTECTED BY ESTOPPEL OR EQUITY

The licensor is estopped from denying the type of a license he granted to a licensee i.e. he had made a promise to the licensee. Such a licence is binding on successors' in title and whoever will be the purchaser.

A licence arising from equity is one in which the licensor is prevented from revoking the licence having regards to a promise he had earlier made.

The difference between equity and estoppel is that in equity there is a belief in revoked and in estoppel the licensor is trying to back out from a promise he entered into with the licensee.

A licensor is a constructive trustee. This arose in the case of *Binions Vs Evans* 1972 (Chancery) in the case a certain company owned land and on the land an employee resided there. The employee died leaving a widow. The company sold the land to the purchaser and the conveyance was a term that the widow was to have a life estate. The effect of the estate was to effect the price of the land. The purchaser wanted to evict the widow. The court held that there was a licence which could not be revoked and which was binding on successive purchase.

LICENCE COUPLED WITH AN INTEREST

This is the one exercised for the purposes of enjoyment of the interest which a licensee has on land of the licensor

Profits a prendre

Here the licensee has profits on the land of the licensor and you can only enjoy this profit when there is a condition to enter the premises for the purposes of enjoying the profits.

4. CONTRACTUAL LICENCE

There is a consideration here and hence there is a binding contract that he won't revoke the licence whilst in all others the question of revocability is not discussed.

5. THE MATRIMONIAL HOMES

In a number of cases the court has held that the wife has a revocable licence is binding on any purchaser of the house who has notice of the license. The licence can be revoked on either divorce or a comittion of matrimonial offence e.g. adultery. The case of National Provincial Bank Ltd Ainsworth 1965 Ac P1175. This case over ruled earlier decisions. In this case the husband had deserted a wife and later along conveyed the house to a certain company. The company charged the house for a loan the bank sued for possession of the house. It requested the wife to vacate the house so that it may sale the house to realise the unpaid loan. The court held that the bank was entitled to possession and the wife was not a licencee. She had no right either in the land or the house itself unless they had jointly contributed the money for the purchase of the house. A wife remains in a matrimonial home as a result of the status of marriage. It's her right and duty to remain there that cannot affect her right to do so. She is not a trespasser. She is not a licensee of her husband. She is lawfully there as a wife providing the wife's marital rights and nothing safeguarded in some way, the court would not refuse to evict the wife.

LEASES AND TENANCIES

At common law a lease could be created orally by parole agreement in writing or by deed. There was no regiment that a lease be in writing except in cases of incorporeal rights (easement e.g. right of light). By statute of frauds of 1677 every lease was requested to be in writing and signed by the parties creating it. Only exception is in case of a lease of less than 3 years period. This could be made orally. The real Property Act 1845 required all those leases frauds to be made by deed, non conformity with formalities rendered it void at law.

INFORMAL LEASES

These arise independently of statutes and one example of such a tenancy at will. It arises when a tenant takes possession of the lease with the consent of the landlord and if it is for a period of time and the tenant and the terms agreed upon will continue to exist as if they had made a formal lease. At common law the..... Must be fulfilled, must be made in writing and secondly there must have been consideration. In equity the agreement was that there must be part performance.

TYPES OF LEASES

1. **Leases for fixed period** - Here the date of commencement and the date of determination of the lease are fixed. There must be certainty and if the duration of the lease depends on someone naming the term then the term must be named prior to commencement otherwise it will be void due to uncertainty. Differentiate the reversion. The reversion ally lease is one that commences at the future date whereas a lease of the reversion is one of un expired time after the expiration of the original lease.

2. **Leases for yearly period-** This continues from year to year and unless it is determined by notice, it will continue indefinitely. It arises where by express terms or by implication a lease has been entered into and payment of rent is calculated by reference of the term of months notice and its determined at the end of the year in which this lease is to finish.

3. **Periodical leases**

These continue from one time to another unless determined by notice which is of the duration of the lease itself.

4. **Tenancy at will**

It arises whenever the tenant occupies the land with the consent of the landlord and a term that a tenant or landlord may determine the tenancy any time it is common that no rent is payable or else it will be converted into a different type of lease. The conditions

which have to be fulfilled are that there must be consent of the landlord and the lease may be determined by either the tenant or the landlord depending on the terms of the tenancy. But tenant can pay some compensation to landlord for occupying of the premises.

5. Tenancy at sufferance

Strictly this is no tenancy at all since there is no private of tenancy. It is opposed to a tenancy at all since the possession after the consent to persons' previous lease.

6. Lease by Estoppel

Estoppel prevents someone from denying what he has already done. A tenant is estopped from questioning the title of the landlord to the land or his own title to the land in the same way as the landlord is estopped from questioning the title of the tenant to the land. Lease by Estoppel only binds the parties to it and successor in title.

7. Perpetually renewable leases

These renew themselves on certain conditions in English law they have cut down and may not exceed 21 years but in Zambia they may continue infinitum.

ESSENTIALS OF A LEASE

Every lease must be in writing and signed. This is according to the statute frauds of 1677. The written agreement must include the following terms

- i) Names of the contracting parties
- ii) Property to be let
- iii) Length of the term for which the lease is granted and the date of commencement
- iv) The rent and preferably when it is to be paid
- v) Any special covenant (conditions)

William Jacks and Company against Orcornear
1967 ZLR

As regards duration of leases in Zambia Section 5 of the Land (conversions of titles) Act provides for statutory leases of 100 years and any other leases for 99 years. A lease must exist for a time term certain or for a time which can be rendered certain. Hence it is not possible to create a lease for the duration of a war. The world's term of years certain were constituted in the case of S.J. Patel (Zambia) Ltd against Bancroft pharmaceuticals Ltd (1924 ZLR) to mean a term certain not exceeding 21 years and includes a term certain of less than one year. Thus even a term certain of less than a year is included. This is specifically for Business Premises. It can be for 99 years to 100 years for any other leases.

RIGHTS AND OBLIGATION OF LANDLORD AND TENANT

These can be considered fewer than 3 situations

- i) The parties have not agreed upon express terms of the lease
- ii) Certain terms classified as usual converts exists
- iii) Statutory terms exist e.g. under the rent Act

- 1) Where there are No Express Terms:-
The landlord's obligation

- a) Implied covenant for quite enjoyment

There is an implied grant by the landlord that "no one is going to disturb the tenants in the enjoyment of the land. Its not personal enjoyment. The quite refers to the tenants not being disturbed by someone claiming title to the land. It's not affected by noise and the covenant does not include the right of privacy. The question of quite covenant only affects the landlord and those claiming lawfully under him. As limitation the tenant has no complaint if he is evicted by someone with title paramount (one with a better title than him). The covenant may be broken if for instance the landlord tries to drive out the tenant by treats or breaking doors.

- b) Obligation not to derogate from the grant

Derogation from the grant is doing something inconsistent with the existence of the grant. The landlord should not do something which will make the tenant cut off water or electricity supply. The right of privacy is not covered. Letting premises next door does amount to a derogation from the grant.

- c) Implied covenant that the premises are fit for the purpose

This is for situations where the premises is a finished house or lettings. It must be fit for human habitation. In the converse it can be said that the tenant has the right not to be derogate from the grant etc.

The Tenants Obligation

1) Rent Payment

If the tenant fails to pay rent the landlord may either sue for the money or he may distrain the rent. [The landlord seizing certain goods from the tenant's premises] – This was the only thing to do at common law. The distress for Rent Act 1689 gave right in the landlord to sell the property after being in possession for five days. You could not seize growing crops perishables, tools of trade and clothes.

Impound breach – where the tenant interferes with the goods which have been seized the landlord could sue, and the recovered money known as treble damages. A tenant has a right to rescue the goods after seizure [Replevin- this is paying so that the goods are recovered after they are impounded but before they are sold]

2) Obligation not to commit waste

There are various kinds of waste viz a viz ameliorating waste, equitable waste, voluntary waste. What consists of any act or omission which alters the physical character of the land whether for the better or for the worse.

- a) **Ameliorating waste** - This is a change which amounts to the improvement in the physical character of the land. The landlord will not normally complain.

- b) **Permissive waste** - This is where the tenant has failed to do what he ought to have done, i.e. he has permitted decay or disrepair of premises. There is an omission here.
- c) **Voluntary waste** - This is where the tenant has done something which deteriorates the condition of the premises or his act damages the premises in the same way in which he would have kept them had he been the owner of the premises.

There is a distinction in how the law of waste affects the tenants. A tenant for a fixed period is liable both for permissive and voluntary waste unless there is a contrary term in the lease. A yearly tenant is obliged to keep the premises in tenants like manner or he will be liable for committing voluntary waste. For periodical tenancy the duty is on the landlord to keep the premises in repair, all the tenants does is to use the premises reasonably so as to prevent them falling under disrepair. Tenants at will and tenants at sufferance are only liable for voluntary waste. A tenant has an obligation to allow the landlord to come and review the state of repairs the premises. The law on waste protects the interest of those who have remained in the reversion. This is so because if the land is changed for the worse the ones with the rights in reversion will not be able to enjoy the land or premises after the tenancy has expired. As a contrast to this, the law on ennoblement on the other hand is intended to safeguard the interests of the tenant after the determination of the lease so that he may invest in the land he will reap the benefits of his investment.

3) **Tenants right of ennoblement**

Ennoblement are growing of crops on the land of the landlord sown by the tenant. Since they are supposed to be part of the land if the tenancy ceases he is supposed to leave them when he vacates the land. The tenant has the right to remove the crops and reap the benefits of his investment. The tenant's right is however limited, firstly the tenant should not be the one responsible for the termination of the lease. Secondly, tenants at sufferance are not entitled to embracement and so are tenants for a fixed term of years. This is because they know when the tenancy will end.

4) Est overs

A tenant for many years and a tenant for life is entitled to estovers so long as the need or use is responsible and necessary. Estovers is the freedom of a tenant to take necessary wood from the land occupied by that tenant or which a tenant is permitted to make use of for instance for domestic purposes. The tenant also has the right to remove fixtures. Certain fixtures may not become part of the land as such and may be removed by the tenant e.g. if fixing it to the land was the only way it could be enjoyed, trade fixtures, domestic fixtures, agricultural fixtures and ornamental fixtures.

USUAL COVENANT

In determining what is usual one looks at the agreement and the character of neighbourhood. The usual covenant on part of the landlord are as follows-:

- i) A covenant of quite enjoyment- This is usually in its qualified form i.e. extending only to the acts of lessor or the rightful acts of any person claiming for or under him. One part of the tenant, there is firstly the covenant to pay rent. Rent must be certain although not necessarily at the date of the lease but rather at the time of payment. The landlord may enforce payment directly by an action for money or distress and in directly by threat forfeiture close.
- ii) Covenant to repair- In long leases the tenant usually covenant is to do all repairs and in short lease the landlord assumes liability for external and structural repairs. Subject to this in every case the matter is one for negotiations. The state of repair is viewed at the time of entering. Fair wear and tear refers to the deterioration to premises as a result of ordinary use of the premises or natural causes. The tenant is not obliged to make repairs but is obliged to prevent consequences following natural causes factors like age, character and locality of premises, class of tenant are considered in determining whether have been kept in repair reasonably suitable for occupation.
- iii) Covenant against assigning and subletting
- iv) If the lease is silent on the matter tenant is entitled to assign or sublet premises without landlords consent. However, a covenant against assignment is often inserted in a lease. If a tenant subleases, the landlord is entitled to determine the

lease and can evict the subtenant but if the landlord consents to sublease he has only got a remedy against a tenant and not against a subtenant.

Determination of a lease

i) By effluxion of time

This only applies to leases for a fixed periods. No notice is needed unless otherwise express is provided.

ii) By notice

This is only relevant for yearly and periodic leases. In yearly tenancies six months' notice is required. In periodic leases the period of a lease itself. Notice must be certain that is exact date of determination must be named

iii) Forfeitures

This arises by not fulfilling any of the conditions or covenant in a lease. The difference between a condition and a covenant is that a breach of a covenant gives rise to the right to claim damages whereas breach of a condition results in determination of a lease hence the question of adding a forfeiture clause will not arise where there is a breach of a condition although it is necessary in relation to a covenant of rent as an exception. The landlord has to forfeit peacefully. There is what is called waiver of breach, this is implied where the landlord knowing of the breach does an act indicating the existing of the lease.

iv) Merger

This applies where tenant acquires the remaining extent of a lease. Other mode of determining the lease includes by surrendering satisfaction of them by disclaimer.

DISTRESS FOR RENT

At common law chattels remained as a pledge in the hands of the party making the distress and could not be sold. This is still valid law even at now although the statute has given the distrained power of sale if certain conditions are satisfied. These conditions are found in the Distress for Rent Act 1689. There are certain requisites for the landlord to levy

distress firstly of the landlord –tenant agreement must exist at the time of distraining. Secondly, the rent must be certain and in arrear. Thirdly, the right to distrain may be prohibited by an agreement express or implied not to distrain by action amounting to estoppel on the part of the landlord. Fourthly, under section 14 of the Rent Act there must be leave of the court. As regards the procedure, distress can only be levied by the landlord personally or by a certified bailiff. And it may be done at anytime during the day. It is also confined on the land which is demised. Making a distress itself constitutes a demand hence actual previous demand is unnecessary. The distrainer may use any means to enter the premises although illegal entry renders the distress void. The tenant must be served with the notice of distress stating the rent due, the particulars of goods seized, time and when the goods will be sold. This notice must be in writing.

GOODS TO BE DISTRAINED

At common law all goods and chattels on premises could be distrained. However, there were certain exceptions on personal chattels. There are certain goods which are absolutely privileged e.g. state property, diplomatic property, trade goods, fixtures, perishables and goods in custody of law. Some goods were conditionally privileged, these include tools of trade, husbandry and livestock. Some clothes beddings and tools of trade must be left out.

REMEDIES

If the distress is illegal due to distraining after tender of rent or distress at right, breaking open outer door or window or distraining things which are privileged the remedies available are

- an injunction to restrain the landlord
- Lawfully rescuing the goods impounded or sue the distrainer in damages for full value of the goods taken without deduction of rent due.

IRREGULAR DISTRESS

This is constituted by selling without notice, selling for otherwise than the best price, selling before the statutory period of five years and where

the distress is levied by anybody other than the landlord or bailiff. Here the remedy available for the tenant is to sue for damages and only proved special damage may be recovered.

EXCESSIVE DISTRESS

This is where the goods seized are disproportionate to the rent due in other words where there is no evaluation of the goods distrained. The remedy available is the fair value of the goods after deducting the rent due. Damages may also be awarded for loss of use and enjoyment of the excess taken away and any inconveniences caused.

CUSTOMARY LAND TENURE

The word tenure to the legal rules regulating the acquisition, the distribution of rights and the use of land amongst a specific population. In Zambia the land tenure system has varied from one area tenure to another due to difference in authorities in.

At present there about two different systems altogether, land may either be held under customary law or under statutory law and hence the two categories of land namely, state land and customary land. For state land this may either be scheduled or non-scheduled land depending on whether the particular land depending on whether the particular land appears in the schedule to the agriculture land Acts Cap 292. This customary land is what we basically trust and reserves we call them customary land and reserves. We call them customary land because the interests in these lands are held under customary law. It has always been contended that the difficult with the

Customary system of land tenure lies in its impression as to title, lack of security of tenure, lack of freedom of alienability and its being prone to fragmentation and parcellation.

Ownership of land

Land rights are acquired by virtue of membership in a particular tribe and once an individual is a member he becomes entitled to a piece of land. However, these rights are mentioned only if certain obligations are fulfilled. These are allegiance to the political authority. Rights in land should be differentiated from the title to land. Acquisition of rights in land does not imply acquisition of title to such piece of land. In most tribal societies in Zambia title to land is vested in the community as a whole and the chief holds this land as a trustee for all the people hence the chief has interests of control whilst the individual members of the community have beneficial rights. In other trades society's title is vested in family groups. Here the family owns the land although the interests in such land are held by a member of the family. Although title may be vested in the community as a whole or the chief as trustee for the community, the interests acquired by individuals are distinct and exclusive. These interests will endure for as long as their heirs succeed

him unless he effectively abandons the land. Hence the interests are so well established that they only fall short of freehold title.

ALIENABILITY OF LAND

Another feature of customary land tenure i.e. say to inhibit both commercial and industrial development is the lack of freedom of alienability. An individual will be reluctant to invest in land where he may not realise his investment if he must move. In most tribal societies in Zambia however, there are no restrictions on the transfer or assignment of land by one individual to another. Land may be assigned by loan or gift without reference to any land authority. It is only in society where clans are the lands holding units that there is need to consult the other members of the clan. This form of alienation however is confined to the UN exhausted improvement on the land which can be sold as opposed to the land itself. In some tribal communities another form of alienation of land by individuals exists. Here an individual may allot a portion to his dependant who then proceeds to cultivate the plot. Here there is no actual transfer of the ownership of the land at all.