LEGAL PROBLEMS OF SECURED TRANSACTIONS IN NIGERIA: A COMPARISON WITH CANADA AND A PROPOSAL FOR REFORM

By

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To

Ogochukwu V. Onwaeze

Nyemike N. Ogbechie

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For their assistance and encouragement.

ABSTRACT

In Nigeria, legal problems of security interests for creditors consitute a major barrier to economic development. It is customary that most creditors will only provide credit when there is security from debtors. Most often, the issue is not the availability of security but its efficacy. The ease with which the security is obtained is also an important consideration. This is the more so as business people are always obsessed with the economic efficiency of a particular transaction. Land in Nigeria is the most important, but vulnerable, security interest for creditors. There are various clogs on the use of land as security for credit transactions. A sizeable part of the country still observes the customary land tenure system, where land is group or communally owned. The major worry of creditors in this system is how to ensure that there is compliance with the complicated rules of customary law in land transactions. The Land Use Act, 1978, which was enacted to rectify most of the shortcomings of the customary land tenure system, has proved to be even more problematic than the regime it sought to modify. The systems of registration of title and interests in land are inadequate. Moreover, the laws of personal property security are dated and out of tune with contemporary commercial realities. These laws proceed from legal categorizations whereby the form of a transaction, as opposed to its substance, determines its legal treatment. The resulting legal regimes are unsystematic, uncertain, cumbersome, and, sometimes, inequitable. As a result it is difficult to employ personal property as security for credit. Canada, on the other hand, seems to have responded effectively to some of the problems that presently affect the Nigerian laws. The use of the Torrens system in Western Canada seems to be economically efficient for security interest in realty. The personal property security Acts, which derive from Article 9 of the United States Uniform Commercial Code, appear to be the appropriate legal regime for security interests in personal property. This study explores some of the limitations of the Nigerian laws of security interests in realty and personalty. The study also attempts to discover whether the Canadian laws, which are efficient, could serve as models for the reform of the Nigerian laws on secured transactions.

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INTRODUCTION.

I. THE NEED FOR SECURED TRANSACTIONS.

Why creditors sometimes demand security before they extend credit, and why the law recognises this form of financing arrangement, are two crucial preliminary questions to this study. It is undeniable that the commercial activities and industrial growth of any economy depend on the availability of credit for those involved in commercial and industrial enterprise. According to Goode, "enterprises live (and sometimes die) by credit."[1] The life and growth of any economy depends on the provision of efficient mechanisms for the extension of credit. But it is not possible for a credit provider to predict the continuity or growth of its debtor. Because of uncertainty in business activities, creditors are always reluctant to expose their money to avoidable or mitigable risks. The product of a company may have been misjudged, or stiff competition may relegate it to a remote position in the market. For several reasons the debtor may find it impossible to pay its debts. The creditor who has obtained security is fairly certain that in the event of unavoidable business catastrophe, it will be able to recoup itself from the proceeds of the security and be saved the trouble of proving in competition with unsecured creditors.[2]

The vast amount of credit granted yearly by secured creditors is enhanced by their

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1. R. Goode, Commercial Law (Middlesex, England: Penguin Books Ltd./Allen lane, 1982), 705.

2. R. Goode, Legal Problems of Credit and Security (London: Sweet & Maxwell, 1988) 1., R. Goode, "The Modernisation of Personal Property Security Law", (1984) 100 L.Q.R. 234.

ability to negotiate a privileged position in the event of insolvency or bankruptcy of the debtor.[3] This demand for security has become even greater in this period of global recession and more frequent business failures. Therefore to the question whether security is necessary, it is answered that "security is ingrained and of long standing, satisfying an atavistic urge to score over one's fellow man."[4]

It is common knowledge that in contemporary commercial practice security is mostly taken as a matter of course by creditors because it is the traditional method of financing, and, sometimes, without critical evaluation as to whether the expense justifies the return.[5] In this conventional wisdom a secured loan provides a "psychological advantage for a lender"[6] that there is a source for it to recoup itself in the event of the debtor's default. It is arguable in this regard that the law is too favourable to those who have the negotiating power and ability to secure their lending.[7] Despite the traditional function of security, in practice, the lending industry relies more on the credit-worthiness of debtors than on their assets.[8] Experience has shown that many debtors will run risks

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3. Goode, "The Modernisation of Personal Property Security", supra note 2.

4. R. Goode, "Is the Law Too Favourable to Secured Creditors?" (1983-84), 8 C.B.L.J. 53. Goode observed that secured transactions have long been part of human existence. For instance, security was used by the Akkadian over 4,000 years ago, with a form of antichresis by which the debtor pledged his land and the members of his family. See ibid.

5. D. Allan, "Security: Some Mysteries, Myths and Monstrosities" (1989) 15 Monash U.L.R. 341 at 342.

6. See R. Scott, "A Relational Theory of Secured Financing" (1986), 86 Colum. L. Rev. 901 at 945.

7. J. Ziegel, "The New Personal Property Security Regime - Have we Gone too Far?" (1990), 28 Alta. L. Rev. 739.

8. R. Miller, "Taking a Look at the Commercial Finance Contract" (1979), 65 A.B.A.J. 628; cited by Scott, "A relational Theory of Secured Financing", supra, note 6 at 946.

different from those for which the loan was obtained. Because of this potential for abuse of the terms of the loan, risk-averse creditors will want to monitor debtors to avoid misbehaviour, and by taking security there is also the assurance that the debtor's assets are committed to the business or purposes for which it borrows.[9] This brings about financial discipline on the part of the debtor. In addition to information given to the creditor to monitor the debtor, this may make less likely the failure of the business or enterprise.[10] Also, monitoring benefits unsecured creditors indirectly: by monitoring the debtor, unsecured creditors are confident that in the event of bankruptcy the secured creditors will not share in the common pool that is not subject to the security interest.[11] This is because the secured assets constitute the pool from which the secured creditors will recoup themselves in the event of the bankruptcy of a debtor, leaving the unsecured creditors to share in the unsecured assets.

Although secured financing gives the creditor some rights in the security agreement, the debtor will always have a greater stake in the collateral than the lender. The debtor's knowledge that the creditor can realize its loan by resorting to the assets if any loan covenant is violated is a compelling incentive to fulfil all the obligations specified in the agreement.[12] Thus the secured creditor may be able to influence the

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9. Allan, "Security: Some Mysteries, Myths and Monstrosities", supra, note 5.

10. Goode, "Is the Law too Favourable to Secured Creditors?" supra, note 4 at 56.

11. R. Picker, "Security Interests, Misbehaviour and Common Pools" (1992), 59 U. Ch.L. Rev. 645 at 658. A "security interest" is defined by Goode as "a right given to one party in the asset of another party to secure payment or performance by that other party or by a third party." See R. Goode Legal Problems of Credit and Security, supra, note 2 at 1.

12. R. Scott, "A Relational Theory of Secured Financing", supra, note 6 at 945.

actions of the debtor before there is any default. This function of secured transactions is different from the conventional opinion that collateral serves as a residual asset claim in the event of default and insolvency. This leads to the conclusion that security has an active rather than a dormant function.[13]

It is also argued that misbehaviour is not peculiar to debtors. Creditors may have the tendency to misbehave if it is known that there is a common pool for all to realize their loan upon default. This creditors' misbehaviour is in the form of monitoring the debtor and other creditors in order to defeat the *pro rata* basis of bankruptcy distribution.[14] Therefore, secured lending which prioritises the claims of creditors prevents creditors' misbehaviour and the attendant monitoring costs in common pool situations.[15]

The taking of security and the consequential reduction in the risks of debtor's misbehaviour might, it has been suggested, lower the interest rate payable by debtors and lessen the cost of credit generally.[16] But it seems that this theory may not have a catholic appeal or application. Security may increase the cost of setting up the credit, and for some financial operations it may not reduce the risk. In small loan transactions, the creditor may obtain the same protection without actually resorting to the expenses of

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13. Scott, ibid., at 950. It is important to note that secured creditors are now cautious about the amount of influence they wield in a debtor's business. This is because excessive control of a debtor may render the secured creditors liable jointly with the debtor to other creditors or for any environmental offence.

14. R. Picker, "Security Interests, Debtors and Common Pools", supra, note 11 at 678.

15. Picker, ibid.

16. See S. Levmore, "Monitor and Freeriders in Commercial and Corporate Setting" (1982), 92 Yale L.J. 49 at 59, 69.

taking security. Information and the right to intervene can be got through contract and financial discipline can be similarly imposed.[17]

The elaborate mechanism set up for secured lending has been criticised by Alan Schwartz.[18] In place of the present practice Schwartz advocates that the first-in-time is first-in-right rule will meet some of the functions of secured lending. It may also reduce, marginally, the cost to commercial parties of realising financing objectives.[19] This proposed scheme appears equitable and simple, but different creditors have varying degrees of risk-averseness, and some will not lend unless their credit is secured. Apart from privity of contract, the law will always recognise and legitimate this form of financing. According to Jackson and Kronman:

> [I]f the law denied debtors the power to prefer some creditors over others through a system of security agreements, a similar network of priority relationships could be expected to emerge between creditors. Permitting debtors to encumber their assets achieves the same result, but in a simpler and more economic fashion. If a debtor has more than two or three creditors, freeriders and hold-out difficulties are likely to plague any attempt on the part of the creditors to work out a set of priority relationships among themselves. These transaction costs can be avoided by allowing the debtor himself to prefer one creditor over another. The rules permitting debtors to encumber their assets by private agreement is therefore justifiable as a cost-saving device for the debtor's creditors to do what they would do in any case.[20]

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17. D. Allan, "Security: Some Mysteries, Myths and Monstrosities", supra note 5 at 342, footnote 19 and accompanying text.

18. A. Schwartz, "A Theory of Loan Priorities" (1989), 18 J. Leg. Stud. 209

19. Schwartz, ibid., at 260 to 261. Schwartz, however, concedes that some form of lending, like purchase money security interest, should continue to be secured.

20. T. Jackson and A. Kronman, "Secured Financing and Priority Among Creditors" (1979), 88 Yale L.J. 1143. This rationalisation of the essence of secured transactions has found favour with Professor Goode. See R. Goode, "Is the Law too Favourable to Secured Creditors?" supra, note 4 at 57. However, it has been criticised by Professor Alan Schwartz, who contends that the Jackson-Kronman argument did not take into account the possibility that a reduction of monitoring costs for one class of creditors might

The above discussion has been focused on the need for, or peculiar commercial attractions of, secured transactions. The analysis in this study is not exhaustive, and the reasons that secured lending is essential to most creditors remain to be given. I have attempted to point out that there may be benefits from secured lending that are different from the traditional rationale for this type of lending. Legal scholars have been attempting, with the aid of economic analysis, to unravel the puzzle of, or rationale for, secured transactions.[21] The debate has reinforced the importance of secured transactions in the economy, even though there does not seem to be any agreement on the extent of the significance of secured financing.[22] The difficulty with the debate is that there have been as many opinions as there have been contributors. Given the variety of opinions on this issue, it is tempting to sympathise with the objection of Kripke, who contends that

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increase monitoring costs for another class of creditors. See Alan Schwartz, "Security Interests and Bankruptcy Priority: A Review of Current Theories" (1981), 10 J. Leg. Stud. 1 at 10-11.

21. Legal discourse on this issue assumed important dimension following the enactment of Article 9 of the United States Uniform Commercial Code. This is the most important, and appealing part of the code from international perspective.

22. The first attempt to unravel the puzzle of secured transaction appeared in the seminal article by Thomas Jackson and Anthony Kronman, "Secured Financing and Priorities Among Creditors", (1979) 88 Yale L.J. 1143. Issues were joined with them by Alan Schwartz in "Security Interests and Bankruptcy: A Review of the Current Theories." (1981) 10 J. Legal Stud. 1., S. Levmore, "Monitors and Freeriders in Commercial and Corporate Settings" (1982), 92 Yale L.J. 49., Alan Schwartz, "The Continuing Puzzle of Secured Debt," (1984) 37 Vand. L.R. 1051., J. White "Efficiency Justification for Personal Property Security," (1984) 37 Vand. L.R. 473., H. Kripke, "Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact," (1985) 133 U.Pa. L.R. 929; T. Jackson and A. Schwartz, "Vacuum of Fact or Vacuous Theory: A Reply to Professor Kripke", (1985) 133 U. Pa. L.R. 987; R. Scott, "A Relational Theory of Secured Financing" (1986), 86 Colum. L.R. 901; F. Buckley, "The Bankruptcy Priority Puzzle", (1986), 72 Va. L.R. 1393., P. Shupack, "Solving the Puzzle of Secured Transactions", (1989) 41 Rutgers L.R. 1067. See also, R. Picker, "Security Interests, Misbehaviour and Common Pools" (1992), 59 U. Chic. L.R. 645.

The debates, which seemed to focus on personal property security, received another twist with the evaluation of the role of real property security in the puzzle. See A. Johnson, "Adding Another Piece to the Financing Puzzle: The Role of Real Property
Secured Debt", (1991) 24 Loy. L.A.L. Rev. 335.

the debate proceeds "in a world of academic reasoning reminiscent of the cloister and unfounded on any discussion of the factual world of commerce."[23] Kripke reasoned that "there was no way that abstract reasoning, economic theory, or rigorous logic could have led" to the particular solutions represented by the Uniform Commercial Code's language.[24]

Nevertheless, apart from the transactional efficiency[25] of secured transactions and other ancillary benefits to both the creditor and debtor, it is usual that most creditors, in order to reduce their risks, will not lend without security.[26] The fact that the legislature has deemed it important to protect this form of transaction and in some cases provides for its facility implies its importance to the economic well-being of any country.

It is in light of the advantages of secured transactions that this study is considered important. It is assumed that creditors will resort to securing their credit when they are confident that the security is realizable in the event of debtor's default. This demands, especially in the case of real property, that there is certainty of title to the secured property. If there is no certainty of title the security interest will turn out to be illusory.

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23. Kripke, "Law and Economics: Measuring the Economic Efficiency of Law in a Vacuum of Fact", ibid., at 931.

24. Ibid, 959. Jackson and Schwartz attacked Kripke's reasoning, arguing that "Kripke's methodology is utterly bereft of serious intellectual support. No one can get a challenging problem of social policy right using Kripke's approach." See Jackson and Schwartz, "Vacuum of Fact or Vacuous Theory: A Reply to Professor Kripke", supra, note 22 at 1001.

25. Shupack, "Solving the Puzzle of Secured Transactions", supra, note 22 at 1083-1084. It has also been argued that there is no puzzle of any kind in secured financing. That amongst other functions, it serves as a management bond that limits the risks of a firm's project. See E. Adler, "An Equity-Agency Solution to the Bankruptcy Priority Puzzle" (1993), 22 J. Leg. Stud. 73.

26. This conclusion was also reached by Jackson and Schwartz, supra note 13 at 1001.

Also, the use of security will be justified when it is commercially efficient. This implies that the cost of taking security should not be more than the advantages it confers. To enhance the efficiency of secured transactions, the law should provide appropriate mechanisms that will make credit transactions fast, economical, easy, and certain. The presence of these features will ensure predictability in credit transactions to the benefit of both creditors and debtors. Ultimately, it is the economy that benefits from the effectiveness of this form of financing arrangement. This may be responsible for the attention given to this area of the law by most developed countries.

Nigeria as a developing country is beset by a number of problems. But apart from political problems and other inhibiting factors, inadequate and uncertain security interests for creditors are major impediments to economic development. The availability, efficacy, cost, and facility of security are some of the important factors considered by creditors. In Nigeria, land is the most important, but fragile, form of security interest for creditors. There are several constraints on the use of land as security for credit transactions. In most parts of the country the customary land tenure system still has a strong hold. The problem for creditors in this area is the viability and efficacy of group or communally owned land as collateral for credit. In an attempt to check some of the difficulties in the customary land tenure system, the legislature enacted the Land Use Act, 1978. But as will be shown in this study, this Act in relation to real property security has created more problems than it attempted to solve.

The registration of titles and interests in land, which, *inter alia*, facilitates land transactions, is equally defective in essential respects in Nigeria. For instance, a

purchaser from the first registered owner of land is liable to have his interest defeated by a party who subsequently proves a better title. In other words, there is no government guarantee of title of the purchaser after first registration. The instruments registration law is mainly good for evidentiary purposes. Again, the laws of personal property security are anachronistic; completely out of tune with the present societal realities. In this area, the form of a transaction, as opposed to its substance, determines its legal treatment. Thus similar transactions are treated differently. Consequently, Nigerian laws in this area are chaotic, uncertain, difficult, and inequitable. This makes it cumbersome to utilise personal property security. These problems have been compounded by the law enacted to protect illiterate persons in Nigeria. The technical requirements of this law do not make for easy compliance. As a result, the taking of secured credit is out of the reach of illiterate persons, and when it is available, it is often at exorbitant cost.

II. SCOPE OF THE THESIS.

This study explores the legal limitations on secured transactions. The thesis proceeds from the premise that secured transactions are essential for the effective functioning of commerce and aid the growth of the economy. Accordingly, the law should not only legitimate these form of financing arrangements but should also provide appropriate mechanisms to facilitate such transactions. In this study, the Nigerian legal regimes on secured transactions are compared with those of Canada with a view to finding which of the two countries has more efficient laws on the subject. There will be an attempt to highlight the problems of security interest in real and personal property in

Nigeria. It is important to observe that the thesis is primarily concerned with the legal constraints on secured transactions and should not be seen as a restatement of the substantive law on real and personal property. Any inquiry into the substantive law in these areas will be done with a view to understanding the root of the problems, concerning secured transactions. Such a discussion is necessary particularly with regard to the customary land tenure system, where a knowledge of some of its features will aid readers in understanding its contribution to the problems of security interests in real property in Nigeria.

Further, the classification of property into realty and personalty can sometimes be artificial, especially in relation to their function as security interests. This is so in the case of quasi-personalty, *i.e.*, those things which are movable in point of law, though fixed to things real, either actually, as emblements (fructus industriales), or fixtures.[27] In this area, classification creates problems in relation to the appropriate legal regime that should regulate the security interests arising from these types of property. Also, a security interest in the nature of the floating charge could affect the registration regimes in real and personal property security.[28] It is equally arguable that the functions, or puzzle, of secured transactions, where discussions have focused mainly on personal property security, can only be properly understood by evaluating the role of real property security interests.[29]

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27. See The Dictionary of English Law vol. 2, E. Jowitt ed. (London: Sweet & Maxwell, 1959).

28. See R. Wood, "The Floating Charge on Land in Western Provinces" (1992), 20 C.B.L.J. 132.

29. A. Johnson Jr., "Adding Another Piece to the Financing Puzzle: The Role of Real Property Secured Debt", supra, note 22.

The thesis is expository, critical, and comparative in its approach. The legal problems of secured lending in Nigeria are explored and compared with the Canadian situation. The comparison relates, principally, to how Canada has responded to some of the legal problems that tend to hinder secured transactions in Nigeria. During the course of my research, it was apparent that Canada has efficient legal regimes on secured transactions. This opinion was reinforced in interviews with bankers in Winnipeg, who expressed satisfaction with the functioning of the present laws in Canada. In addition to the critique of the laws regulating secured lending in Nigeria and Canada, the thesis also highlights the legal principles in the latter jurisdiction that are potentially beneficial and transplantable to Nigeria. An efficient law of secured transactions may help to lower the cost of domestic borrowing and to make credit available. Also for a developing country like Nigeria, a functional legal regime of secured transactions may enhance direct private foreign investment.

III. OUTLINE OF THE THESIS.

The thesis is divided into three sections. The first section deals with the problems of security interests in real property, while the second part is focused on personal property. The conclusion dwells on whether there is the need to reform the law of security interest in Nigeria.

Chapter 1 focuses on the customary land tenure system and the limitations it puts secured transactions. It discusses the problems of ownership under customary law, the inalienability of group-owned land, and the impact of the received English law on

conveyancing. Discussion also covers the protection of illiterates, and how the Land Use Act, 1978, attempted to solve the problems arising under the customary land tenure system.

Chapter 2 explores the Land Use Act, 1978 and its impact on credit transactions. The discussion in this chapter is centred on the conceptual and practical limitations of the Act. The commercial implication of the requirement of the state governor's consent to any alienation or transfer of any interest in land is analysed.

The registration regimes introduced to facilitate real property secured lending are the concern of chapter 3. The Nigerian instruments and title registration systems are compared with the Torrens system that operates in Western Canada. The benefits and burdens of the respective systems are highlighted and a conclusion is reached on which system is the more effective.

The second sections relates to personal property security. Chapter 4 dwells on the limitations of the laws on personal property security in Nigeria. Attention is drawn to unnecessary classifications of the various forms of security interest and the resulting differences in legal treatment, which are mostly inequitable. Reference is also made to the constitutional impediments to the growth of efficient commercial laws in Nigeria and its effect on commerce and the economy.

The decision to allocate chapter 5 to the floating charge was made because of its importance in corporate lending. The origin and nature of the floating charge is discussed. Analysis also focuses on its limitations in Nigeria, especially in relation to its non-applicability to unincorporated business.

The Western Canadian Model Personal Property Security Act is the focus of chapter 6. The features and scope of this model regime are analysed. Also the shortcomings of the new regime are highlighted and it is suggested that its philosophical foundation can form the basis for law reform along this line in any country.

The last section of the thesis evaluates the topic as a whole and attempts to assess whether, in light of the findings in the study, there is the need for a reform of the laws on secured transactions in Nigeria. There is an attempt to evaluate the relevance of the floating charge under any new scheme. Suggestions are also made on how any proposed reforms in the Nigerian laws could be made effective and conflict-free.

Chapter 1.

LIMITATIONS OF THE CUSTOMARY LAND TENURE SYSTEM ON REAL PROPERTY SECURITY.

1.0. NATURE OF OWNERSHIP IN THE CUSTOMARY LAND TENURE SYSTEM.

In the evaluation of security of title to land it is necessary to inquire into the issue of ownership. This is particularly important in the case of the customary land tenure system, as the ascertainment of the nature of ownership is a dominant problem that besets the entire gamut of the tenure system under customary law. It has been very difficult to state whether an individual can own land under native law and custom. The determination of this issue is essential to the consideration of all other rights arising in land. The attempts by courts to state the meaning of "ownership" as used in customary land law have been problematic. In what is often regarded as the *locus classicus* in relation to the nature of ownership, the Privy Council in Amodu Tijani v. Secretary, Southern Nigeria[1] observed:

> The next fact which it 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 ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case, the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometime called the owner. He is to some extent in the position of a

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1. [1921] 2 A.C. 399.

trustee, and as such holds the land for the use of the community or family.[2]

It is difficult to give the precise meaning of "ownership" as used in customary land law.[3] Indeed, the specific meaning of this concept has not passed without some debate.[4] The greatest right an individual can have in land under customary land law, it has been contended, is possession, not ownership.[5] This opinion seems to derive from the fact that an individual in customary land tenure system is often a member of a group - the family or community. Because of the complexity of the rights of the individual in relation to that of the group, it is felt that the term "corporate" may be the apposite description of the nature of land holding in customary law. Ownership is in the group and the individual has mere right of possession.[6]

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2. Ibid at 404-405. The accuracy of this statement has been doubted by Professor Allot, who is one of the renowned scholars of West African customary laws. See A. Allot, New Essays in African Law (London: Butterworths, 1970) at 309. Moreover, the Court of Appeal of Nigeria in LSDPC v. Foreign Finance Corporation (1987), N.W.L.R. 82 at 83, doubted the validity of the Privy Council's pronouncement in present day Nigeria.

3. "One may misunderstand a foreign legal system if one approaches it within the view permitted by the blinkers of (one's) own society", that is, within an alien conceptual framework. See Bohannan, Justice and Judgment Among the Tiv (London: Oxford University Press, 1957) preface iv. See also Bentsi-Enchill, Ghana Land Law (London: Sweet & Maxwell, 1964) at 6.

Any reference to the customary land law of Ghana should not be surprising, as one of the features of customary laws in West Africa is the similarities in important essentials between countries. This has prompted Allot to state that African customary law is, "in a certain but most important sense, a unity, though a unity in diversity." See A. Allot, Essays in African Law (London: Butterworths & Co. (Publishers) Ltd., 1960) at 71. See also T. Elias, The Nature of African Customary Law (London: Routledge & Kegan Paul Ltd., 1962) at 3.

4. See Elias, Nature of African Customary Law, supra, footnote 3 at 164; Bentsi-Enchill, supra, footnote 3 at 7; Coker, Family Property Among the Yorubas (London: Sweet & Maxwell, 1962) at 32-34; Olawoye, Title to Land in Nigeria (Ife, Nigeria: University of Ife Press, 1981) at 2.

5. Coker, Family Property Among The Yorubas, ibid.

6. Elias, supra, footnote 3 at 7. This opinion seems to be at one with the observation of the Privy Council in Amodu Tijani's case supra, footnote 1.

However, it is very easy to be misled or confused by the concept of ownership.[7] Ownership is a right and rights are not held in relation to inanimate objects but in relation to other people. Thus a right is not held in land *per se* but against another person. It follows that ownership is not ordinary possession but a relation among persons.[8] As it is difficult to argue that all members of the community in the African context have a concurrent right to use the same parcel of land at the same time, it has been contended that the idea of individual ownership is not unknown to Nigerian customary land law.[9] It may be suggested that the owner of land is the person who has the right of possession, whether mediate or immediate, and whose right of possession is not tied up with, or restricted by, the superior right of another person. To amount to ownership in this sense the right claimed must be infinite and absolute.[10]

One of the standard ingredients of the liberal idea of ownership is the liability of the owner's interest to be taken away from him for debt, either by execution of judgment

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7. "Ownership" as a concept in law has generated a lot of debate. There is no consensus on the nature of ownership, but there appears to be agreement that it is a form of right. See G. Wilson, "Jurisprudence and the Discussion of Ownership" (1947), Camb. L.J. 216; C. Turner, "Some Reflections on Ownership in English Law" (1941), Can. Bar Rev. 342; J. Jones, "Forms of Ownership" (1947), 22 Tulane L. Rev. 83.

8. See J. Underwood, The Distribution of Ownership (New York: Ams Press Inc., 1968) at 15.

9. See Olawoye, supra, footnote 4 at 4, who is of the view that the fact that the right of a land holder is limited by the general requirement of land tenure system in the area does not render it inappropriate to refer to him as "owner". According to A.N. Allot, to contend that ownership of land does not exist in African customary land law, "assumes that there is something wrong with a foreign legal institution which does not conform to English legal principles; it also assumes that a term such as 'ownership', has a god-given meaning, a 'true' or 'real' meaning; and finally it assumes that a thing called 'ownership' exists and can be discovered in a country's laws, just as one may discover diamonds in a river-bed." See A.N. Allot, "Towards the Definition of 'Absolute Ownership'" (1961) 5 J.A.L. 99, 100.

10. Olawoye, Title to Land in Nigeria, Ibid., 4; A.N. Allot, "Towards the Definition of Absolute Ownership", ibid., at 101-102.

debt or on insolvency.[11] But under the customary land law, apart from certain restrictions on the alienation of an owner's interest, attachment of his interest through legal process is prohibited. However, despite the inalienability of land in early medieval England, Pollock and Maitland argued that any suggestion that no land in England at that time was owned would lead to a barren paradox.[12] Therefore, in customary law, ownership of land may not be absolute in terms of attachment of interest, alienation, or use of land, but this does not prevent the use of the term "ownership" when used to describe an individual's right to land.[13]

It is also necessary to inquire whether an individual can have allodial title to land. There are judicial authorities to the effect that allodial title can be granted to an

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11. The reason for this liberal conception of ownership is that in the absence of such a general liability the growth of credit would be hindered, and ownership would be an instrument by which the owner could defraud his creditors. See A. Honore, "Ownership" in A. Guest (ed.) Oxford Essays in Jurisprudence (London: Oxford University Press, 1961) at 123.

12. F. Pollock and F.W. Maitland, The History of English Law Vol. 11 (Cambridge: University Press, 1964) at 5.

13. However, there may be need to use the term "absolute ownership" or "absolute title" to describe the right of the individual, family or community who has an unrestricted title or the equivalent of allodial title to land. This is necessary to distinguish it from the right of an individual in family land, where he may be said to be owner in a restricted sense, and that of the customary tenant who has a right of occupancy on the land. As Lord Cohen observed in Enimil v. Tuakyi (1952) 13 W.A.C.A. 10 at 14:

> It seems clear from the authorities... that the term owner is loosely used in West Africa. Sometimes it denotes what is in effect absolute ownership; at other times it is used in a context which indicates that the reference is only to right of occupancy... This looseness of language is, their Lordships think, due very largely to the confused state of the land law in (West Africa) as it now stands... There has been introduced to native customary law, to which the notion of individual ownership was foreign, conceptions and terminology derived from English law. In this circumstance it is not surprising that it is difficult to be sure what is meant in any particular case by the use of the expression owner."

See also B.O. Nwabueze, Nigeria Land Law (Enugu, Nigeria: Nwamife Publishers; New York: Dobbs Ferry co., 1972) at 26; Olawoye supra, footnote 4 at 7.

individual by the community.[14] This implies that the interest of the grantee is not subject to the control of, or qualified by the interests of, the grantor. Although, the Privy Council did observe that cases of individual ownership of land at present are due to the introduction of English ideas in the colony,[15] it is not true that individual ownership was unknown to customary law before the advent of the British. On the contrary, it can even be said that all family lands and, in some cases, communal land, must have had their origin in individual ownership.[16]

To lend force to the modern conception of individual ownership, it has been observed that the institution of communal ownership has been dead for many years, while the institution of family ownership is a dying institution.[17] Recently, the Court of Appeal of Nigeria remarked:

> Communal and family title to land is a thing of the past. The conception of land being in the family for the past, present and future members of the family is no longer valid.[18]

Nevertheless, the above observation is of doubtful validity in the light of the Supreme Court decision in Ojemen v. Momodu and Ors[19] to a contrary effect. Thus despite the

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14. Sasraku v. Okine (1930) 1 W.A.C.A. 49; Safo v. Yensu (1941) 7 W.A.C.A. 167; Golightly v. Ashfri (1955) 14 W.A.C.A.676. However, doubts have been expressed on the correctness of these holdings. See G.R. Woodman, "Allodial Title to Land" (1968) 5 Univ. of Ghana L. J. 79.

15. Lord Haldane in Amodu Tijani v. Secretary of Southern Nigeria, supra, footnote 1 at 405.

16. Nwabueze, Nigerian Land Law, supra, footnote 13 at 32; Bentsi-Enchill, Ghana Land Law (supra) at 81; G.R. Woodman, "The Allodial Title to Land" supra, footnote 11 at 89.

17. Per Speed Ag. C.J. in Lewis v. Bankole (1909) 1 N.L.R. 82 at 83.

18. Per Ademola J.A. in LSDPC v. Foreign Finance Corporation (1987) 1 N.W.L.R. 415 at 433.

19. (1983) 3 S.C. 173 at 187.

encroachment made upon it by modern practises, by the courts and the government, communal and family ownership still retains a firm grip upon our society.[20] It is in light of the importance of group ownership - particularly family ownership - in modern day land transactions in Nigeria that it becomes necessary to ascertain the right of an individual in family land.

1.1. THE NATURE OF INDIVIDUAL INTEREST IN FAMILY LAND.

In a group-owned land (whether communal or family) determining the exact nature of an individual interest can be quite problematic. The real ownership is vested in an abstract concept known as "corporation" or "quasi-corporation" i.e. the family, in which the chief or the family head is the trustee of a sort.[21] But behind this general curtain of group ownership there is a gradual individualisation of possessory rights.[22] It is important to point out that the individual's right in the family land may be more than mere possessory right. Elias, while elaborating on this issue rejected the concept of usufructuary right and observed:

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20. That the family is the land-owning unit is confirmed by the facts that grants to individual members of the group or to strangers leave the ultimate title in the family. Moreover, lands originally acquired by an individual as his absolute property devolves at his death upon all his children as family land under indigenous system of tenure. This knowledge would have informed Butler-Lloyd J. in stating that, "Notwithstanding the lapse of nearly a generation since the judgment in Lewis v. Bankole was delivered, the institution of family ownership is still a very life force in native tenure in Nigeria." See Bajulaiye v. Akapo (1938) 14 N.L.R. 10. See also Nwabueze, supra, footnote 13 at 45.

21. Amodu Tijani v. Secretary of Southern Nigeria, supra, note 1. The use of the word "trustee" is different from the conventional meaning of it. According to Nwabueze, the most fundamental of the differences is that whereas a trustee of land has the legal title vested in him and therefore the legal owner of it, the legal title to communal land is vested in the quasi-corporation, the community, village or family, and not in the chief individually. To describe him as an owner, even in a loose sense, is therefore misleading. Nigerian Land Law, supra, footnote 13 at 149.

22. Bentsi-Enchill, Ghana Land Law, supra, footnote 3 at 88.

> The Nigerian occupier's interest in or right over the land of his community or family partakes of the nature of part-ownership enjoyable, at least in theory, in perpetuity."[23]

The nature of this part-ownership is not clear. The interest may be likened to tenancy in common under English law as all members have undivided shares in the family property. However, this comparison is not very helpful since the individual has no alienable interest in the land.[24] It has been held that even when a member of the family has been allotted a portion of the family land, that member becomes entitled to occupy and enjoy that portion during good behaviour,[25] but he does not become the owner of the land as against the family and he cannot alienate it without the consent of the family.[26] Nor is the member's interest attachable for debt owed by the member to a judgment creditor.[27] Again, as there is no doctrine of survivorship, it is difficult to liken the nature of a member's interest to a joint tenancy. On the death of the member, his portion of the land becomes automatically the family property or vested in his children. It has been held that this interest is not devisable.[28] Summing up his opinion on this issue Elias stated:

> The interest of each member of a family in the family land is neither strictly

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23. T. Elias, Nigerian Land Law (London: Sweet & Maxwell, 1971) at 115.

24. In Caulcrick v. Harding (1926) 7 N.L.R. 48, it was observed at page 49 that, "the customary tenure recognised by native law and custom as arising in such a case has not the essential characteristics of a tenancy in common strictly so called, in that it gives no right of alienation"

25. The meaning of good behaviour is quite elastic. Good behaviour requires that the holder should not alienate his interest without the requisite consent; put the land into a use different from that for which it was granted, or does anything that may amount to a challenge of the grantor's title. Courts are empowered to determine whether the conduct of the customary tenant amounts to a misbehaviour.

26. Adogun v. Fagbola (1932), 11 N.L.R. 110 at 111.

27. Miller Bros. v. Ayeni (1924) 5 N.L.R. 40., Jacobs v. Oladunni Bros. (1935) 12 N.L.R. 1.

28. Daniel v. Daniel (1958), 1 F.S.C. 50., Taylor v. Williams (1935) 12 N.L.R. 67.

> usufructuary in the Roman sense, nor is it a tenancy in common or a joint tenancy according to English land law. Again, it is not proprietary in the sense that it carried such a complete power of disposal as enjoyed by an English fee simple owner of land; it is equally inaccurate to regard it as merely possessory, for the occupier ordinarily enjoys a degree of freedom of user which a fee simple owner might envy. It is also clear that the Nigerian occupier of family land is not a life tenant of his holding such as his opposite member in an English settlement... It seems that he holds a kind of fee conditional or even fee determinable which, however, is peculiarly indigenous.[29]

This description of the nature of a member's interest has been criticised by Kom as being too vague and out of context with the true nature of a member's interest. In the opinion of Kom, a determinable or conditional fee under customary law is an interest of inheritance. However, since a member's interest is bound to determine on death, even if he conforms with the customary norms during his life, his interest cannot be described as a "determinable fee, which however is peculiarly indigenous."[30] According to this latter view, the member's interest is nothing other than a possessory licence.[31]

The qualification of a member's right in family land as possessory licence is as tempting as it is misleading. There has been an on-going debate on the nature of licence in relation to land, but consensus as to the precise nature still remains elusive.[32] It

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29. Elias, Nigerian Land Law, supra, footnote 23 at 131.

30. E. N. Kom, "The Nature of a Member's Interest in Family Land in Nigeria and Ghana" (1966) 3 Univ. of Ghana L. J. 122 at 134.

31. Ibid. 135.

32. For some scholarly attempts to analyse the true nature of licence, see H. Wade, "What is a Licence?" (1948) 64 L.Q.R. 57 and "Licence and Third Parties" (1952) 68 L.Q.R. 337; A. Briggs, "Licences: Back to Basics" [1981] Conv. 212; M.P.Thompson, "Licences: Questioning the Basics" [1983] Conv. 50; A. Briggs, "Contractual Licences: A Reply" [1983] Conv. 285; A. Everton, "Towards a Concept of 'Quasi-Property'?" [1982] Conv. 118 and 177; S. Moriarty, "Licences and Land Law: Legal Principles and Public Policies" (1984) 100 L.Q.R. 376; J. Dewar, "Licences and Land Law: An Alternative View" (1986) 49 M.L.R. 741; G. Cheshire, "A New Equitable Interest in Land" (1953) 16 M.L.R. 1; O. Marshall and E. Scamell, "Digesting the Licence" (1953) 31 Can. Bar Rev. 847; G. Williams, "Interest and Clogs" (1952) 30 Can. Bar Rev. 1004.

seems that at present the two recognised forms of licence are estoppel licence and contractual licence.[33] As request is the basis of estoppel licence, this cannot be an apt description of a member's interest; for the individual member has a share in the land owned by the quasi-corporation, the family. This interest cannot be said to arise from mere request or reliance on any promise, since the member's interest is intrinsically recognised by the family. Moreover, the interest cannot be contractual licence because the member does not have to give any consideration to be entitled to this so called licence.[34] Further, licences relate specifically to the use or occupation of land and, generally, are not assignable.[35] However, the only restriction on the assignment of a member's interest in family land is the requirement of the family's consent to the transfer. It should be stated, therefore, that Kom's attempt to liken a member's interest in family land to possessory licence is another effort in conceptual formalism.[36] A member's interest in family land is another unique creature of customary land law which is both possessory and proprietary, but determinable at the occurrence of any prohibited

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33. According to Moriarty, "the difference between contractual and estoppel licence is the difference between contract and estoppel generally. A contract, to be enforceable, requires consideration; whereas an estoppel can arise from mere detrimental reliance... The elusive but crucial factor , therefore, separating contract from estoppel, and contractual from estoppel licence, is the element of request." See "Licences and Land Law: Legal Principles and Public Policies", ibid, at 393.

34. One might question what considerations are given by members who acquire their interest by inheritance or by devolution of a deceased member's property.

35. J. Dewar, "Licences and Land Law: An Alternative View", supra, footnote 32 at 750. Even cases of commercial licences which are assignable are not applicable to the consideration of the nature of a member's interest in family land.

36. This relates to attempts to put all legal concepts into strait-jackets of conventional legal conceptions. This is probably what Robert Gordon referred to as 'Cartesianism'- that is , "the intellectual strategy of constructing highly simplified models of social reality for the sake of analytical rigour and elegance." See "Historicism in Legal Scholarship" (1981) 90 Yale L.J. 1017 at 1026.

act or conduct.

1.2. THE POSITION OF THE CUSTOMARY TENANT.

Customary tenancy arises whenever an outsider or any other person approaches a land owning family or community for a parcel of land for farming, settlement or for both. This system of tenure was in vogue in the early days when land was not of high commercial value, and it was considered charitable to give land to any individual or family in need. There was usually no consideration for this except the payment of annual tributes as a symbolic acknowledgment of the overlord's (the family) title. Nonetheless, because writing was unknown to the natives before the coming of the British, there was no means of recording these transactions other than the reliance placed on the memory of the witnesses to the transfer. But memory grows dim with time, and it is not unusual to find a customary tenant laying claims to the title of his overlord. It thus becomes pertinent to determine the nature of interest held by the tenant in order to ascertain the incidents of customary tenancy.

A customary tenancy creates in a sense the relationship of landlord and tenant between the grantor-family and the customary tenant, but this relationship is not in the nature of occupational licence which confers no interest in land. A customary tenant has definite rights in the land which are enforceable against the world at large, including the grantor and those claiming through it.[37] But is has been judicially recognised that the

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37. Nwabueze, supra, footnote 13 at 125.

right of a customary tenant is not more than mere possessory right.[38]

Tenancy under customary law, being granted in perpetuity, has the semblance of ownership. It is not surprising, therefore, that customary tenants regard themselves, and are regarded by others as "owners" of the land. This has remained the major cause of disputes about land in customary law. The Supreme Court of Nigeria attempted a comprehensive examination of the nature of customary tenancy in these terms:

> The main question, therefore is: what is the legal nature of the interest of the customary tenant in the land granted to him? In customary land law parlance, the defendants are not gifted the land; they are grantees of land under customary tenure and hold, as such, a determinable interest in the land which may be enjoyed in perpetuity subject to good behaviour. They hold something akin to emphyteusis, a perpetual right in the land of another.[39]

From the substantial interest held by the customary tenant in the land, it is easy to see why a customary right of occupancy is sometimes used as implying ownership. In many cases, a customary right of occupancy has an indefiniteness and infinitude of duration which is a striking indicium of absolute ownership. This is the more so where no tribute has been paid or demanded.[40] It may not be far-fetched to argue that the socio-economic setting that allowed this form of tenure no longer exists. With the commercialization of land, the hitherto customary tenant who is ignorant of the nature of his holding (or claims such ignorance) often challenges his overlord's title when the customary tenant attempts to alienate his interest without consent. This attempt to alienate

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38. Osborne C.J. in Lewis v.Bankole, supra, footnote 17 at 105; Lord Haldane in Amodu Tijani v. Secretary, Southern Nigeria, supra, footnote 1.

39. Agheghen v. Waghoreghor (1974) 1 S.C. 1 at 8.

40. Nwabueze, supra, footnote 13 at 26., Nsirim v. Nwakerendu (1955) 15 W.A.C.A. 71.

without the requisite consent may incur the forfeiture of his interest.[41] This has been the main cause of litigated disputes in land and also responsible for the uncertainty of titles

1.3. THE QUESTION OF ALIENATION OF LAND UNDER CUSTOMARY LAW.

It is necessary to note that the main feature of native law is its flexibility; one incident after another disappears as time changes. But the most important incident which has crept in and become firmly established as a rule of native law is non-alienability of land. Originally, alienation of land was foreign to native ideas.[42] The prohibition against alienation was informed by a number of factors. Historically, land was conceived as a sacred trust received from ancestors and to be handed down intact to posterity.[43] Traditionally, the prohibition against alienation had some religious ramifications; for since land was highly revered and worshipped as ancestral gift, it was considered the highest form of irresponsibility and sacrilegious for a member to alienate communal or family land.[44] Thus Elias remarked that there is perhaps no other principle more

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41. It should be noted that the proof of title to land is always onerous as every alleged custom is a matter of fact which must be proved before the court. The only exception is the customs which by frequent proof in courts have become notorious, and, therefore, the subject of judicial notice. See sections 14, 15, and 61-2 of the Evidence Act (Cap. 63 of 1948 edition of the Laws of Nigeria as amended); Buraimo v. Bamgboye (1940), 15 N.L.R. 7 at 10; T. Elias, The Nigerian Legal System (London: Routledge & Kegan Paul Ltd., 1963) at 13-16.

42. Osborne C.J., Lewis v. Bankole (1909) 1 N.L.R. 82 at 104.

43. C.K. Meek, Land and Custom in the Colonies (London: Frank Cass & Co. Ltd., 1968) at 113. "I conceive that land belongs to a vast family of which many are dead, few are living and countless numbers are still unborn", was the testimony given by the Elesi of Odegbolu before the West African Land Commission in 1908 at 183. See Nwabueze, supra, footnote 13 at 53.

44. Bentsi-Enchill, Ghana Land Law, supra, footnote 3 at 46, note 5 and accompanying text. See also M. Trebilcock, "Communal Property Rights: The Papua New Guinean Experience" (1984), 34 U.T.L.J. 377 at 391; where the traditional arguments for restriction on alienation were advanced.

It is also argued that the restriction of alienation that is potentially harmful to other members of

fundamental to the indigenous land tenure system throughout Nigeria than the theory of inalienability of land.[45]

However, the presence of the Europeans may be said to have brought about the alienation of family land in commercial form as land became a marketable commodity with the introduction of transnational commerce by the Europeans.[46] But even with the modern concept of alienability of group owned land, there are certain evolved procedures that must be observed in order to render the transaction effectual. There is the requirement of the consent of the family or community to the transfer. Consent is required when a member or a customary tenant is transferring his interest in land.

For the purpose of transfer, it is necessary to ascertain the authority or individual vested with the power to grant consent. The head of the family, as the trustee[47] of the family or communal land, is empowered to make alienation of land. But for the alienation by the head of the family to be unimpeachable and valid to overreach the interest of the members, he must consult with them and obtain their consent.

It was submitted to the court by counsel in Adedubu v. Makanjuola that the members' consent could not be a legal necessity because if it were, "there would be very little, if any security of tenure; for however careful a prospective purchaser or lessee of land might be to ensure that all is in order before completing his transaction, he could

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the family is justified. See R. Ellickson, "Property in Land", (1993), 102 Yale L.J. 1315 at 1376.

45. T. Elias, Nigerian Land Law and Custom (London: Routledge & Kegan Paul Ltd., 1962) at 172.

46. Ibid, 174; see also Coker, supra, footnote 4 at 40; Bentsi-Enchill, supra, footnote 3 at 45; Ashifri v. Golightly (1955) 14 W.A.C.A. 678.

47. Amodu Tijani v. Secretary, Southern Nigeria, supra, footnote 1.

never be certain that after considerable expenditure on the land some member(s) of the family would not succeed in obtaining a rescission of the contract on the ground that they had not been consulted."[48] Notwithstanding the persuasiveness of this argument, it was held by the Court of Appeal that however much it may be desirable as a matter of legislative policy to protect the grantees of community or family land, "the native law and custom throughout West Africa in regard to alienation of family land quite naturally has as its basis the interest of the family and not the interest of strangers who may wish to acquire family land."[49] Although this decision is protective of the interest of family members in land, it does not account for the commercialisation of land. Moreover, because of the importance of land in secured transactions this decision is a very potent tool for some family members, who use land to secure debts, to defraud their creditors. This judicial position is partly responsible for the dilatory nature of secured transactions in Nigeria and the high cost of obtaining credit for those who rely on real property as collateral for loans.

To mitigate the harshness of this consent requirement, various judicial guidelines have been formulated. It has been held, for instance, that it is not the unanimous consent of the family that is required, but the consent of the majority. But what constitutes a majority in this case is a substantial number.[50] In the Nigerian customary set up, most families are potentially polygamous and a polygamous family may be comprised of

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48. Adedubu v. Makanjuola (1944) 10 W.A.C.A. at 34-35.

49. Ibid, 35-36.

50. Esan v. Faro (1947) 12 W.A.C.A. 135; Elias v. Disu (1962) 1 All N.L.R. 214 at 216.

several branches. The question arises as to how a prospective purchaser can know the majority here and obtain their consent. It has been held that the law in this regard is that the consent of all the principal or important members, and not just the consent of the heads of branches, is necessary.[51]

In Udo v. Melifonwu,[52] a lease of family land was granted for 99 years with the consent of the head of all the constituent branches of the family. It was argued that since the branch heads acted as representatives of their respective branches, their action bound all their members. While conceding that this would facilitate dealings in family land and conduce to some security of tenure, the court refused to accept this suggestion as representing the customary law of the affected people, and held that, although the plaintiffs were not heads of branches, yet being indisputably important members of the family their consent was necessary to any alienation of the family land.[53]

The problems faced by a prospective purchaser dealing with family property are overwhelming indeed. The nuances of customary land law with regard to the consent requirement can never assure any security of title; for often the transfer will be challenged and, in most cases, it will be set aside for lack of the requisite consent. The intricacies of the consent requirement under the customary land tenure system have

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51. In Archibong v. Archibong (1947), 18 N.L.R. 117, it was held that in a meeting of the heads of the five branches that make up the town in question, the majority had no authority to bind the minority. The meeting could only take binding decisions with the consent of all the heads as representing the houses of which the community was composed.

52. (1961), 5 E.R.L.R. 93.

53. This decision should be contrasted with the case of Lewis v. Bankole (1909), 1 N.L.R. 82, where Osborne C.J. held that in any dealing with the family land in issue, it is the consent of the heads of the respective branches of the family and not all the members that may be required.

provided fraudulent chiefs and members of the various land owning families with potent tools to defraud unwary members of the public desirous of land. Recognising the frequency of land litigation in this aspect of the customary land tenure system, Judge Verity observed in Ogumbambi v. Abowaba[54]:

> The case is indeed in this respect like many which come before this court, one in which the Oloto family either by inadvertence or design sell or purports to sell the same piece of land at different times to different persons. It passes my comprehension how in these days, when such disputes have come before the court over and over again any person will purchase land from this family without careful investigation, for more often than not they purchase a law suit and very often, that is what they get.[55]

In customary land law, the absence of consent to a land transaction may render the whole transaction either void or voidable.[56] A void transaction or contract is one that does not have any legal force or binding effect in law because of lack of some essential element. Such a contract creates no legal right and either of the parties can ignore it at pleasure, so long as it is executory.[57] On the hand, a voidable act or transaction is one which is valid but may be avoided at the instance of one of the parties.[58]

It is possible to state the rules of the native jurisprudence regarding the effects of

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54. (1951), 13 W.A.C.A. 222.

55. Ibid., 223.

56. See Sanusi v. Daniel (1956), I F.S.C. 93 at 95, per Jibowu Ag. F.C.J. However, there have been disagreements amongst legal scholars in this field concerning when a transaction in land under customary law is void or voidable. See Nwabueze, supra, footnote 13 at 325-326; Bentsi-Enchill, supra footnote 3 at 50-57.

57. See Black's Law Dictionary (St. Paul, Minnesota: West Publishing Co., 1990) at 1574.

58. Ibid.

alienation or attempted alienation without the requisite consent from the accumulated judicial decisions.[59] It becomes important to reiterate that the prohibition against alienation, *inter alia*, is aimed at avoiding the overreaching of the members or potential members' interest without adequate consultation. It follows that where a proposed transaction affecting communal land is properly brought to the prior knowledge of all competent members but is actively opposed by one or more of them, the transaction is only voidable not void.[60]

Where only some of the members are consulted and consent to the transaction in question, the transaction is voidable.[61] Where the chief has acted alone without due consultation with other members of the family or community, the transaction is void despite the fact that he is regarded as trustee of a kind. Thus where the chief or head of the family conveys land in his personal capacity, and not in a representative capacity, the transaction is absolutely void.[62]

It should be stated that the foregoing considerations also apply to customary

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59. Although there is no judicial consensus as to the applicable rules in this area, it seems that the approach of Professor Nwabueze, as against other text writers in this area, is the most logical, and it will be followed here. See Nwabueze, supra footnote 13 at 326.

60. Esan v. Faro, supra footnote 46.

61. Aganran v. Olushi (1907), 1 N.L.R. 66; Coker v. Animashawun (1960), L.L.R. 7. But contrast these with the case of Bassil v. Honger (1954), 14 W.A.C.A. 569, where such a transaction was held to be void. Nwabueze justifies this holding on the ground that, although consultation is only partial, the transaction has no secrecy about it, nor can there be any suggestion that the chief intended to pocket the proceeds alone. It seems, however, that the emphasis on the 'secrecy' of the transaction may be misplaced as the courts have not expressly stated this to be their guiding criterion in voiding or avoiding a transaction.

62. Adedubu v. Makanjuola, (supra); Young v. Abina (1940), 6 W.A.C.A. 180; Cole v. Folami (1956), 1 F.S.C. 66; Olowu v. Oshinubi (1958), L.L.R. 21.

tenants.[63] In addition to the consequences attending alienation by a family member without the required consent, a customary tenant who alienates his interest without appropriate consent from the land-owning family is liable to forfeit his tenancy. The reasoning here is that although a customary tenant is entitled to enjoy his tenancy in perpetuity with or without tributes, alienation without consent amounts to a challenge of his overlord's title and invites the forfeiture of his interest. Alienation by a customary tenant without consent does not lead automatically to the forfeiture of his tenancy. The land-owning family should apply to a court for an order to forfeit the interest of the tenant and courts are empowered to grant reliefs against forfeiture.

1.4(a). IMPACT OF THE RECEIVED LAW ON CUSTOMARY TENURE SYSTEM

The introduction of English land law into Nigeria came with the colonization of Nigeria by the British. The dual system of laws brought about by British rule appears to have had its greatest impact on land law. The introduction of the received law did have some impact on the traditional incidents of customary land tenure system.[64] The received law made certain novel changes in the hitherto unwritten law as it affected land. One of the affected areas is the mode of conveyancing and its effect. In the wake of this

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63. The rights of the customary tenant under native law and custom are limited to occupation and do not include the power to alienate without the consent of the family. See Onisiwo v. Fagbenro (1954), 21 N.L.R. 3 at 5.

64. Pre-1900 English statutes are of general application in Nigeria. The introduction of the English laws has given rise to the question whether there are dual systems of tenure in Nigeria. See A.E. Park, "A Dual System of Land Tenure: The Experience of Southern Nigeria" (1965) 9 J.A.L. 1; Nwabueze, supra footnote 13 at 106. See also R.W. James, Nigerian Land Use Act: Policy and Principle (Ife, Nigeria: University of Ife Press, 1987).

introduction, a controverted issue is whether the use of the words of limitations in English law could affect land held under customary law. For instance, it has been questioned whether a fee simple can be created out of land held under customary law by the mere employment of the English words of limitations in the conveyance.[65] Further, the issue has been raised whether the use of the English form itself excludes native law and custom even where the transaction is between natives. The view here is that since a deed of conveyance was unknown to customary law, its employment by natives is a clear intention to be bound by it.[66]

(b) WRITING AND PROOF OF TITLE.

The introduction of writing at the time was thought a welcome development that would bring about security of title. Traditionally, proof of title was done orally with the assistance of chiefs and witnesses, who witnessed the symbolic transfer of the land.[67] However, as memory grows dim with time and there was no way of avoiding incessant rival claims to a particular piece of land, reliance placed on unwritten proof of title was always risky. Again, as there was little or no means of investigating and verifying the proof of title, any potential purchaser of land was not unlikely to obtain a law suit.[68]

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65. Coker v. Animashawun, supra footnote 54. In this case the question was answered in the affirmative. See also Balogun v. Oshodi (1929), 10 N.L.R. 36, reversed on appeal (1936), 2 All ER 1632.

66. U.A.C. LTD. v. Apaw (1936), 3 W.A.C.A. 114; Kwesi-Johnston v. Effie (1953), 14 W.A.C.A. 254. Contra, Nelson v. Nelson (1952), 13 W.A.C.A. 248 at 250.

67. This symbolic form of transfer can be likened to a similar form of transfer in medieval English law, known as *livery of seisin*. For an account of this system, see F. Pollock, The Land Laws (London: Macmillan and Co., 1896), 74-79.

68. Ogumbambi v. Abowaba, (1951), 13 W.A.C.A. 222.

A prospective purchaser of land would also have to contend with the traditional method of boundary demarcation, which was equally problematic. Thus the introduction of writing was seen as a panacea to some of these problems.

Nevertheless, as the vast majority of the population was illiterate, instead of ensuring security of title writing became an engine of fraud. Some of Nigerians who were impressed with, and eager to have as evidence of any transaction, colourful papers, began to lose their lands without actually intending to do so. This prompted Waddington J. in Rotibi v. Savage[69] to warn against the overzealous tendency of courts to hold that the mere use of writing displaces customary law in favour of English law:

> where documents amount to no more than the kind of 'paper' which most natives nowadays like to have as evidence of money transaction, and which at this day is, I suppose, quite a familiar object in most native courts, and frequently bearing an impressive array of stamps.[70]

Further, the adoption of the English form of conveyancing saw some of the natives making the conventional covenants as to title. Such expressions as "beneficial owner" or "trustee" have gained currency among the Nigerians, and their specific significance in implying certain covenants may not have been necessarily intended by the native grantors, but the consequence of statutory provisions of which the mostly illiterate natives may not have been aware. Their use in a deed should not, according to Nwabueze, be conclusive of the intention of the parties to be governed by English law.[71] These problems, *inter alia*, would have been obvious to the legislature when it passed a law to

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69. (1944), 17 N.L.R. 77.

70. Ibid, at 82.

71. Nwabueze, supra footnote 13 at 114-115.

protect the illiterates in Nigeria.

1.5. THE ILLITERATES' PROTECTION ACT.[72]

The object of this legislation is to ensure that a document which records a transaction to which an illiterate is a party is an accurate record of the intent of the illiterate person and the other party to the transaction, and is executed by the illiterate with a clear comprehension of its import. The relevant provision provides as follows:[73]

> Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter or other document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement,
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> (a) that he was instructed to write such letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents his instructions, and
>
> (b) If the letter purports to be signed with the signature or mark of the illiterate person, that prior to its being signed it was read over and explained to the illiterate person, and that the signature or mark was made by such a person.

(a). WHO IS AN ILLITERATE PERSON?

An illiterate has been defined as "a person who is unable to read with understanding and to express his thoughts by writing in the language used in the document made or prepared on his behalf."[74] It seems from this definition that whoever is unable to understand the particular language of a document, however educated he may

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72. Cap. 83 Laws of the Federation, 1958.

73. Section 3.

74. Per Charles J. in Ntiashagwo v. Amadu (1959), W.R.N.L.R at 273. Cf. Christian v. Intsiful (1953) 13 W.A.C.A. 347, 348 (P.C).

be, is an illiterate. This liberal interpretation has the tendency to undermine the whole intendment of the Act, which is to protect those who are not schooled in letters or literature. The literal meaning of an illiterate is a person who is "ignorant of letters or literature" or is "without book learning or education."[75] This plain meaning of an illiterate under the Act has received judicial approval.[76] It, of course, goes without saying that a person does not have to be totally unlettered to be an illiterate. Thus, a person who is otherwise unable to read and write in any language does not become literate merely because he has learnt to sign his name and read figures.[77]

(b). EFFECT OF NON-COMPLIANCE WITH THE ACT.

The statute makes failure by the preparer of the document on behalf of an illiterate to insert his name and address on the document a criminal offence, punishable with a fine of N100 or imprisonment for six months. In Amiru v. Nzeribe[78], the Court of Appeal in the lead reason for judgment, commenting on the effect of non-compliance with the provisions of the Act, quoted with approval the pronouncement in the judgment of Justice Smith in U.A.C. v. Edems & Ajayi[79]:

> The object of the ordinance is to protect an illiterate person from possible fraud. Strict compliance therewith is obligatory as regards the writer of the document. If the document creates legal rights and the writer benefits thereunder, those

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75. Oxford English Dictionary.

76. P.Z. Ltd. v. Gusau (1961), 1 All N.L.R. 242 at 244, per Taylor F.J.

77. S.C.O.A. Zaria v. Okon (1959), 4 F.S.C. 220.

78. (1989), 4 N.W.L.R. 755.

79. (1958), N.R.N.L.R. 33.

> benefits are only enforceable by the writer if he complies strictly with the provisions of the ordinance. If a document which does not comply with the provisions of the document creates legal rights between the illiterate and a third party, then evidence may be called to prove what happened at the time the document was prepared by the writer and the parties signed it, but the writer himself cannot adduce evidence in his favour to remedy the omission.[80]

The observation above aptly sums up the effect of non-compliance as interpreted by the courts. Quite often, however, non-compliance with the statute has taken the form of failure by the preparer of the document to insert his name and address on the document. But the omission by the preparer of the document to insert his name and address does not mean that the document is incorrect or that in fact that the document was not read over and explained to the understanding and comprehension of the illiterate person. For example, an illiterate person who had the document read and interpreted to him may avoid or repudiate the document because the preparer inadvertently or, in ignorance, failed to insert his name and address. It should be noted that the need for a name was aimed at tracing the whereabout of the maker[81]- especially in those days when itinerant letter writers abounded. As the statute stands now, it is a veritable instrument of fraud available to the illiterates upon persons:

> whose only sin is that in preparing a document which correctly represents their instructions and which they took the trouble to explain to the illiterate, they, either by sheer ignorance of the statute or for some other reasons failed to insert their name and address on the document.[82]

It is apparent from the previous discussions that the statute, which was enacted

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80. Ibid, at 34. Note that by sections 4 & 5, barristers and solicitors are exempted from this Act.

81. P.Z. Ltd. v. Gusau, supra footnote 76.

82. Nwabueze, supra footnote 13 at 504.

to check cases of fraud, has become a potent weapon in the hands of the illiterates to commit fraud. All these have contributed to the problem of using land as security for any commercial transaction and have created barriers to any meaningful economic development. Thus, another legislative measure was required to arrest this obviously unacceptable situation.[83] Most importantly, policy makers realised that no meaningful development could be achieved without a reconsideration of the entire land tenure system. Because of the obvious limitations of the customary land tenure system, credit suppliers were often suspicious of the use of land as collateral for any loan. Even the acquisition of land by the government for development purposes was difficult because of the spate of litigation associated with the claims by family members to compensation. This problem from the government point of view was exacerbated by the "commodification" of land, which opened viable business for land speculators and racketeers. It is in light of these problems that the Land Use Act of 1978 was promulgated.

1.6. CUSTOMARY LAND TENURE SYSTEM UNDER THE LAND USE ACT.

The discussion here will be restricted to the extent to which the customary land tenure system (especially customary tenancy) survives the Act.[84] It is provided in

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83. In another context, the Privy Council in Balogun v. Oshodi [1936], 2 All ER 1632, observed: "Their Lordships think it right to express the opinion that the wide differences of opinion of learned judges as to title to land in Lagos disclosed in the present case and in a number of cases to which references has been made, and frequent actions in the courts to which these doubts give rise, make it desirable to deal with these question by legislation."

84. It is not intended here to discuss the question of family or communal ownership, as this has been discussed above. Note that a fuller discussion of the features and limitations of the Land Use Act is the subject of the next chapter.

section 1 of the Act that all land in the territory of a state is vested in the governor of the state as trustee[85] for the use and common benefit of all Nigerians. As allodial ownership is vested in the governor, it is tempting to argue that the former overlords have been divested of their legal ownership. Also, the local government and the governor are at present empowered to grant rights of occupancy.[86] Under the present regime, alienation of any right of occupancy must be with the prior consent of the governor or the local government, as the case may be.[87] Any alienation without the requisite consent will, among other consequences, be void and incur the revocation of the right of occupancy of the alienor.[88]

The critical issue here is: as between the overlord and the tenant, who is entitled to a right of occupancy? It appears that the determination of this issue will settle the controversy in this area. Section 36 of the Act, which relates to land in non-urban areas being used for agricultural purposes prior to the Act, provides in subsections 2 and 3 as follows:

> (2) Any occupier or holder of such land, whether under customary rights or otherwise, shall if that land was on the commencement of this Act being used for agricultural purposes continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder by the appropriate Local Government and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the custom of the locality concerned, allowed to lie fallow for

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85. The nature of this trusteeship will be discussed infra.

86. Sections 6 & 5 respectively. Our major concern is the local government which is empowered to grant customary right of occupancy.

87. Sections 22 and 21.

88. Section 28.

purposes of recuperation of the soil.

> (3) On the production to the Local Government by the occupier of such land, at his discretion of a sketch or diagram or other sufficient description of the land in question and on application therefore in the prescribed form the Local Government shall if satisfied that the occupier or holder was entitled to the possession of such land whether under customary right or otherwise howsoever, and that the land was being used for agricultural purposes at the commencement of this Act register the holder or occupier as one to whom a customary right of occupancy had been issued in respect of the land in question.

It is arguable that in a case coming under these subsections, the Act intends to recognise the user of the land to the exclusion of all other claimants.[89] This implies that the Act has abolished the incidents of customary tenancy under these subsections. As customary tenants are usually in occupation or possession, they are entitled to the customary right of occupancy by section 36(3).[90] This provision may help in reducing some of the confusions and rigidity in the customary land tenure system. An example is the question of consent to alienation. However, this contention appears to be wishful since, as will be shown shortly, the Supreme Court has reached a different conclusion on what can be inferred as to the Act's regulation of customary tenancy.

The approach of the courts to this issue is: absent any express provisions revoking or amending their respective rights, and subject to other provisions of the Act, the status and rights of customary landlords and customary tenants will continue as defined by contracts and decided cases before the promulgation of the Act. According to the Supreme Court, this is bound to be so as there is a presumption that the legislature does

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89. J. Omotola, Essays on the Land Use Act, 1978 (Lagos: Lagos University Press, 1984) at 12.

90. S.50 defines customary right of occupancy as the right of a person or community lawfully using land in accordance with customary law and includes a customary right of occupancy granted by a Local Government.

not intend to make any change in the existing law beyond that which is expressly or, by necessary implication, stated in the words of the statute in question.[91] In other words, subject to the provisions of the Act, the relationship of customary landlords *vis-a-vis* their customary tenants continues. So the Act has not done away with the incidents of customary tenancy.[92]

In Abioye v. Yakubu[93], the defendants, according to the plaintiffs, were the customary tenants of the plaintiffs for 60 years. As a condition of the tenancy they were required to pay tributes to the overlords annually in acknowledgement of the overlordship of the land. After the commencement of the Act, the defendants stopped paying tributes to the plaintiffs and erected a sign-board on the land to the effect that the plaintiffs were not the owners of the land. The plaintiffs sued the defendants for a declaration of title to land. The defendants argued in that by virtue of s. 36(2) and (3), they were no longer the customary tenants of the plaintiffs but were those of the local government as stated by the Act. This argument was rejected by the High Court, which found for the plaintiffs. The decision of the High Court was reversed by the Court of Appeal, which held that at the commencement of the Act, the incidents of customary tenancy are abolished to the extent section 36(2) & (3) is applicable. Dissatisfied with this holding, the plaintiffs appealed to the Supreme Court. The full panel of the Supreme Court found

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91. Rolfe v. Flower, Salting & Co (1866) LR 1 PC 191., George Wimpey & Co. Ltd. v. B.O.A.C. [1955] AC 169 at 191.

92. Ogunola v. Eiyekole (1990), 4 N.W.L.R. 632; Onia v. Onyia (1989), 3 N.W.L.R. 514; Salami v. Oke (1987), 4 N.W.L.R. 1 at 49.

93. (1991), 5 N.W.L.R. 130.

for the plaintiffs. It was stated that it is a cardinal rule of interpretation of statutes that unless there is express provision in clear and unambiguous words within a statute expropriating the property of a person, the statute should be construed in favour of the person in whom the property has been vested and it should not be construed so as to deprive the person of his property, as this is against the rules of natural justice. According to Justice Belgore:

> As a result of this decision, the Act which appeared like a volcanic eruption is no more than a slight tremor... Section 36 of the Act relating to agricultural holdings even though explaining limited holding per individual[94] has not divested the traditional holders of their land unless such land is legally acquired by the government or Local Government authority.[95]

In the opinion of Bello C.J.N., the person entitled to the customary right of occupancy is the 'holder' or 'occupier' which according to s.50 means the customary land owner other than a customary tenant. And "mere possession of land as a customary tenant however so long, cannot mature to confer the right envisaged in the Act."[96]

It appears that this decision has dashed all expectation that the Act would be construed as having repealed the most enigmatic aspect of the customary land tenure system. As things stand now, the problem of insecurity of title to land under customary land tenure system remains. It seems that as the customary landlord is still in control, double consent is required for any transfer of land: the consent of the customary landlord

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94. The Justice is probably referring here to s. 36(5) which provides that "no land to which this section applies shall be sub-divided or laid out in plots and no such land shall be transferred to any person by the person in whom the land was vested as aforesaid."

95. Supra footnote 93 at 214.

96. Ibid, 207-208.

and the consent of the governor.[97] The Act, contrary to one of its primary objectives, cannot enhance any facility of transfer of land. Moreover, it seems that s.36(5) prohibits any form of transfer of land covered by this section.[98] Thus the effect of the Act on customary land tenure system can be likened to a motion without movement. The Act in this respect, if strictly construed, has the potential to stultify commercial transactions on land.[99] It is in light of this failure by the Act to redefine the incidents of customary tenancy that we are constrained to conclude that land under customary land tenure system is not a viable security for commercial transactions.

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97. Section 22.

98. See footnote 94.

99. Section 36(5) may have been aimed at halting the activities of land speculators and racketeers. However, the negative consequences of s.36(5) in the long run may turn out to be more inimical to the growth of the economy than the mischief sought to be arrested. See O. Smith, "The Efficacy of Agricultural Charge as a form Security in Nigeria" (1989), 2 Gravitas Bus. L.Rev. 69 at 72.

Chapter 2.

PROBLEMS OF SECURED TRANSACTIONS UNDER THE LAND USE ACT.

2.0. INTRODUCTION.

Before the promulgation of the Land Use Act, 1978, the customary land tenure system exerted a considerable impact upon land transactions in Nigeria. It should be noted that the rules regulating interests in land which derive from customary law are so unsystematic, occasionally illogical and obscure that they defy clear ascertainment.[1] The uncertainty of this tenure system is mainly responsible for the insecurity of title to land and has created litigated disputes, the frequency of which once prompted the court to warn that to purchase land in Nigeria, without a thorough investigation, was akin to buying a law suit.[2].

Under this system, land was a precarious security in any commercial transaction and invariably a barrier to any meaningful economic development. The uncertainty and ambiguity of customary land laws was exacerbated by the received laws introduced by British rule. The introduction of English law in some parts of the country led to the alteration of the hitherto indigenous land tenure system, which gave rise to dualism of land policy in Nigeria. This position created internal conflicts of law, which compounded the preexisting complicated tenure system, and rendered impossible precise legal

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1. J.A. Omotola, Essays on the Land Use Act, 1978 (Lagos: University of Lagos Press, 1984) at 8.

2. Ogumbambi v. Abowaba (1951), 13 W.A.C.A. 222, per Verity J.

definitions and definite assignment of property rights in land.[3]

Recognition of the complexities of the land laws in Nigeria led to legislative efforts for a single national land law, comprised of rules taken from the preexisting systems, but devoid of their objectionable features, their uncertainties and complexities.[4] It was the intention of the new regime to harmonise the tenure systems in the country, minimise bitter and unending litigation in land transactions, end the problem of land speculations, and remove the difficulty of the government in acquiring land for development purposes.[5]

If the objectives of the Act as a comprehensive legal regime for land are met, there may be, *inter alia*, a reduction in the cost of establishing the ownership of land, which will facilitate the use of land as collateral for loans. To this end, the Act begins by providing that the governor of each state is responsible for the control and

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3. See A. Park, "A Dual System of Land Tenure: The Experience of Southern Nigeria" (1965), 9 J. African Law 1; R. James, Nigerian Land Use Act: Policy and Principles (Ile Ife, Nigeria : University of Ife Press, 1982) at 6. See also Meek, Land Laws and Customs in the Colonies (Frank Cass and Co. Ltd., 1968)

4. While inaugurating the Land Use Panel (the panel that inquired into the problems of land and recommended the enactment of the Act), Shehu Yar'Adua, then a minister, stated in part:

> Both the Anti-Inflation Task Force and the Rent Panel reports identified land as one of the major bottlenecks to development in the country and recommended various solutions...The Federal Government is fully aware of the land racketeering, the pernicious role of middlemen in land speculation and in sometimes bitter and unending litigations in land transactions in the country.

(Unpublished Report of the Land Use Panel at 5). See generally, R. Ekpu, "The Role of the Local Government in the Implementation of the Land Use Act: The Bendel State Experience" in A. Adigun ed. The Land Use Act: Administration and Policy Implication (Lagos: University of Lagos Press, 1991) at 43. See also A. Nnamani, "The Land Use Act - 11 Years After" (1989), 2 Gravitas Bus.L.Rev. at 31.

5. The resulting legislation is the Land Use Act, which was enacted under a military regime as Decree No. 6 of 29th March, 1978. See also R. James, Nigerian Land Use Act: Policy and Principles, supra, note 3 at 9.

management of the land that lies within his territory. The governor is empowered to grant a "right of occupancy"[6], consent to the alienation of a right of occupancy[7], and revoke a right of occupancy for overriding public purposes.[8]

The aim of this chapter is to analyse the practical and conceptual limitations of the Act in relation to real property security.

2.1. THE NATURE OF THE GOVERNOR'S HOLDINGS.

The main provision of the Land Use Act is Section 1, which vests the land in each state in the governor of the particular state. According to the section:

> Subject to the provisions of this Act, all lands comprised in the territory of each state in the federation are hereby vested in the Governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provision of this Act.

This provision has been referred to as the revolutionary section in the Act.[9] However, a conceptual problem is the use of the term "trust." It has been questioned whether its effect is to make the governor the trustee of the land in the conventional sense of the term, or whether the term "trust" is used loosely. If the legal title to the

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6. Section 5. The meaning and nature of a right of occupancy is discussed below under *The Nature of Right of Occupancy*. Note that the power to make a grant is also entrusted to the local government pursuant to s.6.

7. Section 22.

8. Section 28. What constitutes public purposes are enumerated under this section.

9. Savannah Bank (Nigeria) Limited v. Ajilo (1989) 1 N.W.L.R. 305.

land is now vested in the governor,[10] it is arguable that the legal interest held is that of a trustee in the technical sense.[11] Further, if it is established that the governor is a trustee in equity, then he would be liable to account for the management of the land on behalf of all Nigerians, who are the beneficiaries.[12] The contention that the governor may be liable to account as a trustee is hardly remarkable considering the flexibility and adaptability of the concept of trust. It may have been the recognition of these features that led Maitland to observe that the trust is an "institute of great elasticity; as elastic, as general as a contract."[13]

That a government can in certain circumstances be held liable to account as a trustee is no longer in dispute.[14] The Canadian and American jurisprudence appear to

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10. Section 1. See also C. Olawoye, "Statutory Shaping of Land and Land Administration Up To the Land Use Act", in J. Omotola ed. The Land Use Act: Report of a National Workshop (Lagos: Lagos University Press, 1982) at 18.

11. For a comprehensive definition of "trust", see L.A. Keeton & G. W. Sheridan, The Law of Trusts (Sussex: Barry Rose, 1983) at 2.

12. This, according to Lord Selborne L.C. is trust in the lower sense. See Kinloch v. Secretary of State for India (1882) 7 App. Cas. 619 at 625-26.

13. F.W. Maitland, Equity (Cambridge: University Press, 1936), 23.

14. See Guerin v. R (1984), 13 D.L.R. (4th) 321. See B. Slattery, "First Nation and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261; R. Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Sask.L.Rev. 301; W. McMurtry and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" (1986) 3 C.N.L.R. 19; L. Green, "Trusteeship and Canada's Indians" (1977), 3 Dalhousie L.J. 105; D. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in T. Youdan ed. Equity, Fiduciaries and Trusts (Toronto: Carswell, 1989) at 411. D. Johnson, "A Theory of Crown Trust Towards Aboriginal Peoples" (1986), 18 Ottawa L.R. 307; Comment, "You Can't Trust the Crown: The Fiduciary obligation of the Crown to the Indians: Guerin v. The Queen" (1984) 49 Sask. L.R. 367. In a line of American cases it has also been held that the state may be liable as a fiduciary to the Indians. See R. Chambers, "Judiciary Enforcement of the Federal Trust Responsibility to the Indians" (1975), 27 Stan.L.Rev. 1213; Hughes, "Can the Trustee be Sued for its Breach? The Sad Saga of United States v. Mitchell" (1981) 26 S.D.L.Rev. 447; Newton, "Enforcing the Federal Indian Trust Relationship After Mitchell" (1982) 31 Cath. U.L.Rev. 635; Orme, "Tucker Act Jurisdiction Over Breach of Trust Claims" (1979) B.Y.U.L.Rev.855. For a similar development in Australia, see C. Hughes "The Fiduciary Obligations of the Crown to Aborigines:

agree on this point with regard to the government management of Indian lands.[15] However, a perusal of the reasons for judgment of the courts in the respective jurisdictions will reveal that the decisions were rooted in treaties, special acts, or agreements entered into by the respective governments and the Indian tribes for the purposes of protecting and managing the land for the Indians.[16] Therefore, the peculiarity of the Indian titles and the statutory devices for disposing of Indian lands could have given rise to the recognition of a trust relationship or fiduciary duty[17] placed on the government in the management of Indian lands.

Another form of trust which is generally not enforceable appears in the judgment of Lord Selborne L.C. in Kinloch v. Secretary of State for India, where his lordship observed:

> Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of a trust- a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction of courts to administer, but as respects higher matters such as might take place between the Crown and public officers discharging under the direction of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense, they are matters with the jurisdiction of, and to be administered

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Lessons From the United States and Canada" (1993), 16 U.N.S.W.L.J. 70; R. Blowes, "Governments: Can You Trust Them With Your Traditional Titles?" (1993), 15 Sydney L.Rev. 254.

15. Ibid.

16. In United States v. Kagama, 118 U.S. 375 (1886), Justice Miller observed, "These Indian tribes are the wards of the Nation. They are communities dependent on the United States...From their very weakness and their helplessness so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection and with it the power."
See also Guerin v. R [1984], 6 W.W.R. 481 at 494 per Dickson J.

17. Justice Dickson in Guerin v. R, (1984), 13 D.L.R. (4th) at 334-5, found the relationship between the Indian and Crown to have established a fiduciary relationship. Contrast this with the holding of Madame Justice Wilson, who found express trust of specific land for specific purpose (ibid at 360-1). On the other hand, Mr Justice Estey analysed the relationship in terms of statutory agency (ibid at 346).

by the ordinary courts of Equity; in the higher sense they are not.[18]

In certain cases, the government or Crown administers property for the benefit of others in the exercise of governmental functions. The trust relationship here is in the higher sense, otherwise known as political trust,[19] and is not enforceable by the courts of Equity.[20]

As Waters[21] has observed, it is a matter of interpretation of the particular source of authority whether in the administration and distribution of goods, the Crown is a trustee in the private law sense such that its conduct is subject to review and enforcement in the courts, or whether it is a trustee only in the popular sense of being trusted to discharge its obligation duly, when no jurisdiction over the matter rests in the courts. In the case of the Land Use Act, the allodial titles to the lands in Nigeria are vested in the governors of the various states to be held in trust for the use and common benefit of all Nigerians. The scope of the trusteeship is not clear; for it is equally provided by implication that the legal titles to certain lands continue to vest in the owners who held them prior to the commencement of the Act.[22] It follows that to the extent that the legal

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18. (1882), 7 App. Cas. 619 at 625-26.
The findings by the Court that the use of trust was in the higher sense led to the failure of most of the claims in Tito v. Waddell (No.2) [1977], 3 All ER 129 at 238, per Megarry V.C.

19. Underhill and Hayton, Law Relating to Trusts and Trustees, J. Hayton ed. (London: Butterworths, 1987) at 5; D.W. Waters, Law of Trusts in Canada (Toronto: The Carswell Company Ltd.,1984) 26.

20. Kinloch v. Secretary of State for India (1882), 7 App. Cas. 619; Tito v. Waddell [1977], 3 All ER 129 at 216-228. Cf. Guerin v. R (1984), 13 D.L.R. (4th) 321.

21. Waters, Law of Trusts in Canada, supra, footnote 19 at 26.

22. See ss.34 & 36 dealing with the transitional provisions. The governor can only come in when his consent is required for alienation of the affected lands. See National Bank (Nigeria) Ltd. v. Ajilo (1989), 1 N.W.L.R. 305.

title continued vested in the owners, it will be technically incorrect to refer to the governors as trustees in the conventional sense.

Nevertheless, in relation to other lands where the legal titles are held by the governors, it may be tempting to argue that these are cases of trust in the lower sense. However, taking into account the enormous discretion given to the governor by the Act,[23] it would seem that the use of the term "trust" in the Act should be construed as a political trust or trust in the higher sense, and therefore not enforceable in the court.[24] This absence of intention to create a trust in the conventional sense may be responsible for alleged abuse of the governors' powers, such as the grant of rights of occupancy for political patronage. By virtue of their powers, they cannot be asked to account for the management of the land.

It has been said that the rationale for this trust concept is the need to avoid the individualistic conception of property.[25] Expatiating on the necessity for the trusteeship model, Adigun argued that even in the traditional juristic conception of property, land was never really regarded as the property of the individual, and this trust concept was imported into its rules and regulations because it was conceived that land belonged to a vast family of which the individual is only a member. His view is that the complexity of social relations calls for a rational and effective state intervention in the balancing of

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23. See ss. 5, 22, 26, 28 and 29 dealing with the powers of the governor to grant a right a right of occupancy, give consent to alienation of a right of occupancy, revoke a right of occupancy and in some cases compensate for revocation of a right of occupancy.

24. Omotola states that to refer to the governor as a trustee is another "suggestio falsi". See J. Omotola, Essays on the Land Use Act, 1978, supra note 1 at 16.

25. O. Adigun, "The Equity of the Land Use Act", in J. Omotola ed. The Land Use Act: Report of a National Workshop (Lagos: Lagos University Press, 1982) 65-66.

claims without according undue priority to such concepts as liberty of contract and inviolability of private property.[26] This argument is flawed to the extent that it suggests collectivity of ownership. Even under customary jurisprudence, cases of individual ownership of landed property might be rare but not unknown.[27]

The contention of Adigun regarding the basis of this trust concept can be analogised to the Public Trust Doctrine, which is an ancient legal concept of Roman origin.[28] This doctrine, which is fairly well established in American jurisprudence, is a flexible judicial protection of public interest in coastal lands and waters. It provides that public trust lands, waters and living resources in a state are held by the state in trust for the benefit of all the people and establishes the rights of the public for the full enjoyment of such lands.[29] This trust confers rights on the public which are enforceable against the government, and its interpretation should be consistent with the contemporary concern for environmental quality.[30]

One discernable feature of this trust is the public ownership of the lands. Except

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26. Ibid., at 66.

27. See B.O. Nwabueze, Nigerian Land Law (Enugu, Nigeria: Nwamife Publishers; New York: Dobbs Ferry Co., 1972) at 32; G.R. Woodman, "Allodial Title to Land" (1968), 5 Univ. Ghana L.J. 89.

28. There is a great volume of legal literature on this topic in the United States, but for one of the outstanding writings in this field, see J. Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention." (1970) 68 Mich. L.R. 47.

29. J. Wilkins & M. Wascom, "The Public Trust Doctrine in Louisiana" (1992) 52 La. L. Rev. 861, 862. The public trust doctrine seeks to provide protection of public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation, and environmental quality. See R.W. Johnson et al., "The Public Trust Doctrine and Coastal Zone Management in Washington State" (1992) 67 Washington L. R. 521, 524.

30. See Sax, supra note 28 at 47.

in rare occasions, the affected lands are insusceptible of private ownership.[31] In this trust relationship, the government could be called upon to account for its management of the trust land, and a member of the public has the legal standing to bring suit to protect public trust resources. However, it strains argument to liken the use of trust here to that under the Land Use Act. The lands under the Act are alienable, and an owner, apart from the governor, has exclusive possession of his land. Thus the term "trust" under the Act and the American public trust concept are two distinct legal concepts.

In his evaluation of the Land and Native Rights Act[32] which required the Government to act as trustee for the natives, Nwabueze comes close to explaining the rationale for making the governor a trustee. He states:

> It is well perhaps to emphasise that the concept of trusteeship is used here in a loose and figurative sense; it confers the individual natives no rights which a beneficiary has against a trustee in English law. No native can claim against the Government on account for any benefits accruing from the lands. The obligation of the Government is to administer the land for the use and common benefit of the natives as a whole.[33]

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31. See J. Wilkins & M. Wascom, supra note 29 at 864., R. Johnson et al., supra note 29 at 525. The reasoning here is that because the right a state holds in public trust waterbottoms is different in character from that which the state holds in land intended for sale, a state may dispose of them only in certain circumstances. See Illinois Central Railroad v. Illinios 146 U.S. 387 at 425. And when public trust lands are alienated, the only interest conveyed is the jus privatum or private ownership interest while the public interest or jus publicum remains with the state. See J. Wilkins & M. Wascom, ibid, at 867.

32. Chap. 96, Laws of the Federation, 1958. This Act was subsequently replaced by the Land Tenure Law, 1962.

33. Nwabueze, supra note 27 at 239. This opinion seems to be the thrust of the Supreme Court rationalization of the concept of trust in Savannah Bank (Nigeria) Limited v. Ajilo, supra note 9 at 305.

2.2. THE NATURE OF RIGHT OF OCCUPANCY.

Another problematic issue is the nature of interests in land created by the Act, which are thought to be radically different from the interests in land as hitherto recognised by law. The difficulty, if not impossibility, in analysing this novel interest in land has spawned the flood of litigation that has attended the Act. This view was echoed by Kolawole J:

> We have reached a position in the evolution of the land tenure system where the present statute has imposed so many restrictions in the use of interest in land that it may be difficult to state precisely the interest that an occupier has in the land which he occupies.[34]

It is uncertain whether the interest created is personal or proprietary. The nature of interest created by the Act can be determined by the powers it gives to the state governors. The governors and the local governments are empowered to grant statutory and customary rights of occupancy respectively, for all purposes within their areas of jurisdiction.[35] Statutory and customary rights of occupancy are two different concepts under the Act. In section 50, customary right of occupancy is defined as the right of a person or community lawfully using and occupying land in accordance with customary law, and it includes a customary right of occupancy granted by the local government under the Act. Statutory right of occupancy is defined as the right of occupancy granted by the governor.

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34. LSDPC v. Foreign Finance Corporation (1987) 1 N.W.L.R. 413 at 480.

35. Sections 5 & 6 of the Act. Historically, the definitions of statutory and customary rights of occupancy may be traced to s.2 of the Land Tenure Law of Northern Nigeria, 1962, which defined a right of occupancy as " a title to the use and occupation of the land and includes a customary right of occupancy and statutory right of occupancy."

It is hardly disputed that the legal titles to the lands in Nigeria are now vested in the governors. Apart from section 1, which vests the legal title in the governors, sections 21 and 22 forbid the transfer of any right of occupancy without the consent of the governors. In addition, section 26 renders any transfer without the requisite consent as null and void. Section 22 prohibits the transfer of any interest or right over land, which implies that both the legal and equitable interests are affected. Any suggested recognition of equitable interests under the Act will be countered by section 25, which provides that the creation of any proprietary interest over land by deed or will not be effective unless there is a plain transfer of the right of occupancy over the entire land. This section suggests that a right of occupancy is not a proprietary interest in land and a holder is prohibited from creating such interest out of it.

Is a right of occupancy a lease? The Supreme Court of Nigeria made a half-hearted attempt at defining the nature of this interest in the case of Savannah Bank (Nigeria) Ltd. v. Ajilo.[36] As the Court stated:

> While the interest vested in the governor is unstated in the Act, the interest a Nigerian can lawfully acquire from the Governor is scaled down to statutory right of occupancy. In terms of known interests in land, the quantum of a right of occupancy remains unclear. To the extent that it can only be granted for a specific term (see s.8 of the Act) it has the semblance of a lease. Also to the extent that a holder has the sole right to and absolute possession of all improvements on the land during the term of a statutory right of occupancy, a holder does not enjoy more rights than a lessee under common law.[37]

This pronouncement may not take us far enough. The opinion that the right of occupancy has the semblance of a lease is subject to qualifications. Section 14 states that in relation

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36. (1989) 1 N.W.L.R. 305.

37. Ibid at 328.

to the land itself, the holder shall have exclusive right against all persons other than the governor. Granted that this section refers to exclusive right as against exclusive possession as used in section 15, if we assume that the two terms are synonymous, it then follows that possession in this respect ceases to be exclusive once it does not exclude the grantor.[38] As was observed by Lord Denning in Strands Securities v. Caswell:

> We have had several cases lately in which we have held that possession in law is, of course, single and exclusive....[39]

Furthermore, it would be remarkable for a right of occupancy to be likened to a lease in light of the mode prescribed for the determination of a right of occupancy, which is quite foreign to leasehold interests. Section 28(1) empowers the governor to revoke a right of occupancy for an overriding public interest. The constituents of overriding public interest are listed in subsection 2 and 3 of section 28. Omotola[40] argues that leasehold interests are not revoked but forfeited; and that revocation is used for personal rights such as licence. He reasons that revocation and forfeiture probably have peculiar meanings, and forfeiture, which is a creature of common law, has had a long history in relation to leasehold interests. In his view, revocation can be described as peremptory, while forfeiture, being a mode of terminating an established interest in land, is now expected to follow established procedure. This further confirms that a right of occupancy cannot be a lease. If this view that a right of occupancy is not a lease is accepted, then

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38. Omotola Essays on the Land Use Act, 1978, supra note 1 at 20.

39. [1965] 2 W.L.R. 958 at 971. See also Hills (Patents) Ltd. v. University College Hospital Board of Governors [1956] 1 Q.B. 90, 99; Willis v. Association of Universities of British Commonwealth, [1964] 2 W.L.R. 946.

40. Omotola, supra note 1 at 20-21.

the provisions of sections 22 and 23 relating to sub-leases and sub-underleases must be odd and inconsistent with the right. The reason is that a sub-lease or sub-underlease cannot arise or emerge from an interest that is not a lease. This difficulty is another conceptual puzzle in the Act.

It seems equally difficult to argue that a right of occupancy is similar to a licence. According to Megarry and Wade, "fundamentally, a licence is a mere permission which makes it lawful for the licensee to do what would otherwise be a trespass".[41] There is no denying the fact that some licences are full-fledged interests in land.[42] Subject to the requisite consent a right of occupancy under the Act is alienable.[43] A right of occupancy is also transmissible by will.[44] These qualities are not enjoyed by a licence.[45] Therefore, the Act must have intended to create an interest more real and substantial than a licence.

Another intriguing interest which may be compared to a right of occupancy is customary tenancy created under customary law. The nature of the interest created under customary tenancy has been compared to a lease.[46] One important feature of customary

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41. R. Megarry and R. Wade, The Law of Real Property (London: Stevens & Sons Limited, 1984) at 798.

42. Ibid p. 806. R. James has observed that the dividing line between licence as a personal right and as a proprietary interest is obscure. See Nigerian Land Use Act: Policy and Principles supra, note 3 at 88. See the discussion of the nature of licence in chapter 1 at 23-25.

43. Sections 21 and 22.

44. Sections 24 and 25.

45. J. Dewar, "Licences and Land Law: An Alternative View." (1986) 49 M.L.R. 741 at 750. We recognise the fact that some commercial licences are assignable. See also S. Moriarty, "Licences and Land Law: Legal Principles and Public Policies" (1984) 100 L.Q.R. 376

46. Martindale J. in Chief Etim v. Chief Eke (1941), 16 N.L.R. 42 at 50.

tenancy is that a customary tenant cannot alienate his interest in land without the consent of his grantor; neither can the grantor alienate any part of land already granted to the customary tenant without the latter's consent.[47] However, under customary tenancy the interest created can be forfeited but not revoked.[48] The Supreme Court of Nigeria attempted an exhaustive examination of the nature of customary tenancy. It was stated by the Supreme Court that tenants under customary law are:

> [G]rantees of land under customary tenure and hold, as such, a determinable interest in the land which may be enjoyed in perpetuity subject to good behaviour. They enjoy something akin to emphyteusis, a perpetual right in the land of another[49].

It is apparent from this pronouncement that the interest of the customary tenant is infinite in duration. Accordingly, a holder of a right of occupancy does not enjoy interests in land similar to those of a customary tenant as enunciated above. Thus a right of occupancy is distinct from a customary tenancy under customary law.[50]

It is arguable that a right of occupancy, whether statutory or customary, is a novel interest in land that has no comparable place in any other Nigerian law or in the English common law. The objective of the proposers of the right of occupancy system is clearly

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47. Agheghen v. Waghoreghor, (1974) 1 S.C. 1.

48. Onishiwo v. Fagbenro, (1954) 21 N.L.R. 3. See also the discussion in chapter 1 concerning forfeiture of land by customary tenant as a penalty for alienation without consent.

49. Agheghen v. Waghoreghor, supra note 46 at 8.

50. Contrast this view with the opinion of James, who states that the interpretation of traditional rights in West Africa as "right of occupancy" is in direct contrast to the theory of "personal right" enunciated by the Privy Council in cases arising from some jurisdictions in Eastern and Southern Africa, and Australia. The former interpretation, he opines, has contributed to the protection of indigenous interests in land in West Africa and has greater relevance to our understanding of the modern right of occupancy, which to him is a proprietary interest rather than a personal right. See Nigerian Land Use Act: Policy and Principles, supra note 3 at 93.

expressed in the following passage from the report of the Northern Nigeria Lands Committee, which influenced the new statutory system:

> We ... avoided as far as possible the use of such expressions as freehold, copyhold, or leasehold tenure, tenancy at will, fiefhold, etc., all of which belong to a system of land tenure which, though it may in some respects present curious analogies with some of the Nigerian customs, has a peculiar and wholly different history.[51]

From the foregoing analysis it is surmisable that the Act was intended as a novel code regulating the rights of the holder and the governor. A right of occupancy in this respect is of a hybrid nature, something between personal and proprietary right.

2.3(a). THE NATURE OF THE CERTIFICATE OF OCCUPANCY

Section 9(2) empowers the governor to issue a certificate of occupancy in evidence of a right of occupancy that he has granted to the holder. Whether the certificate of occupancy is a registrable instrument is another controversial issue under the Act. One view holds that since it is evidence of title, it is a registrable instrument under requisite Land Instruments Registration Laws.[52] Another view is that a certificate of occupancy is to be issued by the governor in evidence of a preexisting right, that is, a deemed grant. It follows that no right is to be granted by the governor by means of a certificate of occupancy. This further implies that a certificate of occupancy is distinct

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51. (Report of the Northern Nigerian Lands Committee, 1908). See also James, ibid, 94. This view is in accord with the examination by the Privy Council of the nature of a right of occupancy under the Tanganyika Land Ordinance, 1923 (Laws of Tanganyika 1960 rev., chap. 113), where it was observed: "The intention of the Land Ordinance was to establish an entirely new interest in land, similar to leases in some respect but different in other.... The Act was intended to be a complete code regulating the respective rights of the Crown and the occupier". See Premchand Nathu & co. v. Land Officer (1963) A.C. 177.

52. R. James, supra note 3 at 89.

from a conveyance under common law, which is defined as an "instrument that transfers property from one person to another."[53] Since a certificate of occupancy evidences a transfer and does not transfer any interest in land, it is not a registrable instrument under the law.[54] But the contention that the certificate of occupancy only evidences a preexisting interest in land is a misstatement of the provisions of the Act. The only preexisting interests are those recognised by sections 34 and 36 of the Act - deemed grants. In the case of an applicant who has no land or any interest in land, the only document of transfer is the certificate of title issued by the governor pursuant to s.5.

These issues aside, the question of registrability of the certificate likely will become of great moment when the system of land registration is considered in chapter 3. In Nigeria, there are two systems of registration. All the 30 states, except Lagos state, operate under the instrument registration laws. Lagos is the only state that has both the instrument registration law and the land titles registration law. Under the latter regime, registered titles are not easily defeated. Its operation may be likened to the Torrens system of registration prevalent in Western Canada. However, under the instrument registration laws, the registered deeds serve as notice to the whole world but do not cure any defect in any title. Since all but one of the registrations are done under the latter regime, it seems that the issue of registrability of certificate of occupancy is not very relevant to security of title, which is the major concern of this discussion. This

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53. See section 2 of the Conveyancing Act, 1881. See also Rodger v.Harrison [1893] 1 Q.B. 161 at 169.

54. Omotola, Essays on the Land Use Act, 1978, supra note 1 at 42-43. See also F. O. Awogu J., "The Judicial View of the Right of Occupancy" in A. Adigun ed. The Land Use Act: Administration and Policy Implications, supra note 4 at 151.

position is probably responsible for the present practice whereby certificates of occupancy are being registered.[55]

(b). DEFEASIBILITY OF THE CERTIFICATE OF OCCUPANCY.

As argued above, the certificate of title may not constitute a root of title if it only evidences the grant of a preexisting interest in land. It may be contended, therefore, that the issue of defeasibility does not arise as the certificate confers no title that may be defeated. Despite this position, it is instructive to note section 5 of the Act, which empowers the governor to grant a statutory right of occupancy. It is further provided in section 5(2) that upon the grant of a statutory right of occupancy, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy will be extinguished. This provision has given rise to the claim by some certificate holders that the effect of the grant of the right to them is that the state, through the agency of the governor, is deemed to have guaranteed their rights as indefeasible.[56]

The difficulty arises because of the vague definition of the terms "Holder"[57] and "Occupier" in section 50 of the Act. It is not clear whether a customary tenant can

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55. Omotola, ibid, at 43.

56. This argument is akin to the indefeasibility of title registered under the Torrens system of registration. See G.W. Hinde, "Indefeasibility of Title since Frazer v. Walker in G.W. Hinde ed. The New Zealand Torrens System Centennial Essays (Wellington: Butterworths, 1971) at 35.

57. Section 50 defines a "Holder" in relation to a right of occupancy as a person entitled to a right of occupancy and includes any person to whom a right of occupancy had been validly assigned or has validly passed on the death of the holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sublessee or sub-underlessee.

"Occupier" means any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-underlessee of a holder.

obtain a right of occupancy and certificate of occupancy by virtue of sections 34 and 36. Again, it seems that the draftsman lost sight of the fact that there could be customary tenants of long duration in urban areas. The confusion is exacerbated by the absence of guidelines to enable the governor to ascertain the veracity of the claims of the applicant for a right of occupancy. The common practice is for the governor to advertise the proposed grant in the newspapers and to ask for objectors. This procedure is wholly unreliable as most of the land holders in Nigeria are either illiterate or semi-literate, and, furthermore, they can easily claim ignorance of the advertisement. However, it has been held by the court that this practice is a complete nullity as it is not stipulated by the Act, and cannot constitute estoppel against the true rights holder.[58] According to the Supreme Court in Ogunleye v. Oni :

> The Land Use Act is not a magic wand it is being portrayed to be or a destructive monster that at once swallowed all rights on land and that the Governor or Local Government with mere issuance of a piece of paper, could divest families of their homes and agricultural lands overnight with a rich holder of a certificate of occupancy driving them out with bull dozers and cranes.[59]

It is thus no longer disputable that a certificate of occupancy is a fragile, defeasible document, and in some cases the right conferred may not be worth the paper on which it is written. The inconsequential nature of the certificate is illustrated in the Supreme Court decision in Dzungwe v. Gbishe.[60] The plaintiff sued for a declaration of title to land. After losing at the court of first instance, he obtained a certificate of

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58. Sir Adetokunbo Ademola v. John Oni in J. Omotola, Cases on the Land Use Act (Lagos: Lagos University Press, 1983) at 131.

59. (1990) 2 N.W.L.R. at 745 per Belgore J.S.C.

60. (1985) 2 N.W.L.R. at 528.

occupancy to the land in dispute and sued the defendants a second time. He won at the High Court but on appeal to the Supreme Court, it was held that he could not relitigate the issue- the possession of the certificate of occupancy notwithstanding.[61]

The inescapable conclusion is that there is uncertainty concerning the nature of a right of occupancy and certificate of occupancy, and this uncertainty has created insecurity of title to land in Nigeria. It seems that the interpretation of the Act has frustrated the harmonization of the land laws in Nigeria, which the Act was obviously meant to achieve. The greater implication of this insecurity of title is that the use of land as security for loan and other investment purposes will be jeopardised. The extent of this harm will be highlighted in this paper.[62]

2.4(a). THE QUESTION OF CONSENT TO ALIENATION.

The unrestricted power of alienation is a distinct feature of freehold interests in land. At common law, courts have frequently struck out restraints on alienation from a grant.[63] However, the ingenuity of lawyers enabled them to out-manoeuvre the common law by the creation of strict settlements and conditional interests. Also, it is not unusual to find covenants in leases against alienation without the prior consent of the

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61. This decision has been criticised as being legalistic and a total negation of the policy behind the Land Use Act. See P.A. Oluyede, Modern Nigerian Land Law (Ibadan, Nigeria: Evans Brothers (Nigeria) Ltd., 1989) at 297.

In defence of this judgment, it has been asserted that the courts are courts of law, not of policy and for the courts to be concerned with policy alone is for them "to travel a voyage of discovery not of law." See Justice Awogu, "The Judicial View of the Right of Occupancy" in A. Adigun ed., The Land Use Act: Administration and Policy Implications, supra, note 4 at 153.

62. This is the subject of subsequent discussion.

63. Re Brown (1954) CH. 39; Thompson v. Richardson (1872) 6.I.R. EQ 596.

lessor. But for this type of covenant to be enforced, it is trite law that the lessor should not unreasonably withhold his consent.[64] Can it be said that Nigeria had uncritically adopted the policy of alienability of lands, and that local property legislation has reproduced the English land reform statutes at the risk of our established customary laws?[65] Justifying the alienability of land as basic for economic growth, Nwabueze states:

> Development can indeed be more effectively pursued under a system which permits free, though regulated, individual enterprise and initiative. There is little virtue in allocating land to a person who has no money to develop it or in withholding it from the person who can, merely on the ground that he has one house already. If an individual is able through his initiative and enterprise to build twenty houses and thereby make accommodation available to people who have no money to build their own houses, the state should not stand in his way, so long as he is not engaging in a racket to deprive those who have money to build of their own share of land, and provided too he is not over-charging in rent.[66]

Nevertheless, this policy assertion was never favoured under the traditional law, which was characterised by clogs on the right to alienate. This customary rule of restraint on alienation was consolidated and extended by the colonial administration by the enactment of the Native Land Acquisition Proclamation of 1903. The proclamation was

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64. Bates v. Donaldson [1896], 2 Q.B. 241; Shanly v. Ward (1913), 29 T.L.R. 714. See generally R.E. Megarry & H.W. Wade, The Law of Real Property (London: Stevens & Sons Ltd., 1984) 713-717; James, supra note 3 at 124.

65. James, ibid., answers this question in the affirmative.

66. B.O. Nwabueze, Nigerian Land Law supra, note 27 at 637. The position of Nwabueze is similar to the argument of Casner and Leach that:

> The policy against restraints on alienation is ... based upon the belief that restraints remove property from commerce, concentrate wealth, prejudice creditors, and discourage property improvements."

See A. Casner and W. Leach, Cases and Text on Property (Boston: Little & Brown Co., 1969) at 1008. See also R. Volkmer, "The Application of the Restraints on Alienation Doctrine to Real Property Security Interests" (1975), 58 Iowa L.Rev. 747 at 750.

repealed and re-enacted with amendments as the Native Lands Acquisition Act of 1917, and it is the forerunner of the current legislation in the states.[67] These laws were designed to impose restrictions on "aliens" acquiring land in Nigeria. The reason was to protect the natives and to ensure that the natives who were uninformed of the intricacies of land transactions were not lured by monetary attractions to dispossess themselves of their heritage and source of livelihood through ill-advised alienation of their lands.[68]

The modern approach to regulating the alienation of land may be said to be public policy. In Nigeria, this can be deduced from the preamble to the Land Use Act which attempts to avoid the landlessness of certain groups in the entire polity. It is therefore provided by the Act that no alienation of a right of occupancy can be effected without the prior consent of the governor or local government.[69] This rule, which requires the consent of the appropriate authority before any transfer can be effectual, is the most potent provision of the Act for enhancing security of title. By requiring the consent of the Governor to such transfers, it is possible to control and regulate them by keeping proper records of all transfers, which will operate as another form of registration of

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67. Acquisition of Land by Aliens Law 1971, chap. 1, Laws of Lagos State; Native Land Acquisition Law, chap 80, Laws of Western Nigeria.

68. Nwabueze, supra note 27 at 11. See also A.B. Kasumu, "The Question of Consent to Alienation-Effect on Development" in Omotola ed. The Land Use Act: Report of a National Workshop supra, note 10 at 93. A similar remark was made by Mugerwa who argues that the laws were passed to protect the natives against " the wiles and trickery of the immigrants." See Mugerwa, "Land Tenure In East Africa-Some Contrasts" (1966) East Africa Law Today, p.106. See generally, James, supra at 124-126.

69. Sections 21, 22 and 23 of the Act.

title.[70]

(b). TRANSACTIONS REQUIRING CONSENT.

With regard to land in non-urban areas, both the governor and the local government are authorised to grant statutory and customary rights of occupancy respectively. However, in cases requiring consent to alienation of a customary right of occupancy, there appears to be a conflict between sections 36(5) and 21.[71] Pursuant to section 36(5), all forms of alienation are prohibited and the issue of consent is of no consequence. Nonetheless, section 21 allows alienation of the customary right of occupancy subject to obtaining the required consent. The consent provision under this section seems to cover all cases of transfer of customary right of occupancy, however acquired. On the contrary, section 36(5) which prohibits transfers has limited application. It appears that this prohibition applies only to cases of deemed grants. It is suggested that the way to resolve the apparent conflict between sections 21 and 36 is to regard the former as making general provision and the latter as making specific provision that operates as an additional restriction.[72]

Regarding urban areas, a distinction should be made between developed and undeveloped land. This is generally covered by a right of occupancy actually granted

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70. Omotola, Essays on the Land Use Act, supra note 1 at 26.

71. Section 21 provides that no transfer of land or any interest to which the section applies can be effectual without the consent of the Governor or the Local Government as the case may be.
S.36(5) Provides, "No land to which this section applies shall be sub-divided or laid out in plots and no such land shall be transferred to any person by the person in whom the land was vested as aforesaid."

72. Omotola, Essays on the Land Use Act, supra, note 1 at 28 to 29. See also James, supra, 130 to 131.

by the governor pursuant to section 5, or deemed granted by virtue of section 34. In relation to the right of occupancy granted by the governor under section 5, section 22 requires his consent before any transfer of land or any interest in land can be effected.[73]

However, there are opposing arguments as to the precise interpretation of section 34,[74] which relates to a deemed right of occupancy. One school of thought argues that no consent is required to the transfer of any developed land.[75] This view proceeds from the premise that under section 34, the restriction on alienation without consent contained therein is only limited to undeveloped land. Moreover, section 22, which bars alienation of the statutory right of occupancy (although it does not distinguish whether the same is held over developed or undeveloped land), requires that for the right to come within the section, it must be specifically granted by the governor as opposed to being deemed to be granted.[76]

The above argument has been criticised by Kasumu,[77] who contends that the

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73. Section 22 provides:
It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained.

74. s.34(2) provides:
Where the land is developed [before the commencement of the Act] the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Governor under this Act.

75. Omotola, Essays on the Land Use Act. Supra note 1 at 27. This view is shared by James, supra note 3 at 130 and C.O. Olawoye, "Statutory Shaping of Land Law and Land Administration Up To The Land Use Act" in J. Omotola ed., The Land Use Act: Report of A National Workshop, supra, note 10 at 19.

76. Ibid., at 27.

77. Kasumu, "The Question of Consent to Alienation- Effect on Development", Supra, note 67 at 94.

argument overlooks the fact that under section 34(3), the holder of a deemed right of occupancy can also get a grant from the governor in respect of the same land. Accordingly, it would be absurd to hold in one breath that he could alienate without consent if he has no grant but that he could not do so if he accepts a grant in respect of the same land. This latter opinion, which seeks to promote the policy of the Act, received judicial imprimatur in Savannah Bank (Nigeria) Ltd v.Ajilo.[78] According to Mr Justice Nnamani:

> The section did nothing more than save the holder of developed land before the commencement of the Act from the inconvenience of rushing to the Governor's office to obtain a certificate of a statutory right of occupancy. A holder of a developed land which was held freehold before the commencement of the Act although he would on the coming into effect of the Act hold as if he was already holding a statutory right of occupancy might never have contact with the Governor's office if he never had to make any transfer or assignment to any other person or needed to borrow money.[79]

The issue for determination in this case was whether a person, who is deemed to be a holder of a right of occupancy pursuant to section 34 , requires (solely by virtue of the Act) the consent of the governor before he can transfer his right, mortgage or otherwise dispose of his interest in the right of occupancy. In other words, do the provisions of section 22 apply to a person who is deemed to be a holder of a right of occupancy pursuant to section 34 solely by virtue of his being such a holder?

The plaintiff had executed a deed of mortgage in favour of the defendant. Upon default by the plaintiff the defendant sought to sell the property by auction. The plaintiff argued as follows: the property was situated in an urban area and vested in the plaintiff

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78. (1989) 1 N.W.L.R. 305.

79. Ibid., at 335.

prior to the Land Use Act, 1978. By section 22 of the Act, the consent of the governor ought to have been obtained before the execution of the deed of mortgage and the public auction. In consequence, as no consent was sought as aforesaid, the deed of mortgage and the auction sale were void.

On the other hand, the defendant contended that the provision of section 22 did not apply to land held before the Act came into effect. Both the High Court and the Court of Appeal held that failure to obtain the governor's consent was fatal to the whole transaction and that this rendered the transaction a nullity. The decision of the Court of Appeal was upheld by the Supreme Court, which observed that every holder of a right of occupancy, whether statutory or otherwise, is regarded as having been granted the right by the governor or the local government as the case may be, for the purpose of management of all right in land comprised in the state. It follows that every such holder- whether under sections 5, 34, or 36 requires the prior consent of the governor before he can transfer, mortgage or otherwise dispose of any interest in the right of occupancy. This means that section 22 is of general application to every holder under the Act.

It has also been argued that mortgage by deposit of title deeds will not breach the section that restricts alienation.[80] This opinion is premised on the proviso to section 22 which states that the consent of the governor shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in respect of whom an equitable mortgage has already been created with the consent of the governor. It is arguable that since nothing is being alienated under this form of mortgage, the issue

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80. Kasumu " The Question of Consent to Alienation- Effect on Development", supra note 67 at 94.

of consent is of no relevance. Moreover, the second proviso to section 22- which states that consent is not required in a reconveyance or release by a mortgagee- appears to support the view that consent under the main provision of section 22 is only needed if a right of occupancy is being alienated. Support for this position can be found in Doed-Pitt v. Hogg[81], where it was observed that:

> The depositing of a lease in the lands of brewers for money lent is not within the meaning of a proviso for re-entry which is to take effect if the lessee, this executor etc., should "grant any underlease, or assign, transfer, and set over or otherwise part with the lease or premises without licence."

However, an equitable mortgage, like any enforceable agreement to transfer an interest in land, passes an equitable interest in the property. The proviso to section 22 assumes the necessity for approval to such mortgages as it expressly exempts from consent, "the creation of a legal mortgage ... in favour of a person in whose favour an equitable mortgage has already been created with consent" of the appropriate authority.[82]

It is equally open to argument whether "a charge by deed expressed to be by way of legal mortgage" requires the consent of the governor. This is pertinent because in the Western States of Nigeria, section 110 of the Property and Conveyancing Act, which is the equivalent of section 87 of the English Law of Property Act, 1925, permits the creation of this form of mortgage. There is authority that such a charge, although a

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81. 171 E.R. 1144 (Q.B.). This decision was followed by Palles C.B. in the Irish case of M'kay v. M'Nally, (1879) vol. iv. L.R. 438., Good Behere v. Bevan 105 E.R. 644. (C.A.).

82. This opinion seems to be supported by James, supra, note 3 at 131.

mortgage, does not alienate any interest of the mortgagor to the mortgagee.[83]

Again, it appears that a devise falls outside the purview of the consent provision. Since a devise is not a breach of covenant "not to assign" [84], it is tempting to read the consent provisions *ejusdem generis*, thus limiting the expression "alienation" to inter vivos transfers. Where the right of occupancy is granted to the grantee "his heirs, executors and administrator", the passing of the property through the executors to the devisee is not a breach of covenant not to assign.[85]

The foregoing arguments are of little relevance when the commercial implications of the consent provisions are considered. The reason for taking a security interest in property is to enable the secured party to realise his security whenever the debtor defaults in meeting the security agreement. In the case of mortgage transactions in land, this is where the power of the mortgagee to sell or foreclose becomes exercisable. It is at this stage that the mischief sought to be arrested by the statutory provisions comes into play as no interest can here pass without the consent of the governor.

(c). EFFECTS OF ALIENATION WITHOUT CONSENT.

Several consequences flow from the failure to obtain the consent of the appropriate authorities before any alienation is made. One of them has significant similarity to the

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83. Thompson v. Salah [1972] 1 All E.R. 530. See especially Megarry J. at 533; Smith v. Nat. Trust Co. (1912), 45 S.C.R. 618, affirming 20 Man. R. 522. See also J.T. Farrand ed., Emmet On Title, (London: Oyez Longman, 1983) 18th ed. at 876. Doed Pitt v. Laming (1822) 22 RR 512., Kasumu, supra, note 67 at 95. This argument may also be advanced for the Registration of Title Law of Lagos State which equally permits the creation of a charge on a property by way of legal mortgage.

84. Crusoe d. Blencowe v. Bigby 95 E.R. 1030 (K.B.).

85. James, supra note 3 at 132-133.

consent requirement under customary land law, which stipulates that a tenant who attempts any alienation without the prior consent of his overlord risks the forfeiture of his interest in the land. This traditional view appears to have been statutorily enacted in section 28, which empowers the governor to revoke a right of occupancy for overriding public purpose. One of the events that may violate the provision on overriding public purpose under the section is alienation of land without the requisite consent. No compensation is recoverable when the right of occupancy becomes revocable as a result of the non-compliance of the rights holder. It seems that recourse can be had to a court of law if the holder of the revoked right is aggrieved by the action of the governor or any other authority.[86]

Any form of alienation of a right of occupancy expressly prohibited from being alienated, or that can only be alienated with the requisite consent, may result in illegality. Sections 34(8) and 36(6), which are similarly worded, provide that any instrument purporting to transfer any land to which these sections relate shall be void and of no effect whatsoever in law and every party to any such instrument shall be guilty of an offence and shall on conviction be liable to a fine of N5,000 or to imprisonment for one year.

While examining provisions similar to those stated above, Judge Unsworth remarked that where a statute not only declares a contract void but imposes a penalty for making it, the contract is not merely void but illegal.[87] Judge Balogun re-echoed this

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86. LSDPC v. Foreign Finance Corporation (1987), 1 N.W.L.R. 413.

87. Solanke v. Abed (1962) 1 All N.L.R. 230.

view while commenting on the effects of a contract that is *ex facie* illegal. One legal consequence is that money paid under an illegal contract cannot be recovered. Note that the court is not precluded from pronouncing on the issue of illegality even though the vitiating factor in the contract has not been pleaded. Neither is the person who is a party to the illegal contract precluded by the court from raising the issue of illegality even when this would mean that he was relying on his wrong. Once the court is seised of the fact that the contract is illegal or vitiated in any form, it is bound to pronounce that the transaction is on those facts illegal, or as the case may be null and void.[88] It follows that the court can, pursuant to sections 34(8) and 36(6), *suo motu*, raise the issue of illegality as a ground for denying the enforcement of any contract or transaction arising thereunder.[89]

Further, section 26 renders null and void any transaction or any instrument that purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of the Act. As was stated above, the attempt to preclude deemed right of occupancy from the operation of this section was struck down by the Supreme Court.[90] It should be borne in mind that where the statute declares a contract

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88. Yonwuren v. Modern Signs (Nigeria) Limited. (Unreported Judgment ID/ 511/ 78).

89. The rule on the consequences of illegality is capable of producing harsh results, particularly as a party may be 'guilty' without being morally blameworthy. In England, recent authorities therefore suggest that the defence of illegality should be approached pragmatically- Euro-Diam Ltd v. Bathurst [1990], Q.B. 1, 35. It was stated here that the courts should not assist the plaintiff where to do so "would be an affront to the public conscience." However, in another English case it was observed that such vague criteria are "very difficult to apply." See Pitts v. Hunt [1990], 3 All ER 344, 362.

For the consequences of illegality, see generally G.H. Treitel, The Law of Contract (London: Sweet & Maxwell/Stevens & Sons, 1991) 377; Cheshire, Fifoot & Furmston, Law of Contract (London: Butterworths, 1991) at 375-379.

90. Savannah Bank (Nigeria) Ltd v. Ajilo, supra, note 78.

or transaction null and void, but does not impose any penalty for making it, the contract is void but not illegal.[91]

The full implication of this provision was demonstrated by the Supreme Court in Savannah Bank (Nigeria) Ltd. v. Ajilo.[92] It was the contention of the defendant/ appellant that since it was the respondent's duty to obtain the consent, which he failed to do, he could not set up his own default to avoid his obligation. This argument did not meet with the court's favour, as according to Justice Obaseki:

> Although the first plaintiff/respondent by the tenure of the Land Use Act committed the initial wrong by alienating his statutory right of occupancy without prior consent in writing of the Governor, the express provision of the Land Use Act makes it undesirable to invoke the maxim 'ex turpi causa non oritur actio'...[93]

To the financial community in Nigeria, this decision was a farewell to equity. Allowing the defaulter to benefit from his own wrong was seen as a massive assault on the universal notion of equity. The effect of the decision was to equip a defaulting mortgagor with a potent defense to avoid his obligation to repay the mortgage debt, and thereby deny the mortgagee his major statutory remedy by rendering the mortgage transaction null and void.[94]

The worrisome aspect of the decision is that since the Supreme Court recognised that it was the mortgagor's duty to obtain the governor's consent to the transaction, the

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91. Solanke v.Abed supra note 86, per Unsworth J., see also Kasumu, " The Question of Consent to Alienation" supra, note 67 at 97., Omotola, Essays on the Land Use Act, supra note 1 at 30-31.

92. Supra, note 9.

93. Ibid at 324.

94. A. Adesanya, "The Land as Security after the Land Use Act: The Bankers View" in Adigun ed. The Land Use Act: Administration and Policy Implications, supra, note 4, 120 at 128.

court ought, reasonably, to have held him liable for his own default. This opinion is fortified by the observation of Widgery L.J. in Buswell v. Goodwell[95] that:

> The proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one which the court would wish to endorse.[96]

The attempt by another mortgagor to void a mortgage transactions by relying on his own default was successfully challenged in the Court of Appeal decision in Adedeji v. National Bank of Nigeria.[97] In this case the mortgage transaction was without the governor's consent. Adedeji defaulted and in an attempt to prevent enforcement of security he contended that the transaction was void. This contention was dismissed as it was the view of the court that the mortgagor (Adedeji) should not be allowed to benefit from his own wrong doing as it was his duty to obtain the governor's consent.

Consoling as the above decision may seem to the financial community, it is pertinent to note that the last word is yet to be heard on the matter. Until the Act is amended or a definite pronouncement is made by the Supreme Court, one cannot confidently state that the dust is finally settled. The issue is mind-boggling because, assuming that the defaulter is not allowed by the court to rely on his own wrong action as a ground to repudiate the transaction, the mortgagee or the bank may still not be allowed to enforce its right arising from the void transaction. This is because for the

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95. [1971] 1 All E.R. 418

96. Ibid at 421.

97. (1989) 1 N.W.L.R. 212. The decision of the Supreme Court in the case of Savannah Bank, supra, note 9, is not definitive on this point since the Court based its decision on the interpretation of ss. 34 & 22 of the Act. According to Justice Alfa Belgore, at page 354 "all the equities were not canvassed." See also Solanke v. Abed. Supra, note 86. Contra Dickson v. The Solicitor General of Benue/Plateau State. (1974) 5 S.C.21.

creditor to foreclose or sell the consent of the governor is required. It may be argued then that this equitable defense can only be used as a shield - not a sword. Assuming the debtor is sued on the covenant to pay, this may not be an easy route for the creditor since the consent of the governor is required before the creditor can deal with the property in accordance with the court's order.

(d). EFFECT OF THE CONSENT PROVISION ON SECURITY TRANSACTIONS.

It is clear that a factor that led to the promulgation of the Act was the need to remove the constraints caused by the confusion and bewilderment characterising Nigerian land law. One would have expected that the new Act would in all respects act as catalyst to the commercial growth and economic development of the country. However, it seems that the present operation of the Act is antithetical to this ideal. Economic development cannot possibly be enhanced where there is no facility of transfer of land, and, above all, where there is no security of title to land.

The effect on the economy of the consent requirement was aptly stated by the Supreme Court in Savannah Bank (Nigeria) Ltd v.Ajilo:

> I agree with... expression of anxiety over the implementation or consequences of the implementation of the consent clauses in the Act. It is bound to have a suffocating effect on the commercial life of the land and house owning class of the society who use their property to raise loans and advances from the banks. I have no doubt that it will take the whole working hour of a State Governor to sign consent papers (without going half way) if these claims are to be implemented. These areas of the law need urgent review to remove their problem nature.[98]

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98. Supra note 9 at 329 per Obaseki J.S.C.

There seems to be a consensus within the legal and commercial community in Nigeria that the Act may have created more problems than it hoped to solve. The present state of doubt, if not disillusion, about the efficacy of the Act does not create the right climate for investment, whether domestic or foreign, for which real property may be used as security. The effect of the Act on industrialization is apparent from the observation of Justice Nnamani:

> Aspects of the Act which have brought untold hardship include the provisions relating to the issue of certificate and grant of consent to alienate. Both can take years and the applicant is subject to the vagaries of bureaucratic action which demand survey plans, interminable fees, documents and a lot of to and froing. These cumbersome procedures have adversely affected economic and business activity and make industrial take off a matter very much in the future.[99]

An aspect of the economy where the Act has had negative impact is secured transactions.[100] Since the promulgation of the Act the real security market has been characterised by uncertainties, inconsistencies and invalidations. There is now a wide spread cynicism and confusion over the viability of the right of occupancy as security for advances, and this has been exacerbated by the frustrating effect of the consent provision on these transactions. It is therefore not without cause that some writers have observed that "the mortgagee who ventures into giving credit facilities on a security without

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99. Justice A. Nnamani, "The Land Use Act- 11 Years After" supra note 4 at 39.

100. Land as security interest in Nigeria at present may be likened to the position in the early days when bankers used to be averse to accepting land as security. We are informed by J.W. Gilbart that "the rule of the banker is never to make any advance, directly or indirectly, upon deeds, or any other dead security." There were however, certain exceptions to this rule which he laid down. See J.W. Gilbart, The Logic of Banking (London: Bell & Daldy, 1865) 191. See also M. Holden, Securities for Bankers' Advances (London: Pitman Publications Ltd., 1980) at 21-22.

consent may find it too costly eventually"[101]

The main cause for concern is that quite unlike the industrialised nations, at this stage of Nigerian economic development land has been and remains the most recognised form of security. It cannot be doubted that where land becomes unreliable as collateral, the impact on secured transactions, while it cannot be quantified, will be far-reaching.[102] The Act is being continuously circumvented because the crying need to examine critically the problematic provisions has not been acted upon. That transactions in land are still conducted under the Act can be explained on the basis of the need for continuity in the economy, and, perhaps, growth. Apart from mortgages, other transactions by way of alienation are being treated informally by the parties. With the help and assistance of lawyers, letter writers and lawyers' clerks, documents relating to the transfer of land are back-dated to pre- March 1978, the commencement date of the Act, in order to obviate the need to obtain consent. The documents are generally accepted for registration with fine for late stamping. And they can form the basis for the issuance of certificate of occupancy on subsequent application.[103]

2.5. CONCLUSION.

The Land Use Act has, therefore, proved to be one of the most enigmatic statutes in

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101. F. Adeoye and H.Ogunniran, "The Socio- Economic Implication of the Consent Provisions Of the Land Use Act" in Adigun ed. The Land Use Act: Administration and Policy Implications, supra, note 4 at 83.

102. K. Oluwajana, "The Land Use Act and the Banking Industry" in Adigun ed., The Land Use Act: Administration and Policy Implications ibid, at 113.

103. Adeoye and Ogunniran, supra, note 100 at 84.

Nigeria.[104] As has been demonstrated in this study, the Act is not efficient in relation to dealings on land.[105] The Act is, conceptually, a unique piece of legislation, and its uniqueness has exacerbated the controversy surrounding it. The vagueness of the trusteeship position of the state governors has given rise to a broad interpretation of their powers. The wide scope of the governors' powers provides room for abuse; thereby undermining the objectives of the Act, which among other reasons, is to ensure equitable distribution of, and certainty of title to, land. The right of occupancy and certificate of occupancy remain as interests without precise legal definitions. A creditor who takes land as collateral for loan is unsure of the nature and efficacy of this security interest. The question of consent to alienation is even more problematic. Although there may be sociological justifications for restraints on alienation,[106] it makes secured lending cumbersome, dilatory, and costly.

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104. See P. Oluyede, "A Decade of Statutory Monster: The Land Use Act" in M. Ajomo ed. New Dimensions in Nigerian Law (Lagos: Nigeria Institute of Advance Legal Studies, 1989).

105. See J. Fekumo, "The Land Market Under the Land Use Act" (1989), 2 Gravitas Bus.L.Rev. 22; O. Smith, "The Efficacy of Agricultural Charge as a Form of Security in Nigeria" (1989), 2 Gravitas Bus.L.Rev. 69.

106. Alienation of land may enhance the efficiency of its use, but group imposed restraints on alienation can be justified when they bar a transfer that could harm others more than it benefits the parties to the transactions. See R. Ellickson, "Property in Land" (1993), 102 Yale L.J. 1315 at 1376. See also M. Radin, "Market-Inalienability" (1987) 100 Harv.L.Rev. 1849; S. Rose-Ackerman, "Inalienability and the Theory of Property Rights" (1985), 85 Colum.L.Rev. 931.

Chapter 3.

REGISTRATION OF LAND TITLES AND INTERESTS.

3.0. INTRODUCTION.

Customary law recognises the symbolic nature of land transfer and protects this traditional form of conveyancing. It follows that conveyancing is an easy business in customary law with far reaching negative consequences. A transferee of land has to rely on a tradition of ownership from time immemorial. Proof of ownership will depend on the unwritten tradition within the locality (which may or may not yet have received judicial pronouncement of a Court). But customary law is a question of fact and there could be conflicting claims of tradition of ownership to the same piece of land. In the case of alienation, the symbolic nature of the transfer may give rise to future disputes, especially where the witnesses are no longer alive, or are too old to remember what transpired decades ago. Therefore, a transferee of land in customary law would always assume a big risk. The realization of these shortcomings afforded some land-owning families the opportunity to make multiple sales of the same land to unwary members of the public.[1] Moreover, there was the problem of group ownership of land, and transferees were always faced with the arduous task of determining from whom to obtain consent to sale and when the requisite consent had been obtained. It is also the obligation of the transferee to satisfy himself about the authenticity of the claim of ownership.

Since the introduction of English law, land held under customary law is usually

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1. B.O. Nwabueze, Nigerian Land Law (Enugu, Nigeria: Nwamife Publishers; New York: Dobbs Ferry Co., 1972) at 513-514.

transferred according to the English system of conveyancing. This tends to eliminate some of the problems inherent in the customary system of transfer, as the English system is based on documents.[2] However, this system is of limited assistance as it may not be possible to obtain the document witnessing the first transfer to the first owner. The need therefore arose to fix a date in the past beyond which no further proof of good root of title may be required by law. Again, there could be instances where a document may be missing from the chain of title and this may throw doubts on the authenticity of the present title or claim of ownership. In conveyancing practice, a statutory declaration is required by the purchaser from the vendor that the latter has not transferred the property to any person. But these measures cannot take care of other minor unrecorded interests on the land. The land may be encumbered and this may not appear on the document.[3] Even the covenant of ownership and right to convey may be worthless if the vendor is found to be a man of straw.

In practice, the risks of private conveyancing or unregistered conveyancing arise less from the proof of root of title than from ascertaining the dealings that have taken place in the land being conveyed. Therefore, there was need to institute a system that would facilitate the task of ascertaining the previous dealings on land. This is the object of the registration of instruments affecting land.[4] The Land Registration Act, 1925[5]

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2. Ibid., 514.

3. T.W. Mapp, Torrens' Elusive Title (Alberta Law Review Series, Vol. 1, 1978) chap. 2.

4. Nwabueze, Nigerian Land Law, supra, note 1 at 521. The registration of instruments was first introduced in Lagos by an Ordinance of 1883. The present law is contained in the Land Registration Ordinance, 1925, chap. 99, Laws of the Federation 1958, referred to under current mode of citation as the Land Registration Act, 1925.

makes provision for the registration in the land registry of all instruments affecting land.[6] The legislation is intended to provide a prospective purchaser with knowledge of all claims affecting the land. Registration of an instrument does not enhance its value, as it is provided that registration does not affect the validity or otherwise of a document.[7] Non-registration incurs certain sanctions. In some cases the instrument becomes void,[8] while in all cases failure to register entails loss of priority in relation to a subsequent registered instrument affecting the same land.[9] Additionally, a non-registered instrument is inadmissible in evidence in any judicial proceedings.[10]

3.1. CONSEQUENCES OF REGISTRATION.

The intention of the legislation requiring instruments affecting land to be registered is to ensure some security of title and to avoid fraudulent conveyancing.

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5. The title of the Act is misleading, as it has nothing to do with the registration of land, but only with instruments. This anomaly necessitated the renaming of the Act in the old Eastern and Western Nigeria as Land Instruments Registration Law, Cap. 72 Laws of Eastern Nigeria 1963; cap. 56 Laws of Western Nigeria, 1959. In Northern Nigeria, it is still called the Land Registration Law.

6. s.6. By s.2 an instrument is defined as "a document affecting land in Nigeria whereby one party (hereinafter called the grantor) confers, charges or extinguishes in favour of another party (hereinafter called the grantee) any right or title or interest in land in Nigeria and includes a certificate of purchase and a power of attorney under which an instrument may be executed but does not include a will."

7. See s.19. See also C.O. Olawoye, Title to Land in Nigeria (Ife, Nigeria: University of Ife Press, 1981) at 66.

8. See s.14 which provides that every State grant executed after the commencement of the Act, and every instruments affecting land the subject of a State grant whereby land is granted by a Nigerian to a non-Nigerian executed after the commencement of the Act shall, to the extent that it affects any land, be void unless the same is registered within the stipulated period.

9. See s.16.

10. See s.15; Amankra v. Zankley (1963), 1 All N.L.R. 304.

Accordingly, the efficacy of any instrument of transfer of land or any interest in land will depend on its registration. In Amankra v.Zankley[11], the plaintiff bought a piece of land from the vendor on August 29, 1957 and registered the instrument of transfer on September 16, 1957. Unknown to the plaintiff, the land had been bought by the defendant on May 16, 1957 but the latter did not register until March 17, 1960. The defendant argued that since the vendor sold the land to him prior to the sale to the plaintiff, the vendor had divested himself of the legal title to the land, and the conveyance to the plaintiff being of no effect at all, the registration cannot cure it of any defect or confer upon it any validity which it would not otherwise have had. Further, he contended that his failure to register could only render the conveyance to him inadmissible, but not void or ineffective. These contentions were rejected by the Supreme Court, which found for the plaintiff. Justice Bairamain in his lead reasons for judgment observed:

> Clearly although...the Act does not relate to registration of titles, but of instruments, it is plainly intended to give some measure of security and protection against fraud...It is desirable to give some protection against fraud and facilitate dealings in land. It is done by such provisions as those in section 15 and section 16 of the Act. In our opinion, they are intended to make an instrument requiring registration ineffectual unless and until it is registered.[12]

As the legal title does not vest in the purchaser unless and until his interest is registered, the vendor is still entitled to make a valid transfer to a subsequent purchaser for value, whose interest will, if registered, be effective against the unregistered purchaser. This

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11. Ibid.

12. Ibid., at 307. On page 308, Justice Bairamian stated that "In cumbrous language the deed given to Adekunle Coker [the defendant] purported to convey the legal estate to him on that day, but it did not effectually transfer it."

decision apart from securing the title of a registered transferee also enhances facility of transfer.

However, the protection given by the Act has some limitations. Apart from certain instruments that are rendered void for non-registration, there is no time limit set for registration. A purchaser who searches the register and discovers no entry may decide to complete the purchase, but may be liable to have his interest defeated if the first purchaser registers his interest within the interval of the second purchaser's search and attempt to register.

Moreover, the statute only relates to dealings contained in written instruments, and does not affect symbolic transactions. Nevertheless, it is well established that until recently most land transactions under customary law were done orally, and transfers were effected symbolically. The publicity of the customary transfer cannot suffice to protect a subsequent transferee of land, and it has been decided that a registered instrument enjoys no priority over an earlier grant by native law and custom.[13] It is arguable that there is no objection to oral transfer being made registrable if the machinery for this is put in place.[14]

Furthermore, when a customary transaction is evidenced in writing, the writing is often of a nature not contemplated by the Act to constitute an instrument. Very often, the writing is no more than a receipt acknowledging payment for the sale of land. It has been held that a receipt for the purchase of land is not a registrable instrument within the

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13. Moubarak v. Japour (1944), 10 W.A.C.A. 102 at 106.

14. Nwabueze, supra note 1 at 527.

Act, as it only evidences an agreement for sale and that consideration for sale has been received by the vendor.[15] But it should not be presumed that since customary law does not require writing for land transactions, if the transaction is reduced into writing, it necessarily evidences a transaction already concluded orally.[16] If the document is the means by which a right, title to, or interest in the land is conferred, transferred, limited, charged or extinguished in favour of another party, it is an instrument within the meaning of the statute and must be registered.[17] This position is qualified by the fact that a right, title or interest created by some other acts of the parties, for example orally, may be created all over again by writing, if the writing embodies such terms and is signed and delivered at such time and place and in such circumstance as to be a recreation of the right, title or interest. The question in each case is whether "the document is an integral part of the transaction and is itself operative (and not merely evidentiary)."[18]

The application of these principles to documents arising out of transactions under customary law has not produced consistent results. For example, a document headed "Memo of Agreement", stated that the vendor would sell and the purchaser would buy the fee simple in possession of certain land for a certain sum, "the receipt whereof the

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15. Yaya v. Mogaga (1947), 12 W.A.C.A. 57.

16. Nwabueze, supra note 1 at 527.

17. Coker v. Ogunye (1939), 15 N.L.R. 57. But if the document does not confer the right or interest, but becomes only an addition to the act or means conferring the right or interest, such a document is outside the ambit of the Act. Ibid., at 59.

18. Per de Comarmand S.P.J. in Elegbede v. Savage (1951), 20 N.L.R. 9 at 10; Paul v. Saha [1939], 2 All ER 737 (P.C. India). In determining whether the document is an integral part of the transaction, and , therefore, registrable, the time of writing the document is important; see Nwabuoku v. Ottih [1961], All N.L.R. 487. See also Nwabueze, Nigerian Land Law, supra, note 1 at 528.

vendor doth hereby acknowledge and confirm," and that the vendor would convey the property whenever called upon to do so. It was held that although the person called the purchaser in the agreement had acquired an equitable interest in land, he acquired it not by means of the document but by the payment of the purchase price independently of the document, which "is really little more than a glorified receipt."[19] On the other hand, a document purporting to be a receipt for the purchase money of land but which also contained an undertaking by the vendor to convey the land to the purchaser, was held not to be a receipt simpliciter, but an instrument for sale, and as such registrable under the Act.[20]

To determine whether a document is an instrument within the definition in section 2 of the statute, the primary consideration is not the tag which the parties have placed on it, but rather the rights and obligations which, as shown from the proper construction of its terms, they intend to create. The tag is evidence of the intended rights and obligations, but is not conclusive and cannot prevail if the rights and obligations are inconsistent with it.[21]

3.2. THE QUESTION OF NOTICE.

It has been observed that where a purchase of land is made, the legal estate does not leave the vendor until the deed of transfer executed by him is tendered for

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19. Coker v. Ogunye, supra note 17 at 59.

20. Ogubambi v. Abowab (1951), 13 W.A.C.A. 222; Griffin v. Talabi (1948), 12 W.A.C.A. 371. This decision seems to be a better representation of the law and should be preferred to the former, and being a decision of the West Africa Court of Appeal, and later in time, should be presumed to have overruled the former. See also Jafia v. Cole (1960), W.N.L.R 140

21. Nwabueze, Nigerian Land Law, supra, note 1 at 529.

registration. This rule notwithstanding, equity requires the vendor not to do anything inconsistent with the right already conferred on the purchaser. Again, in equity a subsequent purchaser is bound by the previous disposition, unless he obtains his interest bona fide for value and without notice. Notice as used here is not confined to actual notice. A purchaser is deemed to have notice of the facts that would have been revealed to him if he had made a proper investigation. This implies that where a purchaser has notice of document, he is taken to have notice of its contents. But it has been held that the registration of an instrument which creates an equitable interest does not, by the sole fact of registration, put a subsequent purchaser of the legal estate for value on notice as to what the instrument contains or conveys.[22] Where the owner of an equitable estate is in possession, the possession constitutes notice of his interest to any purchaser of the legal estate.[23]

The fact of registration does not cure any defect in the instrument of conveyance, nor does it confer upon the instrument any effect or validity that it, apart from registration, would not otherwise have had.[24]

On the basis of the doctrine of notice, any purchaser who would be expected to make a search to find out whether there had been a conveyance of the land to someone else, but failed to do so, would be deemed to have constructive notice of the registered

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22. See Omosanya v. Anifowoshe (1959), 4 F.S.C. 94.

23. Ogumbambi v. Abowab, supra note 20. See also Olawoye, Title to Land in Nigeria, supra, note 7 at 70-71.

24. Folashade v. Duroshola [1961], 1 All N.L.R. 87. See also, T. Elias, Nigerian Land Law (London: Sweet & Maxwell, 1971) at 347.

interest which such search would have led him to discover.[25] Equally, the purchaser will be fixed with notice when he fails to make a thorough search in order to discover any preexisting interests in the land.[26]

It is clear that the advantages of instruments registration are limited. Although it was intended to facilitate transfer and ensure security of title, its function has been greatly undermined by the ubiquitous doctrine of notice. Thus the old system of common law conveyancing coupled with the unsystematic customary law combined to create insurmountable problems for conveyancers and undermined the viability of real property security. Therefore, it became necessary to fashion a more reliable, inexpensive, secure, and expeditious form of registered conveyancing. This brought about the promulgation of the Land Titles Act, 1935.

3.3(a). REGISTRATION OF TITLE TO LAND.

The system of registration of title, as distinguished from instrument registration, was first introduced to Nigeria in 1935 following the enactment of the Registration of Title Act, 1935.[27] Under this system, proof of title is by reference, not to a root of title on private documents, tradition or other acts peculiar to unregistered conveyancing, but to entries in a register maintained and warranted by the state which itself undertakes to establish the title of the registered owner. In this case, once title has been investigated

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25. Ashimi v. Oke (Unreported) F.S.C. 296/62 of 19/10/66.

26. Akingbade v. Elemosho [1964], 1 All N.L.R. 154.

27. Cap. 181, Laws of the Federation, 1958.

and entered on the register, proof of title becomes easy as the register is the evidence of title. In some cases registration cures defects in registered titles.[28]

Although the Registration of Titles Act, 1935, is a federal statute which, notionally, should apply to the whole country, in practice its application is limited to Lagos State. Until recently, not much progress was made even in its limited application, as registration (except in rare cases) is voluntary. The lack of the incentive to register by land owners in Lagos is due to the costly and slow process. Again, the requirement of advertisement[29] and formal notice to neighbours would appear to stir up trouble if rival claims to a piece of land exist.[30] The difficulties are complicated by the uncertainty of title and of boundaries under the customary land law.

The process of first registration requires, first, an application to be made in prescribed form to the registrar. The application may be made by any person who has or is entitled to a fee simple or a lease with not less than five years unexpired term, or by any person who has power to sell the fee simple or lease. In relation to family land, either the family in its own name or any member, with the consent of the family, may

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28. Olawoye, Title to Land in Nigeria, supra, note 7 at 132., Nwabueze, Nigerian Land Law, supra, note 1 at 532.

29. See s.8. See also R. Willoughby, "Land Registration in Nigeria: Past, Present, and Future" (1965) Nig.L.J. 265.

30. Report on the Registration of Title to land in Lagos (Lagos: Federal Government Printer, 1957) para. 43. See Nwabueze, Nigerian Land Law, supra, note 1 at 533. In 1965, the Registered Land Act was enacted to replace the 1935 Act. The main feature of the Act was the introduction of a systematic and compulsory adjudication of all interests in Land in Lagos and this was to be gradually extended to the rest of the country. Pursuant to this scheme the Act, quite unlike the 1935 Act, was intended to guarantee the title of the first registered proprietor. Taken as a whole the Act merely amplified and strengthened the 1935. However, the Act never came into operation because of the costs of its implementation. Because the 1965 Act has not been implemented since it was enacted the 1935 Act continues to govern land titles registration in Lagos and will be the subject of the discussion here. See generally, P. Oluyede, "The Search for Effective Registration in Nigeria" (1973), 6 Nig.L.Q. 11.

be registered. In the case of settled land within the meaning of the Settled Land Acts, 1882-1889, the trustees of the settlement, and not the life tenant, will be registered, but their registration must be with the consent of the life tenant.[31]

Upon the receipt of the application, the registrar will investigate the title and advertise the application in the State Gazette, and if he thinks fit, in one or more newspapers circulating in Nigeria. If there is no objection to the application, the registrar will issue a certificate of title to the registered owner, and this is *prima facie* evidence of the several matters contained therein.[32] Subsequent transactions concerning the registered land are effected by completing the requisite forms and making appropriate entries on the register concerning the change of ownership or the charge on the land.[33]

There are certain cases where estates, interests or claims may not be registered, whether the interests arose before or after registration. These unregistrable interests or claims are protected by the insertion of a caution against the registered title. With this caution, no registration of any disposition or change of ownership can be effected without a prior notice to the cautioner.[34] Registration can only be made with the consent of the cautioner, or at the expiration of fourteen days after service by the registrar on the cautioner of notice of the proposed registration.[35]

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31. See s. 75.

32. See s. 55(5).

33. See s. 28(2) and s. 15.

34. See s. 44(1). This caution is similar to caveat under the Torrens system.

35. See s.44(2).

(b). EXTENT OF THE STATE'S GUARANTEE OF TITLE.

The first registered proprietor of land does not, by the very fact of registration, obtain an indefeasible title to the land. Section 48 states the various limitations to the first registered title. It is important to note s.48(3), which provides that the estate of any registered owner of land is subject to any estate adverse to, or in derogation of, his title and subsisting or capable of arising at the time of first registration. Equally, by s.48(4), it is provided that the estate of every subsequent registered owner of land, not being a purchaser for value, is subject to any unregistered estate affecting the estate of any previous registered owner through whom he derives title, back to and including the last preceding purchaser for value.

Section 48(3) seems to suggest that the act of registration does not cure any defect in the title of the first registered owner. As a result of this section, whenever the title of the first registered owner is challenged, he is expected to prove his title as if it has never been registered. While construing this section Butler Lloyd, Ag. C.J., observed:

> The registration of a title under Ordinance No. 13 of 1935 affords no protection to the first registered owner, not even against an unsuccessful objector to the registration even apparently if the objector had appealed unsuccessfully to the Supreme Court.[36]

Although this pronouncement appears to represent the law, it has been argued that the view that an unsuccessful objection does not secure the title of a first registered owner against the unsuccessful objector ignores the rules as to *res judicata*,[37] and is

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36. Animashawun v. Mumuni (1940), 16 N.L.R. 59

37. Olawoye, Title to Land in Nigeria, supra, note 7 at 143.

inconsistent with the opinion of the Supreme Court in Adebona v. Amao[38].

Section 53(1) provides that any registration which is obtained in consequence of a forged disposition which, if registered, would be void, cannot confer on the registered owner any estate in the land. But a person who obtains registration through forged transfer may obtain compensation from the government if the register is rectified to his prejudice. However, before a person maintaining an adverse claim can succeed in any action for declaration of title, he must have sought and been denied the rectification of the register.[39]

A purchaser for value is protected by section 53(2), which provides that nothing in the section will be deemed to invalidate any estate acquired by any registered owner who is a purchaser for value, or by any person deriving title from such subsequent owner.[40] A volunteer takes only the title of his predecessor. There is no definition of value in the Act, but by subsection 5 of section 53, reference is made to a conveyance for consideration consisting wholly or in part in money. From this it can be deduced that value is intended to have its full legal meaning, which includes marriage as well as money or money's worth. It has been held that the burden of proving that value was given lies with the party claiming the benefit of the transaction.

Although not stated in the statute, it has been suggested indirectly in a case that good faith must be shown by the purchaser for value. Thus *mala fides* on the part of the

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38. (1965), 1 All N.L.R. 370.

39. Rihawi v. Aromashodun (1952), 14 W.A.C.A. 204.

40. Yesufu v. Ojo (1958), 3 F.S.C. 106.

purchaser may result in defeating his interest.[41]

Another important issue is the provision for overriding interests. The title acquired by a registered owner is subject to these interests. The interests are such that they cannot be discovered by any examination of the abstract of title or the register. They can only be discovered by inspecting the land and making inquiries. The overriding interests are listed in section 52. As a result of the existence of these interests a purchaser of registered land is not relieved of the necessity of inspecting the land before completing the transaction. On the question of land inspection, the purchaser is required to make the same amount of investigation as if the land was never registered.[42]

By section 54, a registered owner is protected against unregistered estates or interests when he purchases for value, whether or not he has notice, express or implied. In Balogun v. Salami,[43] it was held that the fact that the owner of unregistered interest or estate was in possession could not remove his case from the ambit of the provision. Also since by section 54 the registered owner for value is not to be affected by notice which the possession constitutes, the interest of the unregistered owner cannot rank as overriding interest.

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41. Mbanefo F.J. in Yesufu v. Ojo, ibid; at 108 observed:

> It is not suggested that they [respondents] paid an undervalue and nothing has been said which could defeat their title in equity. It is the interest such as theirs that section 53(2) was designed to save.

Although courts cannot inquire into the sufficiency of consideration, it seems that if the value given was spurious or, if the respondents had paid an under value in this case, the Court might have reached a different conclusion. See also C. Olawoye, Title to Land in Nigeria, supra, note 7 at 144-145.

42. Olawoye, Title to Land in Nigeria, supra, note 7 at 147.

43. [1963], 1 All N.L.R. 129.

Section 54 seems to arrest the mischief caused by the doctrine of notice. The provision appears to be one of the most effective in the Act to ensure security of title for a purchaser. With the abolition of the equitable doctrine of notice, a prospective transferee will no longer be afraid of someone subsequently impugning its title, even though his interest is not reflected in the register. This provision is highly commendable, as the doctrine of notice has been the bane of land transactions.[44]

(c). COMPENSATION.

Provision is made in the Act for any person who suffers loss as a result of error, omission, or rectification of the register.[45] This section is intended to cushion any adverse effect that may arise as a result of reliance on the register. Nevertheless, there is a rider to the claim for compensation to the effect that a person who by his agent's act, neglect, omission or default, has caused or substantially contributed to any loss, is not entitled to any compensation. It is arguable that this provision has the potential to raise litigation. Although the Act does not state what amounts to contributory negligence, some examples may be given. In the case of boundaries, for instance, there are no complete and accurate survey maps of the lands in Nigeria. It may follow that if an erroneous survey is tendered in support of registration, the registered owner would have contributed to the error and will be disentitled to compensation if it is rectified. If this

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44. Nwabueze, Nigerian Land Law, supra, note 1 at 549. It seems, however, that the Courts are very jealous of and reluctant to relinquish their equitable jurisdiction, even in the face of express statutory provision. See Johnson v. Onisiwo (1943), 9 W.A.C.A. 189, where the court referred to the knowledge of the defendant about the co-owners of the land.

45. See s.63.

is the case, the provision for compensation or indemnity will turn out to be illusory.[46]

The Act at present cannot realise fully the avowed principles of security, facility, and indemnity upon which it was based. By section 48(3) the first registered owner does not have any state guarantee of his title and it follows that a purchaser from the first registered owner is required to investigate the title as if the land was never brought under the Act. In the case of a subsequent purchaser for value whose interest is not obtained by a forged transfer, the recognition of several overriding interests does not enhance any facility of transfer, as the purchaser is not absolved from making historical search on the title. Some writers have aptly stated that:

> This vulnerability to overriding interests is inherent in the scheme of the Act; all that can be usefully said is that the purchaser who fails to inspect the property and make the appropriate enquiries may be in for a nasty shock.[47]

It is apparent from the above discussion that real property security in Nigeria is beset by several difficulties. The state of uncertainty in the substantive land law coupled with the equally uncertain and dilatory system of conveyancing cannot engender the right environment for real property security. The combination of these two factors has rendered security interest in real property fragile, if not illusory, in Nigeria.

3.4(a). THE TORRENS SYSTEM OF REGISTRATION IN CANADA.

Western Canada is one of the jurisdictions where the Torrens system of land registration has maintained a strong foothold. It seems that the legislatures in the various

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46. See S. Cretney and G. Dworkin, "Rectification and Indemnity: Illusion and Reality." (1968), 84 L.Q.R. 528.

47. Ibid; at 530.

provinces have adopted it as the system best suited to their needs.[48] The need for this system arose as a result of the problems associated with common law conveyancing.[49] The Torrens jurisdictions in Canada realised that the introduction of the deed registry system did not engender much relief, as titles to estates and interests were continually haunted by the enigmatic doctrine of notice.[50] The exasperating investigations that never assured security of title could caused loss and pain to purchasers and transferee of land, who often ended up buying law suits instead of the land bargained for purchase. The inequity of the system and the constraints on conveyancing galvanised Sir Robert Torrens into propounding a more just and efficient system of conveyancing.[51] Torrens was of the view that conveyancing should be reliable, simple, cheap, speedy, and suitable to the social needs of the community.[52]

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48. I.L. Head, "The Torrens System in Alberta: A Dream in Operation." (1957), 35 Can. Bar Rev. 1 (hereinafter "The Torrens System in Alberta").

49. T.W. Mapp, Torrens' Elusive Title, supra, note 3 at 7-42; Di Castri, Registration of Title to Land (Toronto: Carswell Thompson Professional Publishing Co., 1987) chap. 1.

50. Head, "The Torrens System in Alberta", supra, note 48 at 45-56.

51. The historical antecedents to the promulgation of what is now referred to as the Torrens System, are well documented in D. Whallan, "The Origin of the Torrens System and its Introduction into New Zealand." in Hinde ed., The New Zealand Torrens System Centennial Essays (Wellington: Butterworths, 1971) chap. 1; D. Whallan, "Immediate Success of Registration of Title to Land in Australia and Early Failures in England." (1967), N.Z.U.L.R. 416; D. Pike, "Introduction of the Real Property Act in South Australia." (1961), 1 Adelaide L.R. 169.

There is now the argument that the introduction of the system was seen as a means of destroying Aboriginal claims to land in Southern Australia. See S. Ainger, "Aboriginal Trailblazer Uncovers 'Extraordinary Conspiracy'", Sydney Alumni Gazette, June 1991, at 18, cited by B. Ziff, Principles of Property Law (Toronto: Carswell, 1993), at 365, note 56 and accompanying text.

It is not entirely true to state that title registration originated in Australia. A similar system had been proposed in England, and according to Di Castri, Torrens does appear to be the first person who obtained letters patent to indissolubly link his name with the system. See Di Castri, supra, note 49 at 1-14.

52. Head, "The Torrens System in Alberta", supra, note 48 at 1. See also T.B. Ruoff, " An Englishman Looks at the Torrens System." (1952), 26 Aust. L.J. 118.

The Torrens system appears to be hinged on three main principles, all closely related. The first principle is the "mirror principle", under which the register book is a proper and true reflection of all facts material to a proprietor's title. This requires that only registrable interests should appear in the register, and all unregistrable interests should be excluded.[53]

There is also the "curtain principle", which implies that a prospective purchaser of land under the system is restricted only to the register for all the information essential for the title, and he need not look behind this.[54] This principle was based on the reasoning that to blur the picture with trusts and obscure equities was detrimental to the system and should be prevented.[55] Furthermore, there is the "insurance principle", which was provided to compensate any damaged party, who may suffer any loss as a result of reliance on the system.[56]

While conveyancing at common law was mainly a private transaction, the state under the Torrens system assumes the responsibility of conferring title through registration. This state intervention saves the community the cost of making novel investigation of title in connection with each transfer or transaction affecting land.[57] Thus the uniqueness of the system is the state's guarantee of title and the avoidance of

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53. The "mirror" and "curtain" principles were introduced as terms by T. Ruoff, "An Englishman Looks at the Torrens System", ibid., at 118.

54. Gibbs v. Messer (1891), A.C. 248 at 254.

55. Wolfson v. Registrar General of New South Wales (1934), 51 C.L.R. 300 at 308.

56. Registrar of Titles v. Spencer (1909), 9 C.L.R. 641 at 645.

57. Di Castri, Registration of Title to Land, supra, note 49 at 1-15. For this feature of the system, see Head, supra note 48 at 5.

the tedious but inconclusive investigation of title that characterized common law conveyancing and the deed register system. The Act contains provisions for the compensation of those who are damaged by the operation of the system.[58]

(b). INDEFEASIBILITY OF TITLE.

Although there is no use of the word "indefeasibility" in the Act[59] the suitability of the term can be seen by looking at the entire Act.[60] It appears that what Torrens had in mind was that every conveyance of land was an implied reconveyance to the Crown which then conveys to the new purchaser. The conveyance by the Crown would cure all previous defects and infirmities in the former title.

There is uncertainty under the Torrens system as to when the interest conferred upon registration becomes unimpeachable.[61] One principle holds that the presence of a vitiating factor cannot undermine any interest that has been registered. This is referred to as the *immediate* indefeasibility principle.[62] The other principle claims that a vitiating factor affecting the registration will make the interest liable to postponement to a

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58. See s.23 of the Real Property Act of Manitoba, C.C.S.M., c.L90, 1988, c.R30 (hereinafter R.P.A. Manitoba). However, there are limits to the amount of compensation that may be claimed by the damaged party from the insurance fund.

59. See for instance, R.P.A. Manitoba.

60. See sections 59(1) and 62 of the R.P.A. Manitoba.

61. See M. Neave, "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173.

62. This is principally supported by the decision of the Privy Council in Frazer v. Walker, [1967] 1 A.C. 569.

preexisting interest. This is known as the *deferred* indefeasibility principle.[63] The question in this regard is whether a purchaser in good faith for value relying on a registered title is expected, as under the common law, to satisfy himself as to the identity and capacity of the vendor and the validity of the transfer from vendor to purchaser. There are differing opinions in the courts on the applicable principle. But it seems that the courts are mainly in favour of the immediate indefeasibility principle.[64] This principle sometimes enhances facility of transfer at the cost of security of title.

The indefeasibility principle under the system has some qualifications. There are certain interests that, although not registered, are protected and may override other interests that appear on the register.[65] The recognition and protection of these interests is contrary to the mirror principle, which requires that the register should reflect all interests affecting the land. However, the protection of some of these interests is explicable on policy grounds. The cost and administrative inconvenience of registering some of the interests, like leases not exceeding three years, may be prohibitive when compared to the security conferred by registration. Also a simple inquiry by investigation may reveal the existence of the interests. But there are some interests whose recognition

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63. The authority for this principle is Gibbs v. Messer, [1891] A.C. 248 (P.C.).

64. See for instance, Hermanson v. Martin, [1987] 1 W.W.R. 439. See also B. Ziff, Principles of Property Law, supra, note 51, chapter 12, note 72 and accompanying text. The uncertainty of the applicable principle of indefeasibility in Australia appears to be settled. See P. Butt, "Torrens Foundations Stabilised" (1993), 67 A.L.J. 535; P. Butt, "Torrens Foundations Confirmed" (1993), 67 A.L.J. 691.

65. See s. 58(1), Manitoba Act, which states the interests to which the certificate of title is impliedly subject to. In England and Nigeria, these interests are referred to as overriding interests.

and protection may not be easily justified.[66]

In other cases the system makes provisions for the filing of caveats, which serves to protect unregistrable equitable interests pending registrations.[67] A caveat thus maintains the existing state of the interest in land but does not create new rights for the caveator. But apart from the warning or "stop order" function of the caveat, it can also be used to protect equitable interests in land already brought within the system. This ensures that the register is a true reflection of all the interests on the land. It is important to note that unless and until the caveat is vacated, every registered interest in the land shall be subject to the caveat.[68] Because of the importance of caveat under the Torrens system, it appears that a deed system of registration has been incorporated into the system.[69] The caveat is commonly used now for the protection of mineral interests in land, and in practice are permanent in some cases.[70] The caveat is attractive to its users because of its cheapness.[71] Also the use of a caveat confers the same priority as a

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66. See for example B. Ziff, "A Matter of Overriding Interests: Unregistered Easements Under Alberta's Land Titles System" (1991), 29 Alta. L.Rev. 718.

67. See s.145 of R.P.A., which provides that a person claiming an estate or interest in land described in an application to bring the land under the Act, may at any time before the issue of a certificate of title therefor, file a caveat in the form prescribed in the regulations, forbidding the bringing of the land under the Act.

68. See s.148(1), R.P.A.

69. It seems that the position of a caveat on the register has been strengthened by the Alberta Court of Appeal decision in White Resources Management Ltd. v. Durish [1993], 1 W.W.R. 752 (C.A. Alta.). Attempts to rationalise the decision of the courts were made by W.H. Hurlburt, "Priorities and the Discharge of Caveats (No. 2): White Resources Management Ltd. v. Durish" (1993) 31 Alta. L.Rev. 418.

70. Head, "The Torrens System in Alberta", supra, note 48 at 29, 33. See also Ruoff, "An Englishman Looks at the Torrens System", supra, note 52 at 322.

71. The filing of caveat does not carry with it the payment of assurance fee levy. Head, ibid; 33.

registered instrument under the Act.[72]

With all this machinery in place, it is apparent that registered titles or interests in land are not readily defeasible. If this presumption is true, then the original intention of Torrens to ensure security of title and facility of transfer would have been met. However, it is arguable that facility of transfer is sometime preferred to security of title. The rationale for this is that titles registration is primarily concerned with protecting the interest of bona fide purchasers for value.[73]

It should be noted that the indefeasibility principle is not absolute. In some Torrens jurisdictions, the existence of a prior certificate of title may suffice to defeat the registered interest of a purchaser. Again, in some jurisdictions that operate the Torrens system, a misdescription of land may prevent a purchaser from invoking the indefeasibility principle.[74] In all Torrens system jurisdictions there are several statutory recognitions of unregistrable interests that are binding on a registered land owner. These are referred to as the implied conditions.[75] The interests recognised outside and protected by the statute are so numerous that the register is no longer a mirror of all the

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72. See s. 155 of R.P.A.

73. In Canadian Pacific Railway Co. Ltd. & Imperial Oil Ltd. v. Anton Turta et al, [1954], S.C.R. 427; 12 W.W.R. (N.S.) 97, the interest of the first registered owner was postponed to that of the subsequent transferee, who benefitted from the error caused through the operation of the system. It seems that this would not have been the case if security of title was preferred to facility of transfer.

74. The Supreme Court of Canada grappled with what constitutes a prior certificate of title and misdescription of land in Canadian Pacific Railway Ltd. v. Turta (1954), 3 D.L.R. 1. This case was decided in light of the Alberta Act. For a case where misdescription was determined, see Edwards v. Duborg [1982] 6 W.W.R. 128 (Alta. Q.B.), additional reasons at [1983] 6 W.W.R. 672.

75. See s. 58(1) (a) to (m), R.P.A. Manitoba. See also footnote 65.

interests affecting the registered land.[76] In light of this, it would be foolhardy for a prospective purchaser or mortgagee to restrict his search to the interests noted on the register. The Act has not done away with the need to make a historical search for other interests not registered or caveated on the register.

Also, in the Torrens system jurisdictions in Canada, for instance, apart from the interests statutorily exempted from registration, the Dominion Crown is not affected by the operation of the Act, unless it brings itself within the system.[77]

The Supreme Court of Canada has equally held that, in certain cases, unregistered instruments may be effective as against a third party from the moment of execution.[78]

(c). NOTICE AND FRAUD.

One of the primary objectives of the Torrens system was the elimination of the equitable doctrine of notice, which has been recognised as a barrier to the working of the deed registration system. What is now seen as the ubiquitous doctrine of notice was developed by the court of Equity to stem unconscionable transactions in land. But the

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76. See Esterman and O'Keefe, "The Impact of Other Statutes on the Land Transfer System." in Hinde ed., New Zealand Torrens System Centennial Essays, supra, note 51 at 210.

77. Prudential Trust v. Humboldt Registrar [1957], 9 D.L.R. 561; A.G. Canada v. Toth (1958), 27 W.W.R. 230; Re Land Titles Act, Re Director of Soldier Settlement (1960), 31 W.W.R. 647 (Alta. S.C.); Canada (Director of Soldier Settlement) v. Snyder Estate [1991], 5 W.W.R. 289 (S.C.C.).

78. Stonehouse v. A.G. of British Columbia [1962], 2 W.W.R. 189(an unregistered deed was operative to sever a registered joint tenancy); Davidson v. Davidson [1946], S.C.R. 115 (An execution creditor can only attach that interest which exist in the execution debtor; and, the registered owner having disposed of his entire interest prior to the judgments, there was no interest upon which the judgments could attach); Jellet v. Wilkie (1896), 16 S.C.R. 282 (An execution creditor does not have any superiority of title to land over prior unregistered transferees); Dominion Lumber v. Winnipeg Registrar [1963] 41 W.W.R. 343 (registered certificates of judgment are not equitably entitled to priority over unregistered mortgages). See generally R. Carter, "Some Reflections on the Land Titles Act of Saskatchewan." (1965), 30 Sask. Bar R. 315 at 316.

importance of this doctrine - especially of constructive notice - has been discredited. In the opinion of Lord Esher:

> The doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts and yet it is said that constructively he does know them.[79]

By eliminating the doctrine of notice, it is possible for title to pass wrongfully to a third party without the knowledge of the true owner. This has the potential to permit unconscionable dealings on land. But the Torrens system does not allow any transactions tainted by fraud to remain unimpeachable.[80]

What constitutes fraud under the system has been variously interpreted by the respective courts where the Torrens system is in operation.[81] The reference to fraud under this regime is distinct from the different shades of meaning attributed to it by equity. Fraud under the Torrens system refers to actual fraud. The Privy Council attempted to describe what constitutes fraud under the system in Waimiha Sawmilling Co. v. Waione Timber Co.[82]

If the designed object of a transfer be to cheat a man of a known existing right,

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79. English and Scottish Mercantile Investment Co. v. Brunton (1892), 2 Q.B. 700 at 707-708.

80. According to section 80, R.P.A. Manitoba:

> Except in the case of fraud on his part, no person, contracting or dealing with, or taking or proposing to take an instrument from a registered owner, shall be required to inquire into or to ascertain the circumstances under, or the consideration for which the owner or any previous owner is or was registered, or to see to the application of the purchaser money or of any part thereof; nor is a person affected by notice, direct, implied or constructive, of a trust or unregistered interests, *and the knowledge that a trust or unregistered interest is in existence shall not of itself, be imputed as fraud.* [Italics supplied].

81. See G. Davies, "Equity, Notice and Fraud in the Torrens System" (1971), 10 Alta. L.Rev. 106 at 108.

82. [1926], A.C. 101 at 106-107.

> that is fraudulent and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of unregistered interest.

It seems that most cases of fraud or dishonest conduct in relation to land can only arise by notice of unregistered interests. The problem is that since actual knowledge of unregistered interests does not amount to fraud according to the statute, what are those extra ingredients above knowledge of the unregistered interest that are required to constitute fraud.

What may appear to be a strict interpretation of the section on fraud was given by Justice Turgeon, while giving the lead judgment in the Court of Appeal of Saskatchewan in Hackworth v. Baker.[83] In this case it was held that the fact that the defendant knew about the unregistered interest of the plaintiff before registering his interest, and might have done so in order to get rid of an unwanted neighbour, did not constitute fraud. In his lordship's view, the essence of the section is to ensure that the indefeasibility provision is not rendered nugatory by the introduction of knowledge or notice. The statute only permits the giving of notice of rights and interests to be done through the land titles office.[84]

It is apparent from the decision that knowledge of an existing unregistered interest

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83. [1936], 1 W.W.R. 321. See also Holt Renfrew & Co. v. Henry Singer Ltd. [1982] 4 W.W.R. (C.A.), leave to appeal to the Supreme Court of Canada refused (1982), 22 Alta. L.R. (2d) xxxvi (note) (S.C.C.).

84. Ibid., at 333.

in land does not amount to fraud. But it has been held that fraud will be found if knowledge of the unregistered interest is used for unjust or inequitable purpose.[85] This decision appears to have equated knowledge with fraud. Thus the knowledge that the purchase or transfer will destroy the unregistered interest may constitute fraud.

Davies has criticised the approach of the Courts in New Zealand, Alberta, British Columbia and Manitoba in interpreting the section on fraud.[86] He maintained that the cases raise difficult problems. If intention to destroy or prejudice a prior interest is sufficient to constitute registration with notice fraudulent, or if mere knowledge that destruction or prejudice will follow upon registration is sufficient, it will be impossible for the section to protect a transferee who takes with notice. This is so because in every case where registration is entered with notice, allegation of intention to destroy or prejudice will always be made by the unregistered claimant, even though the intention is formed after registration. In the opinion of Davies, to accede to such an interpretation would undermine the whole Act, except where the transferee has "but a mere hint of some possible irregularity" whereupon the section may absolve him from making further inquiries.[87]

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85. See Alberta (Minister of Forestry, Lands and Wildlife) v. McCulloch [1991] 3 W.W.R. 662 (Q.B.), affirmed [1992] 1 W.W.R. 747 (C.A.). Cf Holt Renfrew & Co. v. Henry Singer, ibid.

86. See Davies, "Equity, Notice and Fraud in the Torrens System", supra, note 81. See also Stephens v. Bannan and Gray (1913), 5 W.W.R. 201 (Alta); Beaver Lumber Co. v. Pritchard [1933], 3 W.W.R. 35 (Man.); Ukrainian Greek Orthodox Church v. Independent Bnay Abraham Sick Benefit Free Loan Association & Riverside Cemetery (1959), 29 W.W.R. 97 at 107 (Man.); Hudson Bay Co. v. Kearns & Rowling (1897), B.C.R. 536 at 551 (B.C.); Graveling v. Graveling & Blackburn [1950], 1 W.W.R. 574 at 596-597.

See further, D.J. Whallan, "The Meaning of Fraud Under the Torrens System." (1975), 6 N.Z.U.L.R. 207.

87. Davies, ibid., at 116.

It should be noted that attempts to solve the problem of notice are not novel. Notice was a major issue that occupied the minds of the nineteenth century Real Property Commissioners in the United Kingdom. Their second report contained arguments for and against the retention of the doctrine of notice.[88] In the report the Royal Commissioners recommended that the public good required the abolition of the doctrine of notice in titles registration. It was felt that security of title would be impaired if preferences were given to unregistered interests on the ground of notice, as the fact of notice will in every case be possible and in many probable. It follows that the temptation not to register will be high; for the unregistered claimant will commence a suit, in the hope that the other claimant will confess notice, or circumstances from which it may be implied , and there may be a temptation to support the suit so commenced by false evidence.[89]

Professor Whallan[90] has argued that "fraud" under the Torrens system is *sui generis* and not directly related to fraud under either the common law or equitable rules. But, although the common law rules have not intruded, it was inevitable that, given the nature of the equitable principles, conduct which might have come within those principles would also come within the definition of "fraud" under the Torrens system. The continued retention of the doctrine of notice in the titles registration system may therefore be seen as the manifestation of the enduring principles of common morality in the

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88. Ibid; 119. See the second report of the Commission on Real Property, 1830 (575), xi. See also the dissenting judgment of Laskin C.J. in United Trust Co. v. Dominion Stores Ltd. [1977], 2 S.C.R. 915.

89. Ibid.

90. Whallan, "The Meaning of Fraud Under the Torrens System", supra, note 85 at 228.

interpretation of statutes.[91]

(d). CANADIAN TORRENS SYSTEM REFORM PROPOSALS.

After a century of operating under the system and the accumulated jurisprudence, the uncertainties and other shortcomings of the system were clear enough, and the practitioners felt that the time was ripe for reform. In 1990, the Joint Land Titles Committee, comprising representatives from the Council of the Maritime Premiers and other common law provinces and territories published a draft *Model Land Recording and Registration Act.*[92] This draft Act is aimed at remedying the noticeable defects under the Torrens system as shown above. An important aspect of this exercise is that it drew representatives from all the common law jurisdictions in Canada. If put into operation, the Act will enhance a unique inter-provincial harmony in title registration.[93]

Under the Model Act, there is a distinction between title registration and interest recording. The latter relates to the filing of caveats. In the opinion of the Joint Committee, the retention of interest recording can be justified on the grounds that not all

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91. Richmond J., in National Bank v. National Mortgage and Agency Co. (1885), N.Z.L.R. 3 S.C. 257 at 263-264 observed that:

> In many instances the rule of equity that notice is fraud must be consentaneous with the principles of common morality; for it may be an act of downright dishonesty knowingly to accept from the registered owner a transfer of property which he has no right to dispose.

The emphasis on common morality will inexorably undermine the security of title intended by the system.

92. Joint Land Titles Committee, Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada, (1990).

93. The model has been put into operation in connection with the registration of the new Metis settlement legislation. See B. Ziff, Principles of Property Law, supra, note 51, at 378, note 113 and accompanying text.

interests are registrable and that the recording of this type of interest ensures facility of transfer.[94] While title registration gives rise to indefeasibility, the recording of caveat affects priorities only.

Section 5.6 of the Model Act states that a person who becomes wrongly registered in the belief that the registration was valid and without knowledge to the contrary should get either the interest or compensation. The Joint Committee is of the view that ordinarily it is more equitable and cheaper to restore the displaced owner and compensate the registered transferee. It was felt that the displaced owner is likely to have a closer connection with the land, and to suffer loss which will be harsher and less easy to quantify than will be the loss of a recent acquirer of the interest.[95] But a court is empowered under the Model Act to confirm the title of the registered purchaser when it is just and equitable to do so.[96]

An attempt was also made to clarify the meaning of fraud under the Model Act. The doctrine of constructive notice remains inapplicable. Actual notice of an unregistered

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94. See the Joint Land Titles Committee, supra note 91 at 14.

95. See the Joint Land Titles Committee, supra, note 91 at 25.

96. According to section 5(6).5 the factors to be considered in making such a grant are:
(a) the nature of the ownership and the use of the property by either of the parties,

(b) the circumstances of the invalid transaction,

(c) the special characteristics of the property and their appeal to the parties,

(d) the willingness of one or both of the parties to receive compensation,

(e) the ease with which the amount of compensation for a loss may be determined, and

(f) any other circumstances which, in the opinion of the Court, may make it just and equitable for the Court to exercise or refuse to exercise its power under the section.

interest does not amount to fraud, and the purchaser is entitled to assume that the proposed transfer is authorised by the owner of that unregistered interest. But a purchaser who knew that there was no authorization, and who knew that the earlier interest would be prejudiced by the latter transaction, would be acting fraudulently.

The Model Act has reduced the number of overriding interests to (a) reservations and exceptions in the original grant of fee simple, inserted expressly or by virtue of statute; (b) municipal tax liens; and (c) leases of less than three years if there is actual occupation that could have been discovered through a reasonable investigation of the property. Other overriding interests may be expressly created by statute.

There is an improvement in the compensation provisions. The Joint Committee recognised that land value increases over a long period of time, and in most cases a long period of time may have elapsed before a deprivation or subordination is discovered. In the view of the committee, the appropriate time for the assessment of the loss is when the claimant brings the claim to the attention of the Registrar General or sues on it. The date of discovery would be a possible alternative, but a more current date, in the Committee's view, is likely to be fairer, and proof of value at that date likely to be easier and more accurate.[97]

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97. See section 7.2 of the Model Act. Note that compensation also include interest and the cost of bringing an action. See section 7.5(2) & 7.6(2).

3.5. THE TORRENS SYSTEM AND THE NIGERIAN LAND TITLES ACT.

It is apparent from the above discussions that the Torrens system is not a perfect system of land registration. The twin concepts of security and facility, which constitute the hub around which the whole system revolves, are not easily realised. Occasionally, the register is found not to be a complete reflection of the existing interests on the land, and the "curtain" has to be parted in order to discover other unregistered interests. Indeed, the uncertainties in the system make it difficult to conclude that the system has met the aims of its founder. But, despite the shortcomings of the system, it minimizes transaction costs and is economically more efficient than any other system of registration.[98] In relation to real property security, it appears to enhance both security of title and facility of transfer more than any other system. It is important to note that in Western Canada, the continued existence of the system may partly be attributed to its suitability, which has remained an essential feature of the system. According to Head:

> A person not acquainted with the Torrens principles might well wonder what magic spell is cast by a system that can at once so diminish an owner's security of title as to permit him to lose land worth millions of dollars and yet elicit from him no attack on the essentials of the system.[99]

The utility of the system has been reinforced by the proposals of the Joint Land Titles Committee which is contained in the Model Act. The proposals will, if adopted, reduce some uncertainties in the system. Although the treatment of "fraud" under the system is not wholly satisfactory and still leaves room for doubts, generally the Model

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98. See J. Janczyk, "An Economic Analysis of the Land Title Systems for Transferring Real Property" (1977), 6 J. Legal Stud. 213. See also R. Risk, "The Records of Title to Land: A Plea for Reform" (1971), 21 U.T.L.J. 465.

99. Head, "The Torrens System in Alberta", supra, note 48 at 1.

Act is a remarkable improvement on the old regimes.

The Land Titles Act of Nigeria, which borrowed a lot from the English system, has some striking similarities to the Torrens system.[100] The Nigerian Act is equally founded on the principles of security, facility, suitability and compensation. But security of title under the Nigerian system is weaker than under the Torrens system.[101] In Nigeria, for instance, there is no principle of immediate indefeasibility.[102]

Apart from a few shortcomings of the titles' registration law in Nigeria, which have been highlighted in this chapter, there is little case to be made for fundamental and urgent reform of the Nigerian land titles registration system. The major problems lie with the substantive land law, which is principally responsible for insecurity of titles and the dilatory nature of conveyancing in Nigeria. Moreover, as the present system of title registration has not enjoyed a wide scale application in Nigeria, it may be unrealistic and premature to recommend a wholesale transplant of the Torrens system to Nigeria. The

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100. A serious accusation that Sir Robert Torrens had to contend with was the allegation of plagiarism against him. It was strongly argued that he borrowed his ideas from the report of the English commission on real property. Torrens vehemently denied this. The allegation of plagiarism is informed by the marked resemblance between the report of the commission and the idea that Torrens proposed, which turned out to be the present Torrens system. Thus according to Di Castri, Torrens was the first person who obtained letters patent to indissolubly link his name with the system. See Di Castri, Registration of Title to Land, supra, note 49 at 1-14; Whallan, "The Origin of the Torrens System and its Introduction into New Zealand", in Head ed., The New Zealand Torrens System Centennial Essays, supra, note 51.

Di Castri concludes that the Land Registration Act, 1925, although not modelled on the Torrens system, is fundamentally similar to it. See ibid; at 1-21.

See also P.A. Oluyede, "The search for Effective Registration in Nigeria: A Comparative Analysis." 6 Nigerian Lawyers' Quarterly 11 at 22.

101. Section 48 of the Land Titles Act states that a registered title is only guaranteed after the date of registration. Registration does not cure former defects in title. This provision has been criticised as being highly deficient. See Butler Lloyd Ag. C.J. in Animashawun v. Mumuni (1941), 16 N.L.R. 59.

102. Contrast Frazer v. Walker [1967], 1 A.C. 567. But the Nigerian Act provides for compensation. See note 39.

application of the 1935 Act, which is the operative Act, is still limited to Lagos State. It should be noted that the Registered Land Act, 1965, which was enacted to confer greater security of title to and interests in land was never put into operation because of the costs of its implementation.[103]

Until recently, there was little incentive to alienate land or any interests in land, which were mostly group-owned. Because of the initial apathy to alienation of land, and the symbolic nature of most land transfers, the people had no use for land registration. Again as security of titles to land is fragile under the customary land tenure system, most land-owning families would be reluctant, if not opposed, to bringing their lands under the Act, where adjudication of titles and boundaries will be inevitable.[104] This is clearly so as lands in Nigeria are not properly and completely surveyed. The existence of most of these problems were equally responsible for the early failure of the registration of land in England.[105]

There is hardly any justification for the provision on contributory negligence with regard to claims for indemnity. The assurance fund provision will remain largely illusory, as most claims for indemnity from the insurance fund will be contested by the

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103. The 1965 Act is rarely referred to in Nigeria as there has been no attempt to proclaim it since 1965. The Act was intended principally to register all titles to land and interests affecting land in Nigeria. By this method, it was hoped that the uncertainties concerning land in Nigeria would be reduced since, with the exception of some overriding interests, there would be systematic adjudication and registration of all lands. See note 30 supra.

104. P. Oluyede, "The Search for Effective Registration in Nigeria: A Comparative Analysis", supra, note 100 at 20. One of the underemphasised reasons for the success of the Torrens system in Western Canada is the presence of well surveyed lands before the introduction of the system.

105. D. Whallan, "Immediate Success of Registration of Title to Land in Australasia and Early Failure in England", supra, note 51 at 420-421.

registrars and very few claims will be successfully made without a finding of negligence.[106] The provision of the Model Act in Canada on compensation is equitable and may provide suggestions for reform.

Because of the intractable doctrine of notice, the priority given to the filing of caveat is eminently sensible. This will reduce the claim that the person dealing in registered land had notice of the unregistered interest and sought to defeat it. Any claimant who has the opportunity to protect his priority by filing a caveat but fails to do so will be estopped from complaining if his interest is subsequently subordinated or defeated. Most of the proposals in the Joint Committee's report may be helpful to Nigeria. When all these suggestions are put in place, there will be greater security of title and facility of transfer. This will enhance the utility of real property security in Nigeria.

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106. It should be noted that the claims on the insurance fund in Nigeria are not as extensive as the case of Canada. This is because the registered owners of land are entitled only to the surface rights of the lands, and their rights do not extend to the minerals in the land. As a result of statutory provisions in Nigeria the ownership as well as control of all minerals and mineral oils in, under and upon any lands in Nigeria is vested in the State. See section 3(1) & (2) of the Minerals Act 1945, Amendment Act, 1948, which repealed and re-enacted the Minerals Act 1916. See also section 21 of the State Lands Act, 1918. See generally, T. Elias, Nigerian Land Law (London: Sweet & Maxwell, 1971) at 34-37.

Chapter 4.

LEGAL CONSTRAINTS ON COMMERCIAL SECURITY IN NIGERIA.

4.0. INTRODUCTION

The taking of security upon the grant of a loan by a creditor is not foreign to Nigerian laws. Prior to colonialism, customary law was quite conversant with pledge and mortgage, which are forms of security interests.[1] However, because customary law was not sophisticated enough, it could not cater to the novel security devices that came at the dawn of industrialisation. It follows that most of the laws on secured transactions are derived from the English laws on the subject because of the latter's historical connection to Nigeria. Accordingly, the interpretations of the Nigerian laws are linked to English jurisprudence.

Large scale lending on the security of personal property is fairly recent in Nigeria and, just as in most developing economies, its growth and importance have suffered as a result of several complexities. Traditionally, lenders would prefer security in real property that new borrowers cannot afford. Therefore, it is imperative that the old devices be elasticised and new ones invented to meet with novel collateral.[2] The first attempt to deal with the new form of security was the introduction of the English Bills

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1. See S.N. Obi, The Ibo Law of Property (London: Butterworths, 1963); T.O. Elias, Nigerian Legal System (London: Routledge & Kegan Paul Ltd., 1963) at 214 et seq.

2. Grant Gilmore, "The Secured Transaction Article of the Commercial Code", (1951) Law and Cont. Prob., 27 at 29.

of Sale Act 1878, amendment Act 1882.[3]

Initially the position of the law was that to leave a mortgagor of chattel in possession was a clear pointer to potential fraud. This act may enable a mortgagor to execute a secret bill of sale with the collusion of a friend, so as to stand as a bridge between the debtor and his unsecured creditors. This position lends credence to the suspicion in which secret bills of sale, whether absolute or by way of security, were formally held.[4] In order to protect vulnerable creditors, the "reputed ownership" of most Bankruptcy Acts provided that all goods, which at the commencement of bankruptcy are in possession of the true owner under such circumstances that he is the reputed owner thereof, shall pass to the trustee in bankruptcy and thus be divisible among the general creditors.[5] The Bills of Sale Act, 1878, was aimed at softening the hardship of this type of legislation by providing that goods comprised in a bill of sale duly registered under the Act should not "be deemed to be in the possession, order or disposition of the grantor" for the purposes of the Bankruptcy Acts.[6]

But there was a shift in policy in the amendment Act of 1882. Contrary to the preceding Act, which sought to protect creditors against fraudulent debtors, the object

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3. This legislation, which predates 1900, is a statute of general application. However, the statute has been adopted by the respective states that constitute the federation of Nigeria. For the purposes of this work reference will be made to the Bills of Sale Law, c.27, Laws of Bendel State, Nigeria, 1978. In this study a bill of sale, unless the context otherwise requires, refers to a bill of sale by way of mortgage and not an absolute bill of sale.

4. Waldock, The Law of Mortgages (London: Stevens, 1950) at 75.

5. Waldock, ibid, 76-77. See the English Bankruptcy Act of 1914.

6. See s.20 of the Bills of Sale Act, 1878.

of the latter Act was to protect needy debtors from unscrupulous creditors.[7] It is arguable that mortgages of personal chattels are commonly executed in circumstances of serious financial embarrassment, if not actual insolvency, when the debtor is at the mercy of the extortionate creditor or moneylender.[8] This reasoning is predicated on the fact that at its inception bills of sale legislation was usually so complicated as to be incomprehensible to the debtor and so stringent as to give him faint hope of recovering his property. Thus in the words of Lord Herschell:

> It was to prevent needy persons being entrapped into signing complicated documents which they might often be unable to comprehend and so being subjected by their creditors to the enforcement of harsh and unreasonable provisions. A form was accordingly provided to which bills of sale were to conform, and the result of non-compliance with the statute was to render the bills of sale void even as between the parties to it.[9]

This debtors-protection policy of the Act was responsible for the detailed provisions in the Act, which must be mechanically complied with by the grantee of the bill. The cumbrous nature of these requirements is largely responsible for the failure of the Act.

The Bills of Sale Act rather than facilitating the granting of credit actually scuttled it. The Act's requirement of accuracy in the description of the collateral in the schedule,

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7. Waldock, supra, note 21 at 78.

8. Waldock, ibid., at 79. This reasoning has been criticised by Sykes, who contends that the taking of a bill of sale is not necessarily "a whiff of bankruptcy" in the air as such. However, he agrees that the remark may hold good in general, in relation to the general mortgage bill of sale given over chattels used in trade or business in urban commercial setting. See E.J. Sykes, The Law of Securities (Sydney: N.S.W. Law Books Co., Ontario: Agincourt, 1986) at 529. It seems that in the province of Manitoba bills of sale are taken by creditors as a matter of course in business transactions.

9. Manchester, Sheffield, etc, Rly. Co. v. North Central Wagon Co. (1888), 13 A.C. 554 at 560. See also ss. 8, 10 and 14 of the Bills of Sale Law, 1976, Bendel State.

affidavit of good faith, and witnessing are very difficult, and, sometimes, make compliance problematic. Registration under the Act is a hidden trap for unsophisticated creditors[10] as it is demanding, technical, and increases the costs of secured transactions. For instance, an error in the description of the collateral or non-compliance with the affidavit of good faith are grounds to void the security. Although much may be said for the Act's attempt to protect creditors, the theory which led to the enactment of this Act is ancient; as the actual physical possession of chattel does not necessarily leave the world at large with the belief that the debtor is the owner. Neither can the argument of debtor protection be held valid, as it may no longer be necessary in the light of the doctrine of mortgage law, which gives the mortgagor the equity of redemption.[11]

In Nigeria the giving of a bill of sale is associated with financial difficulty. It is therefore not surprising that credit-worthy debtors and genuine lenders avoid this type of secured transaction. The rigidity of the Act has enabled creditors to devise other means of obtaining security.[12] The avoidance of the Act was made partially possible by the distinction made by the court between hire-purchase and bill of sale. In 1895, the House of Lords held that hire-purchase agreements are not within the definition of the Bills of Sale Act.[13] As a result of this decision parties intending to avoid the problems

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10. It has been observed that the statutory form of a security bill of sale under the Bills of Sale Act 1878 has 14 characteristics. See S. Davies, "The Reform of the Personal Property Security Law: Can Article 9 of the U.S. Uniform Commercial Code be a Precedent?." (1988), 37 I.C.L.Q. 469 footnote 23 and accompanying text.

11. Sykes, The Law of Securities, supra, note 8 at 818.

12. M. Lawson, "The Reform of the Law Relating to Security Interests in Property." (1989) J. Bus. L. 287 at 291.

13. McEntire v. Crossley [1895], 1 K.B. 32.

associated with a bill of sale arrange a secured transaction to assume the form of sales and lease back. To distinguish this form of transaction from a bill of sale the courts have considered the intention of the parties. This is done by examining the document to the transaction, in the light of the surrounding circumstances, to determine whether it is a secured financing arrangement which merely uses the language of sale and lease back. If an examination of the whole transaction discloses a security transaction the transaction will be regulated by the Bills of Sale Act. But if the court concludes from all the available evidence that a hire-purchase arrangement was intended, then the transaction will be upheld. Thus the intention of the parties is now the primary consideration of the courts.[14] This distinction has greatly undermined the social policy that led to the enactment of the Act, which was to protect creditors and needy debtors. Because of the shortcomings of the Act, it has been argued that the social evil aimed at by the bills of sale legislation is now non-existent or, if existent, beyond legislative control.[15]

The attempt to distinguish bills of sale from hire-purchase agreements has created uncertainty in the law. Because of the remarkable similarity between the two transactions, it is very difficult, and sometimes impossible, to advise with any degree of confidence and certainty whether a particular transaction will be approved or voided by the courts. The hardship of the law in this regard is felt by the innocent third parties who may buy goods from a hirer without knowing that the goods are subject to a hire-purchase

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14. See Re Lovegrove [1935] Ch. 462 at 495-496. See generally, A.L. Diamond, "Hire-Purchase Agreements as Bills of Sale", (1960), 23 M.L.R. 397, 517-521.

15. Sykes, supra note 25 at 531.

agreement.[16]

4.1(a). THE BILLS OF SALE LAW AND UNINCORPORATED BUSINESSES.

Apart from the technical and cumbrous nature of the Bills of Sale Law already referred to, an additional limitation of the law is its effect on unincorporated businesses. Section 10 of the law[17] provides:

> Save as hereinafter mentioned, a bill of sale to which this part applies shall be void, except as against the grantor, in respect of any chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill.[18]

It is apparent from this section that the law prohibits the granting of any bill to cover after-acquired goods by any unincorporated business. This is a serious limitation of the law as fluctuating inventory constitutes a substantial form of security for creditors.[19] The consequence of this legislation in Nigeria is that most small firms, in order to receive credit facilities from financiers must be incorporated so that the security for the debt will cover after-acquired property. Although incorporation gives limited liability and

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16. Diamond, "Hire-Purchase Agreements as Bills of Sales"' supra, note 14 at 535. See also R. Goode and L. Gower, "Is Article 9 of Uniform Commercial Code Exportable?: An English Reaction", in Ziegel and Forster ed. Aspects of Comparative Commercial Law (Montreal: McGill University; New York: Oceana Publication Inc., Dobbs Ferry, 1968) at 317.

17. Bills of Sale Law, c.27, Laws of Bendel State, Nigeria 1976.

18. By s.17, it is provided that debentures issued by any mortgage, loan or other incorporated business, and secured upon the capital stock or goods, chattels and effects of such company are exempted from the operation of this part of the law.

19. The repealed Canadian Bills of Sale Laws were however, seen as exceptions, as they permitted a chattel mortgage covering after-acquired goods, enabling future inventory to be secured by a bill of sale so long as there is proper and adequate description, without any need for a fresh bill of sale when new inventory comes into stock. See Goode and Gower, "Is Article 9 of the Uniform Commercial Code Exportable?: An English Reaction", supra, note 16 at 306.

other benefits to small firms, the requirement of incorporation has, nonetheless, been a difficult problem for most small business enterprises. It is noteworthy that resort to personal property is only had when the debtor has no real or sufficient real property to offer as security for a loan.[20] If the debtor has real property to secure the loan, the difficulties and publicly registered disclosure associated with the bills of sale legislation will be avoided. However, as the contrary is often the case, the debtor, in order to obtain the credit facility, must be incorporated so that the security in the form of a floating charge will cover after-acquired property.[21]

The difficulty faced by those desirous of obtaining credit on the security of their personal property can be appreciated when the provisions of the Companies Act are considered. The Nigerian Companies Act provides that the authorised minimum share capital of a private company is N10,000, while that of a public company is N500,000. Not less than 25 per cent of the authorised share capital must be issued and paid up.[22] This requirement is additional to the prohibitive cost of incorporating a company in Nigeria, which is beyond the limit of most sole traders. Further, a borrower in financial straits may not be patient with the tedious and dilatory process of incorporating businesses in Nigeria. The manual name search and the various duties that must be paid

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20. See Johnson, "Adding another Piece to the Financing Puzzle: The Role of Real Property Secured Debt" (1991), 24 Loy.L.A.L.Rev. 335.

21. This position of the law in Nigeria is different from that of Canada, as in the latter case, apart from the practice of granting a chattel mortgage covering after-acquired property, manufacturers and certain other classes of borrowers, whether incorporated or not, could grant security in simple form in favour of a bank under section 427 of the Bank Act, S.C. 1991, c.46 (which was section 178 of the Bank Act, R.S.C. 1985, C. B-1 and formerly, s.88 of the Bank Act, R.S.C. 1967, c.87).

22. See s.27(1) (a) & (b) of the Companies and Allied Matters Act, 1990. See also s.99 of the Act, which talks about minimum share capital.

are enough to frustrate a small scale borrower. Thus a sole proprietor who incurs the costs of incorporating a business may, ultimately, be left with no working capital to run the company after incorporation. By the anomalous result of the Bills of Sale Act an incorporated business finds it easier to borrow than an individual proprietorship or partnership does, as the company, but not the individual or partnership, can grant security over its inventory.[23] Accordingly, in Nigeria the aspiration of small business outfits is to be incorporated in order to obtain credit facilities from banks and other financial institutions. This aspiration is apart from the rather uninformed belief of some lay entrepreneurs that it is prestigious to have a limited liability company.

Another area where the laws appear to be complicated is in relation to the Act passed to protect illiterates.[24] The object of this Act is to ensure that a document which records a transaction to which an illiterate is a party is an accurate record of the parties' intent to the transaction and is executed by the illiterate with a clear comprehension of its import. The essential part of the Act requires a writer of a document to which an illiterate person is a party to stipulate that the document is written at the request of the illiterate, or on his behalf, and there must be a statement to the effect that the document is an accurate record of the intent of the parties. Furthermore, it must be stated that prior to the document being signed by the illiterate person, or his mark being affixed thereto, it was read over and explained to him and that the signature or mark was made by such

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23. See Goode and Gower, "Is Article 9 of the Uniform Commercial Code Exportable?: An English Reaction", supra, note 16 at 306.

24. Illiterates' Protection Act, c.83 Laws of the Federation of Nigeria 1958. A fuller discussion of this statute is contained in chapter 1 of this study.

a person.[25] It is equally provided that failure by the preparer of the document on behalf of an illiterate to insert his name and address on the document is a criminal offence punishable with a fine of N100 or imprisonment for six months. An illiterate person under the Act has been defined as a person who is "ignorant of letters or literature" or is "without book learning or education."[26]

One remarkable similarity between the Illiterates' Protection Act and the Bills of Sale Law is the requirement in s.14 of the latter, which states that every bill of sale shall be attested by one or more witnesses, not being a party or parties thereto, before registration; otherwise such a bill of sale shall be void in respect of the personal chattel comprised therein. It should be noted in this regard that the effect of non-compliance with the Illiterates' Protection Act is that the document creating the transaction is voidable at the instance of the illiterate person in relation to any legal right created between him and the writer of the document.[27] This implies that a creditor who is granting credit on the security of personal property to an illiterate debtor must ensure that

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25. See s.3. It may be argued that one of the reasons for the mechanical compliance with this Act is the anxiety of the illiterates concerning written documents. It is a historical fact that most of the treaties entered into between some Nigerians and the imperial power were never explained to the former, who were mostly illiterates. It happened that some of the people that signed the treaties gave what they did not own. For example, Article 1 of the Treaty of Cession of 1861 provides:

> I, Docemo, do, with the consent and advice of my Council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the Port and Island of Lagos, with all the rights, profits, territories and appurtenances whatsoever thereunto belonging...

The members of the Council who purportedly consented to the cession of their land later protested the Treaty. Under their customary law, neither King Docemo nor his Council own the land, and so could not give what they did not own. But the Treaty was construed otherwise. See generally, T. Elias, Nigerian Land Law (London: Sweet & Maxwell, 1971) at 8-9.

26. P.Z Ltd v. Gusau (1961), 1 All N.L.R. 242 at 244, per Taylor F.J.

27. Amiru v. Nzeribe (1989), 1 N.W.L.R. 755., U.A.C. V. Edems and Ajayi (1958), N.R.N.L.R. 33 at 34.

apart from the technical and rigid requirements of the bills of sale law, efforts should also be made to comply with the provisions of the Act protecting illiterate persons. This latter requirement exacerbates the already demanding and obnoxious bills of sale legislation.

As a result of all these difficulties the law is made conceptually complex, obscure and commercially unworkable.[28] These problems may also account for the present demands by creditors that those seeking credit should attain the status of incorporated business. It may be that this status, in addition to enabling the creditor to obtain after-acquired property of the debtor, avoids the traps of the Illiterates' Protection Act, as the corporation is now a legal entity separate from the illiterate person.

(b). HIRE-PURCHASE AND CONDITIONAL SALE AGREEMENTS.

Hire-purchase agreements were devised to avoid some of the problems inherent in the granting of credit and security - especially in relation to the bills of sale legislation. However, because hire-purchase involves a confusion between the concepts of sale and security it has been described as a "monstrosity."[29] Hire-purchase legislation has not succeeded in settling the difficulty of the third party who is affected by the transaction. This position is complicated by the legal distinction between hire-purchase and conditional sale agreements. In conditional sale agreements, title in the goods does not pass to the buyer until the purchase price has been paid in full, but the

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28. Allan, "Security: Some Mysteries, Myths and Monstrosities" (1989), Monash U.L.Rev. 341.

29. Sykes, The Law of Securities, supra, note 8 at 6.

Sale of Goods Act, 1893, and the Factors Act 1889, empower a buyer in possession to, in permitted circumstances, pass title to a third party even if the title has not vested in the buyer. This power of the buyer in possession to pass title to a third party led to the creation of hire-purchase agreements. In a hire-purchase agreement goods are let on hire and the hirer, although given the option to purchase, is under no obligation to do so. According to the courts, a hire-purchase agreement is excluded from the regulation of the Factors Act and the Sale of Goods Act because the hirer is considered not to have agreed to buy the goods, and cannot pass title to a third party without the consent of the owner. But from the consumer perspective, the traditional distinction between a conditional sale and a hire-purchase agreement becomes hazy as a result of the finance houses' practice of imposing on a hirer who terminates his agreement the obligation to make some payment by way of depreciation or compensation. The courts might have taken the view that the introduction of such a provision converts a hire-purchase agreement to a conditional sale agreement, but instead the problem is tackled in a different way by applying rules against penalties.[30]

The aim of the two forms of security interests is to avoid the technical aspects of the law. But the commercial nature of the transactions is similar, and the third party may not always have a way of knowing the differences between the separate forms of security. The differences created by the law result in unfairness in treatment. In the case of conditional sales the seller or supplier is entitled to seize the goods from the buyer if the latter fails to complete the purchase price and the buyer cannot claim back the

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30. Goode and Gower, "Is Article 9 of the Uniform Commercial Code Exportable?: An English Reaction", supra, note 16 at 304.

payment already made or any surplus resulting from resale. In hire-purchase agreements a hirer has an option to buy and the payment made to the owner is for the use of the good. As the two forms of security interests are not usually registered, they create problems for third parties who have no way of knowing whether the apparent owner has or has not the power to give good title. At present, the taking of security may be likened to the early development of the common law where the availability of legal remedies would depend on the form of action taken. For the illiterate and other lay borrowers, there is no way they can tell the difference between hire-purchase and conditional sale agreement, or the security of a chattel mortgage. Their rights and liabilities are determined by the particular instrument that is selected.[31] Even more obnoxious is the effect on third parties acquiring the goods bona fide, whose positions are made to depend on the form of a security agreement of which they had no knowledge or notice.

(c). THE ROMALPA CLAUSE.

The discussion on conditional sales shows that suppliers take security in the goods supplied until the final payment is made by the buyer. But because of some legal loopholes in some of the security devised, creditors and suppliers are continuously evolving new forms of security. As Goode aptly stated:

> As difficulties arose with one form of security practitioners resorted to another, and, finding it worked, adopted it. The evolution of security law thus reflects the practitioners' response to judicial decisions and in turn the attitude of the courts

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31. R. Goode, "The Modernisation of Personal Property Security Law" (1984) 100 L.Q.R. 234 at 239.

towards the new instrument prompted by that response.[32]

This remark is particularly true in respect of the Romalpa[33] clause in sales, which is quite useful in insolvency cases, where it gives the seller priority over other creditors. The clause enables a supplier to reserve title to his goods until the final payment is made. It should be observed that the effectiveness of the reservation of title clause was first established in the nineteenth century, but, although the technique was frequently used in the continent, it became common in Britain and other common law jurisdictions only after the decision in Aluminium Industrie B.V. v. Romalpa Aluminium.[34]

The decision in the *Romalpa* case has had a pervasive influence in most common law jurisdictions. In Nigeria it is one of the most potent forms of security interests taken by suppliers of goods. The use of the reservation of title clause, which is often all-embracing, has created a situation where the secured creditor is over-protected to the detriment of other creditors and third parties.[35]

There have been attempts by courts to contain the extensive use of reservation of

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32. R. Goode, "Security: A Pragmatic Conceptualist's Response" (1989) 15 Monash U.L.R. 361 at 362.

33. The name "Romalpa" is derived from the decision of the court in Aluminium Industrie B.V. v. Romalpa Aluminium [1976], 2 All ER 552.

34. Ibid. See R.A. Pearce, "Reservation of Title on the Sale of Goods in Ireland", (1985), 20 Irish Jurist 264; B. Collier, Romalpa Clauses: Reservation of Title in Sale of Goods Transactions (Sydney: The Law Book Company Ltd., 1989) at 1-5. The first case where reservation of title clause was recognised was McEntire v. Crossley Brothers Ltd. [1895], A.C. 457.

35. As a distinguished writer in this field has observed:

> Receivers and liquidators of the debtor company, arriving at their desks on a bright Monday morning would find that an apparently healthy cash balance at the debtor company's desk, together with a substantial amount of receivables was all so much a waste of paper - everything belonged to some wretched supplier belatedly unveiling his new secret weapon.

See Goode, "The Modernisation of Personal Property Security Law", supra note 31 at 248.

title clauses by sellers. As a result of the injustice caused to creditors and third parties, courts have formed the view that the facts of each case must be specifically determined to know whether the clause permits the reservation in issue.[36] In response to the recent strict judicial interpretation of the Romalpa clause, it has become increasingly common for an extended reservation of title clause to be used. These clauses purport to apply not only to the original goods supplied but also to any product into which the goods are incorporated or converted.[37]

A consequence of the reservation of title clause is that because the buyer is not in law the owner of the goods until full payment is made, the reservation is not susceptible to registration under the bills of sale laws or the Companies Act. This makes it impossible for a buyer of the product or creditor of the seller to know whether the products are in any way encumbered before buying or giving credit. In the event of insolvency or bankruptcy, the creditors will be forced to queue behind the supplier, who more often than not leaves them with nothing with which to recoup their losses.[38]

4.2. REGISTRATION OF CHARGES AND PRIORITY PROBLEMS.

Another unsatisfactory aspect of security law in Nigeria can be found in the

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36. See Borden (U.K.) Ltd. v. Scottish Timber Product Ltd. [1979], 3 All ER 961. See also Re Peachdart Ltd. [1983], 3 All ER 204.

37. Clough Mill Ltd. v. Martin [1984], 3 All ER 982. See also Pearce, supra note 51.

38. See Goodhart and Jones, "The Infiltration of Equitable Doctrines into English Commercial Law", (1980), 43 M.L.R. 489 at 501.

However, it has been argued that no interest can be claimed by a Romalpa seller over property manufactured from goods supplied by him until it has been registered as a floating charge. See A.M. Tettenborn, "Reservation of Title: Insolvency and Priority Problems", (1981), J. Bus. L. 173 at 175.

Companies Act. Section 197, which provides for the registration of company charges, does not make provision for the determination of priorities. The section provides that every charge created by a company shall be void in relation to the security on the company's property or undertaking, unless the prescribed particulars of the charge together with the instrument creating the charge are delivered for registration within 90 days after the date of its creation. By this provision, any prospective lender who searches the register without finding any registered security may discover to his dismay, after giving credit, that there was a prior security on the property of the company, that had not been registered when he made his search, the registration period of which had not expired when he gave his security; the prior security being subsequently registered. This provision is anything but fair to the subsequent creditor; in the event of insolvency his interest will be subordinated to that of the first lender. Even if the lender is prudent and waits for 90 days after registration before madking its advance this will cause excessive delay in business transactions.

Also, even though it is customary to include negative pledge clauses in debentures creating floating charges, it is apparent in the Companies Act that there is no provision for giving notice of negative pledge and subordination agreements. According to Goode, in England, the negative pledge is usually referred to in the filed particulars relating to the security but there is no statutory warrant for this, and its effect against a third party who does not search is unclear.[39]

With these deficiencies in the Act a fraudulent debtor may obtain successive credit

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39. Goode, "The Modernisation of Personal Property Security Law", supra, note 31 at 239.

on the same collateral without disclosing this position to the creditors. Unfortunately, the creditors would have searched the register without finding any registered security or negative pledge, yet their interests are subordinated to the prior lender who registers within the statutory time limit. The limitations of the priority rules under the present legal regime derive from abstract rules of property law, which have little regard to the commercial setting of the particular transaction.[40]

Although no formal inquiry has been made as to the commercial implications of the present legal regime on secured transactions, it is obvious that the laws are highly defective. Nigeria is one of the common law jurisdictions where law lags behind commercial realities and necessities. It may be inferred that the cost of obtaining credit is very high because of the non-availability of credit and the bewildering range of the laws that regulate the granting of credit. The slim chance of realising his credit in the event of the debtor's default is the creditor's price for giving credit under the present regime.

Just as land has proved to be a fragile security under the Land Use Act,[41] creditors and their legal advisers (as under real property security) have devised means of granting and realising their securities. In some instances, professional debt collectors have been employed to collect debts in non-legal manners.[42] Some proprietors have

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40. Goode, ibid, 240.

41. The problems of real property security in Nigeria have been discussed in chapter 2.

42. This includes issuing subtle threats to the debtors, and in some cases the embarrassment caused to debtors by having their names published on the pages of national newspapers may suffice to make them pay.

been forced to borrow and incorporate companies to enable them obtain credit from banks. But it has been found that incorporation is no panacea to the legal problems of credit and security. The rules devised to regulate priority conflicts between the secured party and third parties remain unfair and incomprehensible, while the present laws remain highly defective and fail to provide solutions to common problems. Adherence to form over substance has never made good law.

4.3. THE CONSTITUTION AND COMMERCIAL LAW.

The constitution plays a significant role in ensuring the effectiveness of the laws of a country. It is arguable that one of the problems militating against the introduction of commercial laws that may provide for an efficient legal regime of security interests in Nigeria arises from the very nature of her federalism. There is a great imbalance of legislative powers between the federal or central government and the states. The Nigerian constitution empowers the federal government to legislate, exclusively, on commercial matters.[43] This has led to the argument that the over-concentration of legislative powers in the federal government has had adverse impacts on the commercial and economic growth of the country.[44]

As has been discussed, most banks and financial institutions require potential borrowers to incorporate a company before they obtain credit so that the lenders will

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43. See s.4(2) of the Constitution of the Federal Republic of Nigeria, 1979; s.4(2) & (3) of the Constitution of the Federal Republic of Nigeria, 1989.

44. J.O. Anifalaje, "Constitutional Impediments to the Progress of the Nigerian Commercial Law and the Economy" in Omotola and Adeogun ed. Law and Development (Lagos: University of Lagos Press, 1987) at 44-45.

avoid the limitations of the Bills of Sale laws. However, the power to incorporate companies, whether their activities are local, inter-state or national, is vested in the federal legislature.[45] The presence of only one company registry to serve the whole country is responsible for the dilatory and costly nature of company incorporation - especially for those who are far removed from the location of the company registry.[46]

The framers of the Nigerian constitution, by learning from the experience of the American Constitution in force, favoured a centralised legal control of commercial matters because of the fear of the problems associated with the lack of uniformity of laws in the United States, which proceeded from the Tenth Amendment of the constitution.[47] It is probable that the fear of not having uniform laws in a country with such a heterogeneous group of people might have compelled the makers of the Nigerian constitution to expand the already overabundant borders of the legislative power of the central government, at the risk of the legal, economic and social progress of the entire country.[48]

A close look at other countries with a federal system of government will reveal the legislative empowerment of the state, regional or provincial government in relation

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45. This is provided for in the second schedule to s.4 of the 1989 constitution.

46. See Anifalaje, "Constitutional impediments to the Progress of the Nigerian Commercial Law and Economy", supra note 44.

47. For a case where the legal friction between the federal government and the state was tested in the United States, see McCulloch v. Maryland 4 Wheat 316 (1819). See also E.N. Griswold, Two Branches of The Same Thing (Maccabean Lecture in Jurisprudence of the British Academy, 1962) referred to by Anifalaje, supra note 60 at 46.

48. Anifalaje, "Constitutional Impediments to the Progress of the Nigerian Commercial Law and the Economy", supra, note 44 at 50.

to commercial matters. It is argued that federalism must assume a certain reality in the states' separate identities in economic matters.[49] For instance, in Canada s.92(11) of the Constitution Act, 1867, vests the provincial legislatures with the power to make laws for the incorporation of companies with provincial objects. The provisions of this section may avoid the high cost of incorporating companies in Nigeria. Moreover, the power of the provinces to make laws in relation to "Property and Civil Rights in the Provinces", ensures that the provinces have sufficient field to legislate on commerce and the like, for the general economic growth of the provinces and the entire country.[50]

It is important to note that the provinces are empowered under the "property and civil rights" head to make laws covering secured transactions. The power of the provinces to legislate on commercial matters obviously creates problems with regard to the uniformity of the laws, which is enjoyed in Nigeria where the central government has exclusive legislative jurisdiction on this matter. But it can be argued that the disadvantage of lack of uniformity of laws is out-weighed by the advantage of enabling the provinces to legislate on this essential aspect of the economy -commerce. It is also to be observed that the difficulty with any attempt in Canada to have a uniform legislation in this area is the presence of two legal systems in the country - the civil law system in the province of Quebec and the common law system in other provinces. One benefit of the provincial

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49. R. Whitaker, Federalism and Democratic Theory (Kingston, Ontario: Institute of Inter-Governmental Relations, Queen's University, 1983) at 38-39.

50. The provision on property and civil rights has been described by Hogg to be by far the most important of the provincial heads of power. He also argues that the provincial residuary power in s.92(16) over "all matters of a merely local or private nature in the province" has turned out to be relatively unimportant, because the wide scope of "property and civil rights in the provinces" has left little in the way of a residue of local or private matters. See P.E. Hogg, Constitutional Law of Canada (Toronto: Carswell, Thompson Professional Publishing, 1992) at 537, 540.

legislative powers is that a province that blazes a trail might encourage others to follow.[51]

The strength of the federal parliament under the Nigerian constitution is quite obvious in the exhaustive provisions of the exclusive legislative list of the federal parliament. With these provisions there is inevitable whittling away of the states' legislative powers, which results in a gradual but steady shift towards unitary system of government in a federal set up.[52] Summarising the implications of the present constitutional hindrance, Anifalaje observed:

> Incidentally, it would seem that there is a significant correlation for instance, between the stupendous economic growth together with the rapid development of commercial laws and the Tenth amendment of the United States on the one hand, and between the relative economic stagnation together with the lack-lustre development of commercial laws and the exclusive central control of commerce in Nigeria on the other hand.[53]

4.4. CONCLUSION.

The problem of the creation, categorisation, registration, and enforcement of security interests in personal property is not a novel development. The promulgation of the Bills of Sale Act, 1878, was one of the earliest attempts to curb the potential for fraud that is inherent in allowing a mortgagor of goods to be in possession. The Act thus

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51. For instance, in Canada, since the enactment of the Personal Property Security Law in the province of Ontario in 1963, which came into effect in 1976, most of the common law provinces in the Dominion have followed this eminently sensible example and other provinces -including Quebec - are considering legislation along this line. For a further discussion on this see chapter 6 *infra*.

52. See J.O. Akande, "Legislatures and their Powers" in National Association of Law Teachers Proceedings on Law and Development: The Nigerian Draft Constitution (1977) at 41-42; Anifalaje, supra note 61 at 59.

53. Ibid, at 63. The reference to the United States will apply to Canada with equal force.

provided a system for the public registration of non-possessory chattel mortgages. Since this period there has been a gradual judicial and statutory development of the common law in relation to secured transactions. However, there still remain difficulties and complexities within the system, which undermines confidence in the effectiveness and ability of the system to operate equitably.[54]

In the case of Nigeria, the complex state of the law on personal property results partly from her heavy reliance on the English system of chattel mortgages. The inherent confusion and technicality of the English law coupled with the peculiar limitations of the Nigerian laws have combined to create a chaotic legal regime on personal property. Consequently, the laws are observed more in breach than in compliance. The apparent order amid this chaos[55] is a tribute to the ingenuity of businessmen and lawyers who create quasi-security. However, the effectiveness of their ingenuity is always tested when the debtor is insolvent. The cause of the present difficulty is that the courts have placed unnecessary emphasis on the form of the securities rather than on their substance. In the United States the realisation of this problem led to a complete overhaul of the laws on personal property security.[56]

Canada seems to be the only country in the Commonwealth jurisdictions that has almost succeeded in extricating herself from the chaos that is the common law on

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54. M. Lawson, "The Reform of the Law Relating to Security Interests in Property", supra, note 12 at 287.

55. See Chen, Qian and Scromeda, "Order Amid Chaos: Security Devices for Credit Transaction in China", (1990) 86 International Lawyer 85.

56. Grant Gilmore, "The Secured Transactions Article of the Commercial Code" (1951) Law and Cont. Problems at 27.

personal property security. The result is a conceptual unification, simplicity and effectiveness of the law for commercial purposes.[57] Following the leading example of Canada, there have been continuing calls in some Commonwealth jurisdictions to reform the present perplexing laws on secured transactions.[58] That the Nigerian laws on this matter are defective is not in dispute, but whether Nigeria should join others in the reform process will be seen when the thrust of the new legal regime is considered.

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57. J. Ziegel, "The Modernization of the Canadian Personal Property Security Law", (1981), 31 U.T.L.J. 249; Ziegel, "A New Deal in Personal Property Security Law", (1963) 6 Can. Bar Rev. 374.

58. Goode, "The Modernisation of Personal Property Security Law", supra note 2., J. Farrar, "New Zealand Considers a Personal Property Security Act", (1990), 16 C.B.L.J. 328.

Chapter 5.

THE FLOATING CHARGE.

5.1(a). ORIGIN AND NATURE OF THE FLOATING CHARGE.

The rigidity of the common law was a major constraint on the growth of commerce and industrialisation in the nineteenth century. The origin and growth of the floating charge as a form of security can be linked to the infiltration and expansion of equity into commercial transactions in response to the rigidity of common law. The floating charge is one of the remarkable subtle creations of equity, which has remained conceptually elusive.[1] At common law it was recognised that security for credit should be taken on fixed assets, which were then seen as commercially sound and permissible for raising loans. This position of the common law is explicable on various grounds. First, quite unlike equity, common law did not permit assignment or mortgage of debts owed to a debtor-company. Moreover, the present and circulating assets of a company were always changing, and the common law maintained that mortgages or pledges should be of land or goods owned by the company and ascertained at the time of the creation of the mortgage or pledge.[2] It is obvious that this position would create difficulty for companies whose sources of security were constantly changing assets. Floating charges,

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1. R. Goode, The Legal Problems of Credit and Security (London: Sweet & Maxwell, 1988) at 46.

2. R. Pennington, "The Genesis of the Floating Charge." (1960), 23 M.L.R. 630 at 631; G. Curtis, "The Theory of the Floating Charge." (1941-42), 4 U.T.L.J. 131.

therefore, were accepted by courts as a form of consensual security interest.[3]

The growth of the floating charge and its popularity as a form of security is traceable to the great expansion of the joint-stock enterprise which dates from the adoption of the limited liability principle. This form of debenture[4] has "grown with the growth and strengthened with the strength" of limited liability companies.[5] With the emergence of corporations it is customary to set out in the object clause of the memorandum of association the power of a company to mortgage its assets. But without express power, a trading company has an implied power to give security over any of its property for debts properly contracted by it.[6] The popularity of the floating charge in the common law jurisdictions, other than the United States, can be attributed to its sophisticated nature. Additionally, the charge is tailored to meet the needs of the parties who use it.[7]

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3. E. Ferran, "Floating Charges: The Nature of the Security." (1988) Camb. L.J. 213. The recognition of the floating charge obviated the need for what would have been endless series of deeds of substitution and release on the changing assets of a company. See J. Farrar, "World Economic Stagnation Puts the Floating Charge on Trial." (1980), 1 Co. Law 82 at 83.

4. The term "debenture" has been difficult to define. According to Chitty J. in Levy v. Abercorris Slate and Slab Co. (1887), 37 Ch.D 260 at 264: "A debenture means a document which either creates a debt or acknowledges it." However, his Lordship confessed his inability to find any precise legal definition of the term. Chitty J. is not alone in this difficulty; other judges have as well found it difficult to define the term. See British India Steam Navigation Co. v. IRC (1881), 7 Q.BD. 165 at 172., Knightbridge Estates Trusts v. Byrne [1940], 613 at 627. For a critique of Chitty J.'s definition, see Sykes, The Law of Mortgages (Sydney: N.S.W. Law Books Co., Ontario: Agincourt, 1986) at 922.

5. E. Mason, "The Growth of the Debenture" (1897), 13 L.Q.R. 418 at 419. This remark reveals what will be shown later to be one of the limitations of the floating charge; which is the requirement of incorporation as a condition for obtaining the charge. Section 10 of the Bills of Sale Law, c.27, Laws of Bendel State, Nigeria, 1978 is quite clear on this requirement.

6. General Auction Estate and Monetary Co. v. Smith [1891], 3 Ch. 432. See also R. Pennington, Company Law (London: Butterworths, 1985) at 474.

7. J. Weisman, "Floating Charge: Recent Developments under Israeli Law." (1988) Current Legal Problems, 197.

The floating charge first arose for judicial determination in Holroyd v. Marshall[8], but it might have been too early at the time for the Court to recognise it as such. In this case, the House of Lords held that the mortgage of after-acquired property created a contract which was enforceable in equity. As is usual with some novel concepts created by equity the courts have had to tinker with the term in order to obtain an acceptable definition. It appears that the definition commonly referred to is the one colourfully put by Lord Macnaghten in Illingworth v. Houldsworth, where his Lordship stated:

> I should have thought that there was no difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering and, so to speak, floating with the property which it is intended to affect, until some events occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.[9]

One outstanding advantage of the floating charge is that, in contrast to a fixed charge, it enables the chargor to continue to deal with the assets of the company, which usually involves the security interests of the creditor. The security interest may comprise the inventory and receivables (stock-in-trade and book debts). The use of a floating charge thus avoids business paralysis.[10] To require a trading company borrowing money on the security of its inventory to obtain the consent of the creditor whenever it

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8. (1862), 10 H.L.C. 191.

9. [1904], A.C. 355 at 358. Romer L.J. in this same case also stated what is now referred to as the three essentials of a floating charge. His Lordship was of the view that for a security to be a floating charge, the charge must be comprised of the present and future assets of the company; the class of assets affected would be such that change intermittently in the ordinary course of business and the debtor company has the autonomy to deal with the charged assets until there is crystallization.

10. W. Gough, Company Charges (London: Butterworths, 1978) at 66. See also Lindley L.J. in Biggerstaff v. Rowatts Wharf Ltd. [1896], 2 Ch. 93 at 101.

wished to dispose of an item would invite unbearable administrative burden for both parties. Also, as the repayment of the advance by the debtor could be possible from the proceeds of the sales, it was imperative to allow the company freedom to dispose of its inventory in the ordinary course of business free from the charge.[11]

However, it is debatable whether the power given to a company to deal with and dispose of its assets which have been charged until there is crystallisation, that is, the conversion of a floating charge to a fixed charge, is an "implied licence."[12] The implied licence theory has found judicial favour in Canada[13] and to a lesser extent in England.[14] But it seems that the licence theory might have been implicitly rejected by Buckley J., while he was explaining the nature of the floating charge:

> A floating charge is not a specific mortgage of the assets plus a licence to dispose of them in the course of business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed charge.[15]

Adhering to the licence theory will create insurmountable problems for debtors concerning the scope of the rights of the debenture holders. The licence theory will impose unnecessary restrictions on the activities of the company which may result in

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11. Goode, Legal Problems of Credit and Security, supra note 1 at 46-47.

12. See for example Jessel M.R., in Re Panama, New Zealand and Australian Royal Mail Co. (1878), 10 CH.D. 540-541. See also, Pennington, "The Genesis of the Floating Charge" supra note 2 at 644 et seq.

13. R v. Consolidated Churchill Copper Corporation [1978], 5 W.W.R. 652 at 666, per Berger J.

14. Davey & Co. v. Williamson & Sons Ltd. [1898], 2 Q.B. 194 at 200, per Lord Russel C.J., Re Borax Co., Foster v. Borax [1899], 2 Ch. 130; Re Crompton & Co. Ltd. v. Crompton & Co. Ltd. [1914], 1 Ch. 954, per Warrington J. at 964.

15. Evans v. Rival Granite Quarries (1910), 2 K.B. 979 at 999.

premature crystallization of the charge. For instance, any proposed disposition of the company's assets which is *ultra vires* the powers of the company may be grounds for an injunction to restrain such disposition. Equally, the implied licence to deal may be terminated if the company is being wound up, whether it is for structural reorganisation or not. This position will result in the law interfering with the freedom of contract of the parties to determine when there should be crystallization and what may trigger it.[16] It is also possible that the idea of crystallization which occurs without the active intervention of the secured party, that is, of automatic crystallization, will be jettisoned if the licence theory prevails, as the secured party may be expected to intervene and end the licence before the charge crystallizes.[17] The licence theory would bring about unnecessary complication of the law relating to floating charges that can be avoided if this theory is abandoned.[18]

Another contentious issue is whether the creation of a floating charge confers a proprietary interest before crystallization. Dr. Gough[19] is of the view that the idea of a floating charge which attaches in the future creates an apparent contradiction which can be explained on the basis that until crystallization, the chargee obtains no proprietary interest in either the property owned by the chargor at the time of the charge or in property subsequently acquired. However, since the creation of a floating charge confers

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16. Pennington, "The Genesis of the Floating Charge" supra note 2 at 646.

17. See Berger J. in R. v. Consolidated Churchill Copper Corp., supra note 17. The concept of automatic crystallization will be dealt with infra.

18. Pennington, "The Genesis of the Floating Charge" supra note 2 at 646.

19. Gough, Company Charges, supra note 10 at 72.

an interest before crystallization, albeit an equitable interest, the better view, it is thought, is that the chargee obtains a proprietary interest upon the creation of the charge.[20] In a comment on this view Ferran observed that:

> Notwithstanding the "dormant" nature of the floating charge until crystallization, the potential ability to enforce the security, without first obtaining judgment for the sums owed and an order enforcing such a judgment, distinguishes the floating charge from a purely contractual claim and, it is suggested, is indicative of proprietary claim.[21]

It is important to note that a floating charge is different from a specific security with a licence granted to the debtor company to deal with the assets in the ordinary course of business. The charge floats over the assets of the company and only attaches upon crystallization. But it is not uncommon for a specific charge to be taken over the existing and future inventory of a dealer as security for credit extended to the dealer by the financing creditor to aid the former in acquiring inventory. This form of security is considered to be distinct from the floating charge but is capable of causing conceptual confusion.[22] A possible drawback of this form of financing arrangement is its potential to cause business paralysis of the debtor-company. The underlying difficulty is how far the concept of "licence to deal, which is of general and continuing nature, may be compatible with specific proprietary interest."[23] A licence is a precarious interest

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20. See J. Farrar, "World Economic Stagnation Puts the Floating on Trial." supra note 3 at 83-84.

21. Ferran, "Floating Charges: The Nature of the Security." supra note 3 at 216.

22. J. Ziegel, "The Legal Problems of Wholesale Financing of Durable Goods in Canada." (1963), 41 Can. Bar Rev. 54 at 62-65; D. Sher and D. Allan, "Financing Dealers Stocks-in-Trade." (1965) N.Z.U.L.R. 371 at 392-410; D. Allan, "Stock-in-Trade Financing (Australia and New Zealand)" (1967), 2 U. Tas. L.R. 382 at 391-403.

23. Gough, supra note 10 at 123. See also Siebe Gorman & Co. Ltd v. Barclays Bank Ltd. (1979), 2 Lloyd's Rep. 142.

because it can be withdrawn at any time and this will be prejudicial to a third party who deals with a debtor on the basis of the presumed right of the debtor to deal with the charged assets in the ordinary course of business. In the case of a floating charge, unless the parties stipulate events that will automatically crystallize the charge, notice of crystallization should be given to the debtor and the charge holder should, in order to put third parties on notice that the debtor is no longer allowed to deal with the charged assets, intervene, for example, by the appointment of a receiver.

In trying to ascertain the elusive nature of a floating charge, it may be instructive to refer to the analogy made by Goode of the floating charge to the interest of a beneficiary in a trust fund. He reasons that in so far as the trustee's power of management continues, the beneficiary has no right in any specific asset within the fund. The beneficiary's interest is a floating interest of the same kind as that of a chargee under a floating charge.[24]

(b). CRYSTALLIZATION OF THE CHARGE.

The concept of future crystallization is the hallmark of a floating charge. Upon crystallization, the security becomes fixed and fastened on the assets of the company comprised in the charge.[25] Crystallization puts an end to the power of the company to deal with its assets. This is because a crystallised charge will bite on all the assets

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24. Goode, supra note 1 at 49. It is important to note that a floating charge may cover only specific assets of the debtor and still remains a floating charge insofar as it is a shifting charge on the assets and the debtor is allowed to deal with the assets in the ordinary course of business. See Slade J. in Re Bond Worth [1979], 3 All ER 919.

25. See Lord Macnaghten in Illingworth v. Houldsworth, supra, note 9.

covered by the charge, since, normally, a floating charge does not provide for crystallization over part only of the assets to which it relates.[26] It may be said that the possibility of crystallization gives the floating charge its security aspect. Crystallization enables the creditor to resort to specific property of the debtor to satisfy the debt and this gives the secured creditor priority over general unsecured creditors.[27]

Notwithstanding a contravention of the condition stipulated in the instrument creating a floating charge, the charge will not crystallise unless the secured creditor actively intervenes to determine or terminate the debtor company's dealing power on the charged assets. One of the methods of intervention is to appoint a receiver or apply to the court to make such an appointment.[28] However, if the company is being wound up, no intervention by the debenture holder is necessary, as the charge in such event automatically crystallizes. The reason is that the company's power to deal with the charged assets is subject to the implied condition that the company carries on business.[29]

The crystallization of a floating charge to a fixed charge does not imply its being treated as if it was a fixed charge from the outset. The crystallization of the floating charge is not retrospective. Moreover, the fact that the charge began life as a floating charge means that the debtor company may have apparent authority to deal with the

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26. Gower, Prentice & Pettet, Gower's Principles of Modern Company Law (London: Sweet & Maxwell, 1992) at 417. The authors also observed that there is nothing in principle that prevents a partial crystallization if it is provided for in the agreement.

27. Gough, supra note 10 at 84.

28. Nelson & Co. v. Faber & Co. (1903), 2 Q.B. 367; Evans v. Rival Granite Quarries (1910), 2 K.B. 979. See also Goode, Legal Problems of Credit and Security, supra note 1 at 68.

29. Wallace v. Universal Automatic Machine (1894), 2 Ch. 547; Re Crompton Co. Ltd. (1914), 1 Ch. 954.

charged assets, which may affect priorities in the event of later dealings.[30] It is also important to note that the crystallization of a prior floating charge does not automatically crystallize a subsequent charge.[31]

Floating charges, being equitable charges, are subject to postponement to later legal charges. Furthermore, it seems that because of the autonomy given to the debtor company to deal with the charged assets in the ordinary course of business, a floating charge will be postponed to some fixed charges, whether legal or equitable, even if the latter chargees had notice of the floating charge.[32] According to Jessel M.R., to hold that the floating charge security prevented the making of "specific alienation of property" would "destroy the very object for which the money was borrowed, namely the carrying on of the business of the company."[33]

Section 179 of the Nigerian Companies Act[34] is particularly instructive in this respect concerning floating charges in Nigeria. It gives tacit recognition to the above principles when it provides that a fixed charge shall have priority over a floating charge on the same property unless the terms on which the floating charge was granted

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30. Goode, supra note 1 at 51.

31. Re Woodroffes (Musical Instrument) Ltd. [1985], 2 All ER 908. In Bayhold Financial Corporation Ltd. v. Clarkson Co. Ltd. et al. (1992), 86 D.L.R. (4th) 127, it was held that a floating charge does not crystallize automatically upon the appointment by the Court of a receiver/manager at the instance of another creditor. It only crystallizes if the holder takes action under it to make it crystallize.

32. Re Benjamin Cope and Co. (1914), 1 Ch. 800. The subsequent holder of a fixed charge also has priority to the insurance proceeds of the collateral, even though the floating charge was prior in time. See Canadian Commercial Bank v. C.I.B.C & Touche Ross Ltd. [1988], 3 W.W.R. 607.

33. Re Colonial Trust Corporation ex parte Bradshaw (1879), 15 Ch.D 465 at 472.

34. The present regime is termed "Companies and Allied Matters Act", 1990.

prohibited the company from granting any later charge and the person in whose favour such later charge was granted had actual notice of that prohibition at the time he obtained the charge.[35]

(c). AUTOMATIC CRYSTALLIZATION.

There appears to be a controversy concerning the power of the parties to provide for automatic crystallization of the floating charge without the need for active intervention of the creditor. The implication of the automatic crystallization clause is that the authority of the debtor company to deal with the assets of the company in the ordinary course of business is deemed to cease and determine on the occurrence of the crystallizing event, even without any intervention of the creditor. This may be unfair to other creditors as they may not be in a position to know the crystallizing event, and may, unwillingly, have their charge postponed to the floating chargee because of automatic crystallization.

To allow automatic crystallization could lead to business paralysis and will reduce the need to monitor the debtor. This is why the courts are sometimes reluctant to enforce automatic crystallization clauses. It would seem that Canadian Courts may not be inclined to uphold automatic crystallization clauses on policy grounds. This reasoning is inferable from the pronouncement of Berger J:

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35. s.179 recognises the validity of restrictive clauses or negative pledges, but for the subsequent chargee to be bound by it he must have actual notice of the same. But the Supreme Court of Canada, per Duff J., held in Bank of Halifax v. The India and General Investment Trust [1908], 40 S.C.R. 510, that the onus of proving that the transaction was entered without notice of the prior charge is on the subsequent debenture holder.

> But there has been no judgment rendered on the question [automatic crystallization] in Canada. The matter is one of first impression. So policy consideration might weight heavily against the adoption of the notion of self-generating crystallization.[36]

This position seems to be in accord with the opinion of some of the judges in Evans v. Rival Granite Quarries,[37] that there is a need for the debenture holder to actively intervene before the charge crystallizes. It should be noted that the clause being considered was not an automatic crystallization clause but one which merely empowered the debenture holder to intervene on stated events.

Nonetheless, as between the debtor and creditor, the issue of validity or propriety of automatic crystallization cannot arise because of their freedom to stipulate events that may crystallize the charge.[38] Thus enquiry should be directed to the effect of an automatic crystallization clause on a third party. This point was aptly put by Goode:

> [I]n the relations between chargor and chargee it is open to them to agree on any event they choose, however trivial, capricious or invisible to the outside world, as an event which will cause the charge to crystallise automatically. Since the effect of crystallization is simply to cause the security interest to attach to the assets, and since attachment concerns only creditor and debtor, there is nothing in this proposition which has any impact on third parties.[39]

It appears that the doubt as to the validity of automatic crystallization has been put to rest by the judgment of Hoffman J. in Re Brightlife Ltd.,[40] which upheld the validity of a

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36. R. v. Consolidated Churchill Copper Corporation [1978], 5 W.W.R. 652 at 665. It should be noted that the statement of his Lordship is obiter as it was provided in the security that the secured party must actually intervene in order to crystallize the charge.

37. [1910], 2 K.B. 979; See Vaughan Williams and Fletcher-Moulton L.JJ.

38. Re Brightlife Ltd. [1986], 3 All ER 673; Re Manurewa Transport [1971], N.Z.L.R. 909 at 916.

39. See Goode, supra note 1 at 70.

40. [1987], Ch. 200.

provision allowing the chargee of a floating charge to serve a notice of crystallization on the company. His Lordship was of the view that crystallization is a contractual matter between the parties, and that on this premise it is unobjectionable for a charge, as between the parties to the charge, to be made to crystallize on the occurrence of a stipulated event. Therefore, it appears settled that the parties are empowered to stipulate events that may trigger automatic crystallization in the security agreement, and the efficacy of this concept is equally supported by a number of dicta in England,[41] and some jurisdictions in the commonwealth.[42]

It would seem that this expansive party autonomy to stipulate and enforce automatic crystallization may undermine the principle of reputed ownership on insolvency.[43] This leads to the contention that there is strong policy argument against upholding automatic crystallization by the Courts. The basis of this opinion is that to uphold this concept would accentuate the unfair treatment of unsecured creditors who, apart from the peril of floating charges, would be subjected to the uncertainty of automatic crystallization.[44] Although this contention has some merits it is feared that

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41. Re Home & Hellard (1885), 29 Ch.D. 736; Davey & Co. v. Williamson [1898], 2 Q.B. 194; Government Stock and Other Securities Investment Co. Ltd. v. Manila Railway Co. [1897], A.C. 81; Illingworth v. Houldsworth [1905], A.C. 335. See also J. Boyle, "The Validity of Automatic Crystallization Clauses" [1979] J.B.L 231; Pennington, Company Law, supra note 6 at 478; Gower, Prentice & Pettet, Gower's Principles of Modern Company Law, supra note 26 at 418; Gough, Company Charges, supra note 10 at 102-107.

42. Stein v. Saywell (1969), 121 C.L.R. 529; Re Manurewa Transport Ltd. [1971], N.Z.L.R. 909.

43. Gower, Prentice and Pettet, Gower's Principle of Modern Company Law, supra note 26 at 418.

44. L. Boyle, "The Validity of Automatic Crystallization Clauses.", supra note 40 at 237-238. See also Business Computers Limited v. Anglo-American Leasing Ltd. [1977], 2 All ER 74, where Templeman J. deprecated the inferior treatment of trade creditors and unsecured creditors by the law.

judges must necessarily exercise judicial self-restraint on matters of public policy. It is entirely within the province of the legislature to be concerned with policy issues. Further, notwithstanding the occurrence of crystallization, a third party may not be adversely affected if the company is left free to deal with the assets in the normal course of business, as the holder of the floating charge will be estopped from denying the company's authority to do so.[45] There is also the need to point out that not all security interests are subject to, or can be prejudiced by, automatic crystallization. The concept is applicable only to those security interests lacking priority to a crystallized floating charge.[46]

(d). THE PROBLEMS OF AUTOMATIC CRYSTALLIZATION.

The unguided use of automatic crystallization clauses may do some harm to the commercial essence of credit and security. Because of the autonomy given to the parties to stipulate events that may crystallise a charge, the temptation would be high to cluster a security agreement with automatic crystallization clauses. As the clauses may serve as potent safeguards for the secured creditor, they may equally constitute a trap for the debtor and other creditors.[47] Some trivial breach may activate crystallization, even though the debtor never intended to do so. Although it is arguable that the secured

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45. Goode, Legal Problems of Credit and Security, supra note 1 at 70-71.

46. Gower, Prentice and Pettet, supra note 26 at 418-419.

47. The use of automatic crystallization will exacerbate the unfair treatment of unsecured creditors on insolvent liquidation. "Unsecured creditors who grant credit on the risk of a floating charge may discover eventually that the former credit was secured on a fixed charge - the crystallized floating charge, even though they were not warned and had no means of discovering their existence". See Boyle, "The Validity of Automatic Crystallization." Supra, note 40 at 237.

creditor may waive a minor breach of crystallization clause, this will place the debtor at the whims of the secured creditor.[48] However, the secured party may, unknowingly, be providing the Courts the opportunity to ignore subsequent automatic crystallization because of previous waivers.[49]

To stem unrestricted use of automatic crystallization clauses, the clauses should be limited to those events which, to the parties, are so important that if one of them occurs, the creditor will be moved to end the company's management power, and to specify other less significant events which enable the debenture holder to intervene by taking possession or by appointing a receiver.[50]

Another way of providing against an overkill in automatic crystallization is by stating in the security agreement that the crystallized charge shall attach only to part of the assets that comprised the security. This device is referred to as automatic partial crystallization.[51] This can be done by stipulating in the charge that on the occurrence of stated events, there will be automatic crystallization in respect of the assets which are sought to be mortgaged or attached by execution, while the charge will continue to float over other assets of the debtor company. The alternative suggestion is that the debenture could simply entitle the holder to intervene with regard to the assets in question. This implies that the partial crystallization will not be automatic but may require some active

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48. Goode, Legal Problems of Credit and Security, supra note 1 at 73-74.

49. Goode, ibid.

50. Ibid.

51. Gough, Company Charges, supra note 10 at 103.

intervention by way of possession or the appointment of a receiver by the security holder.[52] Moreover, it has been suggested that notice of crystallization should be required to be given to the company or to be registered.[53]

(e). CRYSTALLIZATION AND THE ISSUE OF PRIORITIES.

The crystallization of the floating charge enables the security holder to pounce on the assets of the company which comprise the security interest. But the security holder is always concerned with the issue of priorities upon the crystallization of the charge. It is trite that one of the main features of a floating charge is the autonomy granted to the debtor company to deal with the charged assets in the ordinary course of business, and the debenture holder must deal with the question of priorities between himself and those who dealt with the company before the charge crystallized. The underlying difficulty in analysing this issue is that even though a floating charge is a present security, it does not attach to any asset, and third parties, in principle, are not affected during the currency of the charge.[54]

A charge created by the debtor company pursuant to the autonomy given to it to deal with the assets comprised in the floating charge will have priority over the

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52. Goode, Legal Problems of Credit and Security, supra note 1 at 75.

53. J. Farrar, "The Crystallization of a Floating Charge." (1976), 40 Conv. 397 at 405-406. The suggestion of Farrar has been criticised by Boyle, who argued that it is impossible to protect the rightful desire of third parties to be protected from the unknown or the unknowable occurrence of a crystallising event and yet preserve a shred of value for the debenture holder in having such a clause in the first place. See Boyle, supra note 40 at 240.

54. Robson v. Smith [1895], 2 Ch. 118 at 124; see also Goode, supra note 1 at 84.

crystallized charge, whether the subsequent charge is legal or equitable.[55] It seems that a transaction entered into outside the course of business will be outside the actual and ostensible authority of the company and should be postponed to the floating charge.[56]

Generally, it is not permitted for a floating charge to be created to cover the same class of assets over which there is a pre-existing floating charge.[57] It follows that where two floating charges are created by a corporation, both duly registered, the debenture earlier in execution and registration takes priority notwithstanding that the later debenture is first "crystallized" by the appointment of a receiver.[58] But it is permissible in some circumstances to grant a subsequent floating charge over part of the same assets which have been encumbered, but ranking in priority to the earlier floating charge.[59]

As a result of the latitude shown by the courts to companies who have created floating charges, the practice arose whereby creditors insert clauses in the security agreement, prohibiting the debtor company from granting further security that may rank prior to or *pari passu* with the preexisting floating charge. This is referred to as a "restrictive clause" or a "negative pledge." At first blush, this practice may be justified because of the vulnerability of floating charges to other charges created by the company

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55. Wheatley v. Silkstone & Haigh Moor Coal Co. (1885), 29 Ch.D. 715; Re Hamilton Windsor Ironworks Co. (1879), 12 Ch.D. 707. But a company cannot create a mortgage ranking in priority to the floating charge after it has crystallized.

56. Goode, supra note 1 at 86.

57. Re Benjamin Cope & Sons Ltd. [1914], 1 Ch. 800.

58. Re Household Products Co. Ltd. et al. and Federal Business Development Bank (1981), 124 D.L.R. (3d) 325 (Ont. Q.B.) per Hughes J.

59. Re Automatic Bottle Makers Ltd. [1926], Ch. 412.

before crystallization. It is important to note that this restriction on the company's dealing power does not take away the floating character of the charge. To preclude a charge from being a floating charge, the inhibition must substantially deprive the company of the power to deal with its assets in the normal course of business.[60]

Courts have recognised the validity of negative pledges.[61] But because they are capable of paralysing the business activities of companies, strict constructions have been given to such clauses.[62] Thus, if a fixed charge is subsequently created, it may gain priority as a legal interest unless the chargee had notice[63] not only of the floating charge but also of the restriction in it.[64] It would also appear that on the basis of estoppel, a subsequent equitable chargee may be preferred to the holder of a floating charge on the ground that the company has been allowed to represent that it is empowered to deal with

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60. Gower, Prentice and Pettet, Gower's Principles of Modern Company Law, supra note 26 at 414.

61. Rother Iron Works Ltd. v. Canterbury Precision Engineers Ltd. [1974], Q.B. 1 at 6; Siebe Gorman & Co. Ltd. v. Barclays Bank Ltd. [1979], 2 Lloyd's Rep. 142.

62. Farrar contends that since restrictive clauses fetter the power of companies to carry on business, they are inconsistent with the nature of a floating charge. However, he concedes that this argument is too late to advance. See Farrar, "Floating Charges and Priorities." (1974), 38 Conv. 315 at 318.

63. s.68 of the Nigerian Companies and Allied Matters Act, 1990, seems to have abolished constructive notice, since notice as recognised by the Act is actual notice only.

64. English and Scottish Mercantile Investment Co. v. Brunton [1892], 2 Q.B. 700 at 707; Re Standard Rotary Machine Co. Ltd. (1906), 95 L.T. 829. Compare this with the case of Lloyds Bank of Canada v. Lumberton Mills Ltd. [1989], 2 W.W.R. 360, where it was held that the registration of a debenture containing a negative pledge is a constructive notice of all the contents of the debenture to those with an interest in the company's encumbrances.

In England, most of the problems inherent in the provision of negative pledges have been resolved by the requirement that the pledge by a company to refrain from creating subsequent charges ranking *pari passu* or in priority to an existing floating charge should be registered in the company register of charges. This will constitute notice to any person taking a charge, which, also, has to be registered. See s.415(2)(a) of the English Companies Act, 1985 (introduced by s.103 of the 1989 Act). See also Gower, Prentice and Pettet, supra, note 26 at 416.

the assets in the normal course of business, as if they were unencumbered.[65]

A floating charge with a negative clause is defeasible by a subsequent purchase money security interest. The reason for the favoured position of the latter interest holder is that his "equitable right under the contract to make the mortgage advance attaches to the property before the company acquires the legal ownership of it on completion of the purchase, and so such rights have priority in point of time over the equitable right of the debenture holder under the restriction in the debenture."[66] Again, it appears that the priority of the purchase-money security holder is not dependent solely on the attachment of the new assets from inception but by the policy of preventing injustice that may result in enabling the former chargee to obtain an unexpected rise in his security which is enhanced not as a result of the debtor company's money or further cash inflow from the former chargee, but by the fund provided by the subsequent creditor. Consequently, even the requirement that if there is a moment of time, *scintilla temporis,* in which the creditor is not the owner, his interest will be postponed to that of the holder of floating charge with after-acquired property clause, is unfair.[67] The priority of the purchase-money security holder should no longer depend on the compliance with this concept, which is

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65. Re Standard Rotary Machine Co. Ltd., ibid., Siebe Gorman & Co. Ltd. v. Barclays Bank Ltd. supra note 23; Wilson v. Kellard [1910], 2 Ch. 306. See also Gower, Prentice & Pettet, supra note 26 at 416; Pennington, Company Law, supra note 6 at 485.

66. Pennington, Company Law, ibid. See also Security Trust Co. v. Royal Bank of Canada [1976], A.C. 503, [1976], 1 All ER 381, per Lord Cross.

67. In Abbey National Building Society v. Cann [1991], AC 56 (H.L.), Lord Oliver of Aylmerton at 93, described "scintilla temporis" as no more than a legal artifice. See also Re Connolly Bro. Ltd. (No.2) [1912], 2 Ch. 25. Cf Church of England Building Society v. Piskor [1954], 1 Ch. 553.

out of touch with the exigencies of business.[68]

The present precarious character of the floating charge in Nigeria has been accentuated by the provisions of s.494(4)(b) of the Nigerian Companies Act[69] which states that on the winding up of a company, all the debts specified in that section have priority over any floating charge. Since by this section a holder of a floating charge will, in the event of a company's winding up, queue behind some general creditors, the floating charge becomes not only vulnerable but an inferior security. Further, it is not clear what will be the basis of crystallization on winding up as the security will fasten on an empty interest.[70] It is equally provided by the Act that any floating charge created within three months of the commencement of winding up proceedings is void, unless the company was solvent at the time it was created or fresh cash was provided by the creditor in consideration for it.[71]

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68. Goode, Legal Problems of Credit and Security, supra note 1 at 101; Abbey National Building Society v. Cann, ibid.

69. This is the present company code in Nigeria. By s.494 of the Act, in the event of a winding up a floating charge will be subject to all local rates, tax, and charges in arrears; all Pay-As-You-Earn tax deduction; deductions under the National Provident Fund; all wages or salary of any clerk or servant in respect of services rendered to the company; all wages of any workman or labourer; all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his rights) on the termination of his employment before or by the effect of the winding up order or resolution; etc.

70. It seems that if there is a literal interpretation of the provision of this section, the temptation might be high for floating charge holders to cluster security agreements with restrictive clauses so that it becomes easier to realize their assets before or without any winding up. The negative impact of this is that many otherwise viable companies will be sent into premature insolvency.

71. s.498 of the Companies and Allied Matters Act, 1990.

5.2. THE FLOATING CHARGE AND EXECUTION CREDITORS.

The holder of a crystallized charge will have priority over execution creditors if the crystallization occurred before the completion of the execution process. For instance, in the Nigerian case of Mandilas and Karaberis v. Management Enterprises,[72] judgment had been given against the debtor company and some of its property had been seized in the process of execution. The applicant had obtained a floating charge over the company's undertakings, and after the company's property had been seized by the judgment creditor a receiver-manager was appointed for the purposes of the security. The issue for determination was who was entitled to priority as between the applicant and the judgment creditor. It was held that when a floating charge on the company's assets crystallized, it constituted a fixed charge upon all such assets and has priority over any subsequent chargees as well as unsecured creditors. Also, if a judgment creditor has taken property in execution but has not yet sold same, a receiver appointed by a floating charge debenture holder can take over such assets since the right of a secured debenture holder prevails over that of an ordinary creditor. However, if the judgment creditor has already carried out the execution before crystallization, the holder of a crystallized charge cannot compel him to hand over the benefit of the execution.[73]

Several attempts have been made to rationalize this favoured position of the debenture holder against a judgment creditor. Some of the cases adopt the reasoning that the autonomy given to the debtor company to deal with its assets can only be exercised

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72. (1967), Nig. Comm. L.R. 42.

73. See also Evans v. Rival Granite Quarries [1910], 2 K.B. 979.

when such autonomy to deal is utilised in the ordinary course of business. It thus follows that since execution is not in the ordinary course of business of the company, it cannot rank in priority to the holder of floating charge debenture.[74] In Davey v. Williamson[75] counsel for the respondent argued, unsuccessfully, that as long as the debenture remains a floating security, the company was in possession of their property for the purpose of carrying on its business in the normal way, and of doing all things necessary to enable it carry on such business to advantage. Also that a natural part of such business would be the incurring of debts for which the assets of the company would be primarily liable. However, in holding to the contrary, Russel C.J. stated:

> It is not in the ordinary course of business that the debts of a going business firm or company shall be liquidated by seizure of their assets under legal process. Nor can the transaction be properly described as a dealing by the company at all. It is a compulsory legal process directed at the company - not a dealing by them.[76]

In some other cases the question asked has been whether the execution process has been carried to the stage of giving full title to the proceeds of sale to the execution creditor.[77] But it is questionable whether the debenture holder can apply to the court for the proceeds of the execution if the execution is complete but the sheriff has not handed out the proceeds to the judgment creditor.

The treatment of the judgment creditor by the courts *vis-a-vis* the holder of a

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74. See Russel C.J. in Davey v. Williamson [1898], 2 Q.B. 194. Sykes asks whether this case does not go too far. See Sykes, supra note 4 at 931.

75. Ibid.

76. Ibid., at 200.

77. See Re Opera Ltd. [1891], 3 Ch. 260 at 263, where there were remarks to the effect that the completion of execution and payment to the creditor before the crystallization of the charge vests the property in the judgment creditor. See also Sykes, The Law of Securities, supra note 4 at 931.

floating charge security has not gone without debate. It is contended that the Courts should not place premium on the date of completion of the execution. The reason for this is that the execution creditor obtains a proprietary interest in the company's assets before the completion of execution[78] and, in principle, he should gain priority if this proprietary interest has been obtained before the charge crystallized, the date of completion of execution notwithstanding.[79] However, it appears that the proprietary interest of the debenture holder exists before the judgment creditor acquires a proprietary interest, if any, in the assets of the judgment debtor. Moreover, insofar as the judgment debtor is entitled at law to restrain or halt the process of execution, it may be incorrect to say that prior to the completion of execution, a proprietary interest is vested in the execution creditor.

There is also the opinion that floating charge holders engage in extensive monitoring practices in order to avoid being subordinated to other creditors, whether secured or not. But in relation to judgment creditors, the present rule may produce a perverse monitoring incentive as it is cheaper for the secured party to monitor the initiation of judgment enforcement measures than to monitor the financial health of the

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78. See Slater v. Pinder (1871), L.R. 6 Exch. 228 at 236 per Martin B., Ex parte Williams, re Davies (1872) L.R. 7 Ch. App. 314 at 317, per Mellish L.J., Re Clarke [1898], 1 Ch. 336. Contra Giles v. Grover (1832), 9 Bing. 128 at 138, per Patteson J., Ex parte Rayner, re Johnson (1872), 41 L.J. Bkcy. 26 at 30, per Bacon C.J.

79. R.J. Calnan, "Priorities Between Execution Creditors and Floating Chargees." (1983), 10 N.Z.U.L.R. 111. For a reply to Calnan, see P. Blanchard, "The 'Security' of an Execution Creditor." (1983), 10 N.Z.U.L.R. 332 at 340 where he submitted that upon the seizure of the debtor's goods by the sheriff, the debtor is no longer in a position to deal with his property, but if the property is already affected by a preexisting floating charge, and the charge crystallizes upon the seizure, there is no reason in theory why the debenture holder's priority should be postponed.

debtor.[80] This position is quite unfavourable to execution creditors who contribute a lot to the company as a going concern. The seeming inequity of this judicial treatment of judgment creditors has led to the call for a judicial or legislative reappraisal of the priority problem between debenture holders and judgment creditors.[81] Tempting as this argument (which may be shared with garnishors) appears, to further subordinate the interest of holders of floating charge debenture will only succeed in rendering this form of security so precarious, vulnerable and unreliable as to be totally shunned by creditors.

5.3. REGISTRATION OF CHARGES.

The priority of a floating charge over other subsequent charges, whether legal or equitable, is dependent on the registration of the charge with the registrar.[82] Every charge which is created by a company and is required to be registered pursuant to s.197(2) must be so registered within 90 days of its creation, otherwise such a charge will be void not only against the liquidator but also against any other creditor of the company.[83] It is worthy to note that it is not the loan transaction or contract that is rendered void, so that the obligation to repay the money remains intact. Indeed, only the security is rendered void for non-registration. Section 197(1) is clear on this point as it

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80. R.J. Wood, "The Floating Charge in Canada." (1989), 27 Alta L.R. 199.

81. See Buckley J. in Re London Pressed Hinge Co. Ltd. [1905], 1 Ch. 576; M. Hare and D. Milman, "Debenture Holders and Judgment Creditors - Problems of Priority." (1982), L.M.C.L.Q. 57; Calnan, supra note 79; Wood, ibid.

82. The body entrusted with the duty of registering companies' charges in Nigeria is the Corporate Affairs Commission. See s.197 of the Companies Act.

83. s.197(1), ibid.

stipulates that when a charge becomes void under the section the money thereby secured immediately becomes repayable. The debtor company is charged with the duty of sending the relevant particulars of the charge for registration. But if a company fails or neglects to register a charge which it has created, the secured party is empowered to effect the registration of the charge.[84]

Despite the requirement of registration within 90 days, Courts are given the discretion to extend the time within which registration may be made.[85] The grounds on which such extension of time may be granted were declared in Development Finance v. Registrar of Companies.[86] It must be established that failure to register the charge was due to inadvertence, accidental omission or that it is just and equitable to have the time extended for registration.[87] Additionally, it must be shown that the company is still carrying on business and that no unsatisfied judgment has been recovered against the company nor any winding up proceedings commenced against it.

After registration has been effected, the Corporate Affairs Commission is required to issue a certificate of registration. This certificate is a *prima facie* evidence that the

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84. The secured party is entitled to recover from the debtor company any sum of money which he may have expended in effecting the registration. See s.199, ibid.

85. In England, a charge can be registered outside the 21 day period at any time prior to the company's liquidation or the appointment of an administrator without the need to obtain a Court order. See s.400 (introduced by s.95 of the 1989 English Companies Act). This is a clear departure from the previous Act which required a Court order.

86. (1973), N.C.L.R. 497.

87. The Companies Act has different penal measures against a company and its officers for failure to comply with the Act's requirement on registration. See ss.199(3), 200(1) & 203(2).

requirements for registration under the Act have been observed.[88] This provision can be contrasted with the Companies' Act, 1968, which provided that the certificate of registration was conclusive evidence of compliance.[89]

One of the shortcomings of the Companies' Act is that the registration of company charges does not constitute any priority point. It follows that if a creditor searches the registry, discovers no encumbrance and gives credit to a company, he may have to contend with several problems. First, there may be a preexisting unregistered interest or encumbrance that is still within the statutory time limit to effect registration. The later creditor may come to register after giving the loan only to discover that the previous charge has been registered in the interim. Again, even though he registers immediately after the search, his interest is still liable to defeat if the previous debenture holder registers within the statutory time limit.[90] Further, it is not clear what the effect on priority will be if a court exercises its discretion to extend the time for registration. The present state of the law is full of confusion in relation to secured transactions.[91]

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88. s.198(2), ibid.

89. In keeping with the provision of the 1968 Act, it was held in Re C.L. Nye Ltd. (1971), Ch. 442 that after the issuance of a certificate of registration, the registration of the relevant facts cannot be impugned even if some facts or particulars have been misstated. According to the Court, this principle was so because if any person interested in the charges of a company wishes to know the items or details contained in such charges, the proper document to look at is the instrument creating the charge rather than the registration certificate. See also Musini & Ors. v. Balogun & Ors. (1968), 2 Afr. L.R. 197.

90. Watson v. Duff Morgan (Holdings) Ltd. [1974], 1 All ER 794. See Pennington, Company Law, supra note 6 at 535-536.

91. For an attempt to settle the complex issues of priorities arising herein, see Pennington, ibid., at 534-538. Compare this to Article 9 of the American Uniform Commercial Code and the Canadian provincial Personal Property Security Acts, which amongst other things, make the time of perfection (usually by registration) - with the exception of a purchase money security interest - the determining factor on the issue of priority, and not the time of creation of the security. See ss. 21 & 22 of the Personal Property Security Act, C.C.S.M. 1987, c.P35.

In the event of liquidation, unregistered charges are void against the interest of unsecured creditors.[92] This implies that upon liquidation and subject to registered charges and charges not requiring registration, unsecured creditors are entitled to share rateably with unregistered chargees. By virtue of this section registrable but unregistered charges will be treated as if they were not created.[93]

With regard to judgment creditors, they obtain a charge on the assets of the company once the sheriff seizes the assets pursuant to a writ of *fieri facias*.[94] Equally, the execution creditor obtains a charge on a debt owed to the company the moment a garnishee order *nisi* is served on the company's debtor. Assuming the company has created a floating charge over its assets, the execution creditor has priority to a holder of a floating charge if the latter did not register his charge. This is so even though the floating charge crystallizes before the completion of execution, so long as the charge was not registered.[95]

5.4. THE FLOATING CHARGE AND UNINCORPORATED BUSINESS.

Despite the importance of the floating charge in credit transactions, it is rather surprising that an unincorporated business cannot avail itself of this form of security. In

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92. s.197(1) of the Companies Act.

93. Pennington, Company law, supra note 6 at 530.

94. Slater v. Pinder (1871), L.R. 6 Exch. 228 at 236, per Martin B., affirmed (1872) L.R. 7 Exch. 95.

95. As has been stated above the floating charge will have priority if the charge crystallizes before the completion of execution provided that the charge was registered. Pennington, Company Law, supra at 531.

principle, there does not seem to be any valid rationale why the floating charge should continue to be the exclusive preserve of incorporated business. The present limitation is a consequence of the Bills of Sale Act and the Bankruptcy Act.[96] Under the present regime both banks and some financiers require sole traders to incorporate to enable such traders to give the secured party floating and fixed charges on after-acquired goods.[97] This requirement, *inter alia*, unnecessarily increases the number of companies on the register. Added to this, in Nigeria, is the prohibitive cost of incorporation. This is one of the areas where the charge created under the personal property security laws and Article 9 has an advantage over the conventional English floating charge, as the former enables unincorporated businesses to give security to a financier over their personal property, both present and future, in the same way as companies.[98]

The requirement of incorporation as a condition precedent to obtaining a floating charge by unincorporated business is indefensibly discriminatory. The present state of the law encourages a situation whereby businesses are incorporated for the sole purpose of borrowing against a floating charge.[99] This situation may create problems for debtors in relation to taxation and other administrative burdens, which are inherent in companies. The requirement of book-keeping, financial statements, and publicity of accounts may

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96. Abel, "Has Article 9 Scuttle the Floating Charge?" in J. Ziegel and M. Forster (eds.), Aspects of Comparative Commercial Law (Montreal: McGill University; New York: Oceana Publication, Dobbs Ferry, 1968) at 389. See also the provision of s.10 of the Bills of Sale Law, c.27, Laws of Bendel State, Nigeria, 1978.

97. S. Sealy, Cases and Materials on Company Law (London & Edinburgh: Butterworths, 1989) at 369.

98. G. Hammond, Personal Property (Auckland: Oxford University Press, 1990) at 299.

99. This is one of the limitations of Nigerian laws on secured lending.

be too heavy on small businesses.[100] These burdens may appear unjust to small unincorporated businesses.

In defence of the present state of the law, it is contended that the floating charge thrives on the ability of the creditors to monitor the debtor so as to prevent the debtor from dissipating the assets and rendering their security valueless and unrealizable. The cost of monitoring could be high and the small size of the loans usually required by unincorporated business may make monitoring them very uneconomical. Even when monitoring is possible, the absence of proper book-keeping and accounting by unincorporated business makes it difficult to monitor. Further, it appears unrealistic to expect that security interests in future assets will play a substantial role in the mobilization of credit when offered by a non-corporate debtor, as the means of supervision available to the creditor are flimsy.[101]

No matter the force of any argument to the contrary, the flexibility of the floating charge makes it a potentially useful security device for unincorporated business. In Nigeria, apart from the limitations imposed by the Bills of Sale Law, the difficulty of complying with the Act that protects illiterate persons[102] will also be considered when

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100. See also sections 331-356 of the Nigerian Companies Act, which require companies to keep accurate accounting records and to file annual financial statements and, in some cases audited accounts, in the prescribed form with the Corporate Affairs Commission. These points were aptly demonstrated in J. Weisman, "Floating Charges; Recent Developments Under Israeli Law" supra, note 7 at 202-203, where the author stated the various views on whether unincorporated business should be allowed the benefit of a floating charge in Israel. Weisman's analysis of some of the arguments in Israel with regard to this issue will apply with equal force to the Nigerian situation.

101. Weisman, ibid., 203-204.

102. Illiterates' Protection Act c.83 Laws of the Federation of Nigeria. This Act has been considered in chapter 1.

advocating that unincorporated businesses should utilise the floating charge. One of the ways to avoid the problem of the Illiterates' Protection Act is to make it easier to incorporate companies, or prevent the Act from applying to corporate lenders. This will enable small businesses to utilize the floating charge. It has been observed that there is no basis for requiring small firms to incorporate as a condition for obtaining a floating charge, for "the link between the floating charge and incorporation was never created as a matter of policy. The whole thing was a historical accident"[103]

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103. L. Sealy, Company Law and Commercial Reality (London: Sweet & Maxwell; Centre For Commercial Law Studies, 1984) at 63. It should be noted that New Zealand has abolished its law that required the incorporation of business as a prerequisite for taking a floating charge. Moreover, some of the repealed Canadian provincial Bills of Sale Laws permitted a chattel mortgage covering after-acquired goods, enabling future inventory to be covered by a bill of sale provided that there is proper and adequate description, and there would be no need for a fresh bill of sale when new inventory comes into stock. This made it possible for unincorporated business to give a floating charge on tangible personal property. The same purpose can also be achieved by utilising section 427 of the Bank Act, 1991 (which was section 178 of the Bank Act, R.S.C. 1985, C. B-1 (formerly, s.88 of the Bank Act, Stat. Can. 1967, c.87). See Gower & Goode, "Is Article 9 of the Uniform Commercial Code Exportable? An English Reaction." in Ziegel & Forster eds. Aspects of Comparative Commercial Law, supra note 111 at 305-306.

Chapter 6.

THE MODEL LEGAL REGIME ON PERSONAL PROPERTY SECURITY.

6.1. INTRODUCTION.

Separate treatment of the various forms of security by the law does not promote the commercial essence of secured transactions. This is partly because the law as it stands in Nigeria and some common law jurisdictions offends the very objective of a fair and just system, which requires that like transactions should be treated alike.[1] The law as it is treats similar transactions differently with varying consequences. The differential treatment by the law of the various security devices was thought necessary at the dawn of industrialisation when some of the security interests evolved and the courts had to grapple with their intricacies. Unfortunately, the law continues to adhere to measures devised in the 19th century which are obsolete in the light of present commercial realities.

In the early 1940s the United States of America recognised the severe limitations of the existing commercial laws. The need to unify the commercial laws in the various states was felt, and the result was the model Uniform Commercial Code.[2] The single most significant and highly acclaimed aspect of the uniform code is Article 9, which covers secured financing transactions in personal property. The reporters of Article 9 of

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1. A. Diamond, "The Reform of the Law of Security Interests" (1989), Current Leg. Probs. 231 at 238.

2. The American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Legislation (NCCUSL) sponsored a joint project for the revision and modernization of the many preexisting or model acts on commercial law. The first official version of the code appeared in 1952.

the code recognised early that there was no legal or commercial justification for the bewildering array of security devices and the laws that regulate them, and a new approach was required.[3]

The drafters of Article 9 realised that the taking of security in property, irrespective of the form, serves the same purpose - to secure payment or performance of an obligation. It thus became unnecessary to continue to retain the old laws which characterised security interests and the resultant rules and doctrines that went with them. The characterisation of the various security devices was abandoned and replaced with the generic concept of a "security agreement" that creates a "security interest."[4] The hitherto elaborate structure of technical limitations was rejected. A secured party is no longer bothered by the complicated choice between conditional sale and chattel mortgages, trust receipts and factors' lien, etc. Nor is the counsel for the prospective secured party any more required to scheme for a virile security device as against a feeble one, or to avoid foreseeable traps in the statute by inventing a new security device. Any transfer of property for purposes of security, some sales of accounts, contract rights and chattel paper are done under Article 9 regime and are subject to its rules.[5]

Article 9 stipulates that every consensual security interest, irrespective of the nature of its creation and its characterisation, is governed by a single set of rules -

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3. The independent reporters of this section of the code, Professors Grant Gilmore and Allison Dunham, working independently of each other, realised the need for a restructuring of this aspect of the law. The chief reporter of the code, Professor Karl Llewellyn, had also reached this conclusion independently. See G. Gilmore, Security Interests in Personal Property (Boston: Little, Brown & co., 1965) at 290, footnote 20 and accompanying text.

4. See UCC 9-105(1) (i) and UCC 1-201(37).

5. G. Gilmore, supra note 3 at 333.

covering the creation, registration, priority, and enforcement of security interests - except where the nature of the collateral or its functional context justify separate treatment.[6] The rationalisation and codification of this aspect of commercial law enhances predictability in commercial transactions. This benefit is one of the appealing features of Article 9.[7]

Moreover, Article 9 makes detailed provisions for the determination of priorities in security interests. With these sophisticated rules of priorities, an end is put to the difficult and, sometimes, bewildering priority rules that were evolved by courts over a period of time. The problem with judicially evolved priority rules is that they are often rooted in property law which does not account for commercial realities and necessities.[8] This was a great departure from the pre-Article 9 regime, which could only resolve priority situations in which conflicting security interests existed in the same collateral by tracing the locus of legal title. The method of resolving conflicting priority claims before the Act was developed in the context of a simple economy that did not witness the enormous amount of credit being granted today and the various ways of securing the credit. The wide gap between the effectiveness of the old priority rules and the present commercial practices made it necessary for Article 9 to abandon the old rules.[9]

Canada was the first country to recognise the advantages of Article 9 and adopted

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6. J. Ziegel, "The Canadian Personal Property Security Legislation" (1986), L.M.C.L.Q. 160 at 162.

7. See R. Gordon, "Critical Legal Histories" (1984) 36 Stan. L.R. 57 at 78-79.

8. R. Goode, "The Modernisation of Personal Property Security Law" (1984), 100 Law Q.R. 234 at 240.

9. R. McLaren, Personal Property Security: An Introductory Analysis (Toronto: Carswell, 1992) at 5-5.

it early enough for provincial needs. The province of Ontario blazed the trail when it recognised that Article 9 offered a workable solutions to the chaotic state of the legal regime on personal property security. The draft Ontario Personal Property Security Act was made in 1967.[10] Although the Ontario Act was based on the fundamental concept of Article 9, it departed from it from the point of details, and was actually the first jurisdiction to introduce a novel form of computer registration oriented towards "notice filing."[11] Another distinguishing feature of the Canadian provincial Personal Property Security Acts is the simplicity of the drafting style and their coherence.

Manitoba was the first Western Canadian province to adopt personal property security legislation based on Article 9. The Act was enacted in 1973 but did not become effective until 1978. A new Act has been enacted in Manitoba and is awaiting proclamation. Alberta, Saskatchewan, British Columbia and the Yukon Territory have all enacted their personal property security laws. In addition to New Brunswick and the Northwest Territories, which have introduced legislation in this regard, other Maritime provinces and Quebec are also considering the possibility of legislation along the line of Article 9. This chapter focuses on the scope and main features of the new scheme.[12]

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10. Although the draft was made in 1967, most of the Act did not come into force until 1976. The Act has been revised and the current Act came into force on October 9, 1991.

11. J. Ziegel, "The New Provincial Chattel Security Law Regimes" (1990), 70 Can. Bar Rev. 681 at 686; J. Ziegel, "The Draft Ontario Personal Property Security Act" (1966), 44 Can. Bar Rev. 104.

12. Discussion on this topic will centre around the Canadian Personal Property Security Acts with emphasis on the Alberta Act. Regular references will be made to the parent code - Article 9 - and to other provinces in Canada , where the need arises.

6.2(a). SCOPE OF THE PERSONAL PROPERTY SECURITY ACT.

A remarkable feature of the model legal regime on personal property security is the emphasis on the substance of the transaction as against the form, which was the determining factor under the pre-Act regime. The Act applies to every transaction that in substance creates a "security interest"[13] without regard to its form and without regard to the person who has title to the collateral.[14] One of the practical consequences of the substance test can be appreciated by reference to the pre-Act law which differentiated between legal and equitable mortgages. In the determination of the competing priorities of the respective secured parties recourse will no longer be had to the contest between persons with legal and equitable interests or to examining the source of the security interests. The secured parties are now subject to the same rules of priority, notwithstanding the form of security that the secured party procured or the nature of the

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13. "Security interest" is defined as:

(i) an interest in goods, chattel paper, a security, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of the agent of the seller unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods, and

(ii) the interest of

(a) a transferee arising from the transfer of an account or a transfer of chatter paper,

(b) a person who delivers goods to another under a commercial consignment, and

(c) a lessor under a lease for a term of more than one year,

whether or not the interest secures payment or performance of the obligation.

See s.1(1)(qq) of the PPSA, S.A. 1988, c. P-405 (hereafter Alta. Act).

14. Ibid., s.3(1)(a). Note that s.3(1)(b) contains examples (which is not exhaustive) of a range of standard secured financing transactions in their old forms which are now governed by the Act. However, a notable realist approach to the reform effort is the invention of new defined terms and the abandonment of the old ones like mortgages, charges, etc.

interest.[15] This has swept away the pre-Act judicially evolved rules of priority, which were, in most cases, *ad hoc*, and which paid little attention to the commercial policy behind secured transactions.

All that a secured party is entitled to in the debtor's collateral is a security interest, which is an interest in all forms of personal property that secures payment or performance of an obligation. This is a significant departure from the old regime where in conditional sales and hire purchase agreements the default of the buyer or hirer gives the secured party more than a security interest in the property. This arises from the exercise of the power to repossess the goods and the absence of any legal obligation on the part of the secured party to account for the extra profit it makes to the defaulting party. Under the substance test, some of the disguised security interests have been brought within the regulatory framework of the Act. An important example in this regard is finance leases, which traditionally were not regarded as secured transactions. The commercial essence of the various types of leases (especially equipment leases) is to enable the lessee to have the incidents of ownership and to place the lessor in the position of a financier. It implies that the economic aim of a finance lease and its "substance" is to provide for the secured financing of the purchasing of the equipment. As the substance of the transaction is the acid test for determining whether a particular arrangement is a secured transaction, finance leases were brought under the regulation of the Act, despite

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15. R.C. Cuming, "The Scope of the Alberta Personal Property Security Act" in An Introduction to the Alberta Personal Property Security Act (Alberta Law Review, Book Series, 1990) at 19.

the fact that title to the goods never passed under the transaction to the lessee.[16]

The use of the substance test to distinguish security leases from true leases[17] under the Alberta Act is preferred to the intention test used in the present Manitoba Act.[18] However, it seems that the ultimate results under the two tests will be the same.[19]

The substance test that is applied to determine the true nature of a finance lease is also employed to ascertain the nature of a commercial consignment. If in substance the latter transaction is found to be a secured financing scheme rather than an agency relationship, then the transaction will be regulated as a secured transaction under the Act and will be subject to, along with other stipulations of the Act, the default rights and remedies provisions. On the other hand, if the transaction is that between a principal and an agent, other provisions of the Act will apply to the true consignment but the default rights and remedies of the parties will be regulated by the common law.[20] According to section 1(1)(g) of the Act, a commercial consignment does not extend to any agreement under which goods are delivered to an auctioneer for sale or to a consignee

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16. R.C. Cuming, ibid., at 20-21. But true leases for more than one year which do not create secured party-debtor relationship are exempted from the provisions of the Act that regulate the rights of secured parties and debtors in the event of the default of the debtor. See ss.3(2) and 55, Alta. Act.

17. For a discussion of the distinction between security leases and true leases, see R.C. Cuming, "True Leases and Security Leases under the Canadian Personal Property security Acts" (1982-83), 7 C.B.L.J. 251.

18. s.2(a)(ii) PPSA, C.C.S.M. 1987, c.P35 (hereafter referred to as Man. Act). The new Manitoba Act, which awaiting proclamation, adopts the substance test.

19. R. Cuming & R. Wood, Alberta Personal Property Security Act Handbook (Toronto, Calgary, Vancouver: Carswell, 1990) at 32.

20. See section 3(2) Alta. Act. See also B. Colburn, "Consignment Sales and the Personal Property Security Act" (1981-82), 6 C.B.L.J. 40 at 51-63.

for sale, lease or other disposition if it is generally known to the creditors of the consignee that he is in the business of selling or leasing goods of others. What constitutes general knowledge of a consignee's business that may suffice to exclude a transaction from the Act's regulation is unclear. It seems that this "knowledge" test may lead to uncertainty in the Act because it depends on factual considerations.

The Act has also altered the traditional features of the floating charge. As no regard is paid to the nature of the title held by the secured party, it seems that the Act has swept away the accumulated learning on floating charge. Although the floating charge is still recognised as a security device under the Act[21] it now creates a form of fixed charge called a security interest in the debtor's property. For the purposes of priority, recourse will no longer be had to the time of crystallization.[22] The question may then be asked if the new regime has scuttled the floating charge,[23] and if this is so whether the present position is justified. Professor Ziegel argues that there are justifications for the scuttling of the floating charge under the Acts.[24] He is of the opinion that in Canadian law the demarcation between a fixed security interest and a floating charge is infinitesimal, and that it would be unwise to continue with the uncertain state of the law in this area. Further, the employment of the floating charge to cover circulating assets

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21. s.2(a)(i), Man. Act.

22. R. Cuming, "The Scope of the Alberta Personal Property Security Act" in Introduction to the Personal Property Security Act of Alberta, supra note 15 at 19.

23. See A. Abel, "Has Article 9 Scuttled the Floating Charge?" in J. Ziegel and W. Forster (eds.) Aspects of Comparative Commercial Law (Montreal: McGill University; New York: Oceana Publications; Dobbs Ferry, 1968) at 426.

24. J. Ziegel, "The New Provincial Chattel Security Regimes" supra, note 11 at 713.

under English law has been met in Canada by utilising a wholesale conditional sale agreement and s.427 of the Bank Act security. However, as against the English floating charge these security devices have fixed interests.[25]

Again, Ziegel contends that the functional advantage of a floating charge can be met by utilising other security techniques. In any event even the avowed merits of the floating charge are hamstrung by the various restrictions imposed by secured parties on the debtor's autonomy to deal with the collateral. Expanding on this argument, he observed:

> Even if it is true that the floating charge holder cannot intervene in the conduct of the debtor's business before crystallization, it is not a meaningful restriction. What difference does it make to a debtor whether a breach of the agreement leads to instant reprisal or whether imposition of sanction must be preceded by crystallization of the charge.[26]

In conclusion, Professor Ziegel noted that the rejection of the floating charge has not had any practical impact on the effectiveness of the Acts, and maintained that there is no need to allow the relationship between secured and unsecured creditors to depend on the accident of characterization.[27]

In his report on the review of security interests in personal property, Professor Diamond noted that, although the floating charge should continue to be retained under the recommendation for a new Act, its incidents will be regulated by the proposed law

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25. Ibid. But Professor Ziegel conceded that conditional sale agreements fall into a separate category because of the seller's retention of title. This is equally applicable to the fixed interests obtained in a chattel mortgage on inventory and a security assignment of book debts.

26. Ibid., at 714.

27. Ibid., 715. The opinion is also held that the elimination of the floating charge from the present Acts can be justified on the ground that the floating charge is a fragile and vulnerable form of security. See R. Wood, " The Floating Charge in Canada" (1989), 27 Alta. L. Rev. 199.

along the line of Article 9. According to his report:

> Under the new scheme, the essence of what is now referred to as a floating charge would be preserved. The security agreement, whether expressly or by using the term 'floating charge', would permit the debtor to dispose of the property in the ordinary course of business and would attach to after-acquired property which falls within the description of the property in the agreement. Perfection in accordance with the new scheme will be required, which means filing in the new register of security interests. For the purposes of priorities the important date would be the date of filing and the notion of crystallisation would lose all or most of its importance.[28]

But doubts have been raised as to the commercial wisdom of allowing a floating charge under the new regime to have priority from the date of registration of the charge. The doubts stem from the fact that to permit the floating chargee's priority to commence from the date of registration or perfection would place the debtor under the control of the floating chargee, and prevent the debtor from having other sources of finance.[29] However, one of the ways that the potential for abuse of the floating charge under the Acts (which should properly be referred to as the 'floating lien' in American jurisprudence) can be avoided is to resort to purchase money security interests.[30] The super-priority given to purchase money security interests can be justified on policy grounds. The holder of purchase money security interests adds new assets to the stock

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28. A.L. Diamond, A Review of Security Interests in Property, Department of Trade and Industry, HMSO (1989) at 84-85. The question may be asked whether crystallisation may still be relevant between a floating charge under the Act and the non-Act security interests, for example, statutory liens.

29. P. Coogan & J. Bok, "The Impact of Article 9 of the Uniform Commercial Code on Corporate Indenture" (1959), 69 Yale L.J. 257 at 258. It is also argued that to alter the traditional incidents of the floating charge will enable long-standing institutional creditors like banks to have a proprietary monopoly over the assets of the debtor company to the detriments of the company's other creditors. But it seems that Article 9 must have considered this possibility. See M. Bridge, "Form, Substance and Innovation in Personal Property Security Law" (1992), J.B.L. 1 at 12-13.

30. G. Gilmore, "The Purchase Money Priority" (1963), Harv. L. Rev. 1333 at 1336-37.

of the debtor and there is no defensible reason to prevent him from having priority to the secured creditor.[31] But the use of a purchase money security interest is limited to the financing of new assets. It cannot be employed to help a debtor who is in need of ready cash for other purposes of the business such as the payment of rents and wages.

(b). DEEMED SECURITY INTERESTS.

In keeping with the pragmatic approach of Article 9 and the Canadian Acts, some transactions which do not create security interests have been brought within the regulatory regime of the Act.[32] The rationale for the new approach is to avoid the possibility of those who are not the true owners of property to appear as if they have title to the property and deceive innocent purchasers into entering transactions with them. To prevent this potential for fraud it was thought necessary to give public notice of the lessor's or consignor's interest in the property. The present arrangement is in conformity with the requirement in the common law provinces in Canada that holders of a proprietary interest under a security device should give public notice of that interest so that third parties are not deceived.[33]

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31. The New South Wales proposed personal property security law does not make any provisions for the purchase money security interest. The law reform commission was of the view that the regime proposed has provisions which apply to floating charges and to after-acquired property. These security interests, to them, are the most common forms of transactions which create purchase money securities. See the Law Reform Commission of New South Wales, Discussion Paper 28, Personal Property Securities, at 75.

32. Section 3(2) Alta. Act provides:
subject to sections 4 and 55, this Act applies to a transfer of account or chattel paper, a lease for a term of more than one year and a commercial consignment, notwithstanding that the transfer, lease or consignment does not secure payment or performance of an obligation.

33. R.C. Cuming, "The Scope of the Alberta Personal Property Act" in An Introduction to the Personal Property Security Act of Alberta, supra, note 15 at 24.

The Act extends its application to a lease for a term of more than one year and commercial consignments. The Act has limited application to true leases for more than one year. A commercial lease will come within the Act if the lessee is likely to be in possession of the leased goods for more than one year. But if the lessor is not regularly involved in the business of leasing goods, or if there is a lease of household furnishings or appliances as part of a lease of land and the goods are merely incidental to the use and enjoyment of the land, the Act will be excluded.[34]

A commercial consignment is one where both the consignor and the consignee are engaged in the business of dealing in goods of the kind consigned.[35] Thus the consignment of goods to an auctioneer or the delivery of goods by a consumer to a consignment seller is outside the purview of the Act, as the consignor is not in the business of selling goods of the kind consigned.[36]

The model legal regime is designed to accommodate modern methods of business financing. The scheme of the new Act permits the parties to fashion their security agreement to meet their particular needs. An attractive aspect of the Act to a developing economy that relies on agriculture is the security interest created in crops and animals. The Act enhances the availability of credit for agricultural producers by allowing them to give security interests in their crops and animals. Also, creditors may take purchase

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34. See s.1(1)(y). See also Cuming, ibid., at 25.

35. See generally, ss. 1(1)(g) & 1(1)(y) Alta. Act for the definition of "commercial consignment" and "a lease for more than one year."

36. R.C. Cuming, "The Scope of the Alberta Personal Property Security Act" supra, note 15 at 25. Note that the same reasoning will apply to the transfer of account.

money security interests in crops or animals for loans or credit given to acquire seed, insecticides, herbicides, fertilizer, animal feeds, hormones, and drugs. There is comprehensive provisions for the registration, in the land registry, of the security interests in crops.[37]

Under the existing regime in Nigeria and some other jurisdictions, the rights of the secured party and the debtor in the event of default by the latter depend on the nature of the security agreement and the terms of the contract. However, the new regime proceeds from the reasoning that all secured transactions are intended to serve the same purpose. This is in addition to the fact that debtors do not often have the bargaining power to stipulate favourable contractual terms applicable to default. Thus the new Act prescribes a uniform system for the regulation of default rights and remedies which are equitable and consistent in the enforcement of security interests.[38]

6.3. ATTACHMENT.

"Attachment" is one of the essential features of an effective security interest under the Act. The occurrence of attachment implies that all the requirements necessary for the creation of a security interest have been met. Attachment determines the time that the debtor's right in the collateral are restricted and affected by the right of the secured

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37. See generally, sections 1(1)(k), 12(3), 13(2)(a), 34(9), 37 and 49, Alta. Act.

38. See Part 5 of the Alta. Act (sections 55-71). See also J. Ziegel, B. Geva, and R. Cuming, Commercial and Consumer Transactions (Toronto: Emond Montgomery Publications Ltd., 1990) at 970-971.

party.[39] For a security interest to attach, value must have been given, the debtor must have rights in the collateral and either the secured party or his agent must obtain possession of the collateral, or the debtor must have signed a security agreement containing a description of the collateral sufficient to identify it.[40]

It appears that a security interest will attach when the parties execute the security agreement. Section 12(1) of the Alberta Act is clear on this point; although the parties may agree to delay the time of attachment. This provision is a departure from s.12(1) of the existing Manitoba Act, which requires that the time for attachment is when the parties intend the interest to attach. The judicial view of provisions similar to that of the present Manitoba Act is that, in the absence of a contrary intention in the security agreement, the interest will be presumed to attach upon the execution of the security agreement.[41] The clear wording of section 12 of the Alberta Act and the omission of the word "intention" implies that the attachment cannot take place prior to the execution of the security agreement.[42]

The requirement that value be given for there to be attachment is a major

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39. R. McLaren, Personal Property Security: An Introductory Analysis, supra, note 9 at 2-2. It should be pointed out that attachment is different from "perfection" which is another term used in the Act. Upon the attainment of perfection the rights of the secured party in relation to third parties' interests in the collateral are defined. See McLaren, ibid.

40. See ss. 12 Alta. Act and 10 & 12, Man. Act. For a thorough analysis of the ingredients of attachment, see R. Goode, Legal Problems of Credit and Security (London: Sweet & Maxwell; Centre for Commercial Law Studies, 1988) at 28.

41. See Sperry Inc. v. C.I.B.C. (1985), 17 D.L.R. 236 (Ont. C.A.)., Euroclean Canada Inc. v. Forest Glade Investments Ltd. (1985), 16 D.L.R. 289 (Ont. C.A.). See also T.J. Hunter, "Certainty or Fairness - The Interpretation of 'Attachment' in the PPSA" (1983), 9 C.B.L.J. 111.

42. R. McLaren, Personal Property Security Act: An Introductory Analysis, supra, note 9 at 2-3.

prerequisite. Value means any consideration sufficient to support a simple contract and includes an antecedent debt.[43] The inclusion of antecedent debt to constitute value should be contrasted with section 1 of the present Manitoba Act which defines "value" as "any consideration sufficient to support a simple contract." This definition leaves open the debate in the general law of contract whether past consideration suffices to constitute a contract and whether an antecedent debt could be taken as value to enable a security interest to attach.[44]

6.4(a). PERFECTION[45]

This is another important concept under the new scheme. It is a term employed to define the time when the holder of a security interest has obtained the greatest bundle of rights under the statute with respect to the collateral.[46] The importance of perfection under the Act is manifest when the priority rules on competing claims in the same collateral are considered. Upon perfection, the rights of the secured party to the collateral are no longer restricted to the interest of the debtor but to the rights of other third parties in the collateral.

However, perfection does not imply that a secured party has obtained an

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43. Section 1(1)(tt), Alta. Act.

44. R. McLaren, Personal Property Security: An Introductory Analysis, supra, note 9 at 2-4. See also Agricultural Credit of Sask. v. Pettyjohn (1991), 2 W.W.R. 689 (Sask. C.A.); Greyvest Leasing Inc. v. C.I.B.C. (1991), 1 P.P.S.A.C. (2d) 264 (Ont. Gen. Div.).

45. This term originated in American bankruptcy law. "Perfection" denoted the ability to withstand attack by unsecured creditors and the debtor's trustee in bankruptcy. See R. Cuming & R. Wood, Alberta Personal Property Act Handbook, supra, note 19 at 113.

46. R. McLaren, Personal Property Security: An Introductory Analysis, supra, note 9 at 3-3.

unimpeachable claim free from other competing interests; nor is perfection synonymous with priority rules.[47] Perfection is primarily concerned with ensuring that maximum efficacy is given to the security interest. An unperfected security interest will be subordinated to other perfected security interests and to the interests of creditors who cause the collateral to be seized under legal process, buyers without notice, and a debtor's trustee in bankruptcy or a court appointed receiver.[48]

A security interest is perfected when it has attached and all steps required for perfection under the Act have been completed, irrespective of the order of occurrence.[49] The method of perfection will depend on the nature or classification of the collateral. Perfection by registration is allowed for all kinds of collateral. Some collateral may be also be perfected by possession, for example, goods, securities, and negotiable instruments. Some collateral in certain circumstances is susceptible to temporary perfection, which means that within a grace period the security interest, although not actually perfected, is deemed by law to be perfected.

One of the notable advantages of the new regime is the novel system of perfecting security interests. As against the new regime, there are several limitations to the registration scheme under the present system of instrument registration in Nigeria. With the exception of a floating charge, it is impracticable to register a security interest that is of a constantly changing nature. Until the security agreement is executed the secured

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47. R. McLaren, ibid. Registration and perfection are different concepts under the Act. Registration is one of the several methods of perfecting a security interest.

48. See s.20, Alta. Act.

49. Section 19 Alta. Act.

party cannot register his proposed security interest. Further, the security agreement may contain provisions that it is not in the interest of the parties to be made public. Added to these problems is the administrative inconvenience to the registry personnel caused by lengthy security agreements.[50]

The new registration system of security interests does not adopt the rule that registration is a notice of the contents of the registered instrument in the public registry to the whole world.[51] Under the present North American regime, registration does not require the security agreement itself to be filed.[52] All that is required is the filing of a notice known as a "financing statement", which shows that a debtor may have created or may create in the future a security interest in favour of the creditor over property of a particular type. With this method, precise description of the property or collateral is not necessary.[53]

The benefit of "notice filing" is that it can be made before the security agreement between the parties is entered into or before the transaction is completed, and the filing will cover all transactions between the parties entered into during the currency of the registration. The flexibility of this system allows a single filing to cover a number of transactions between the parties to the security agreement(s). This scheme saves the

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50. See United Kingdom, Report of the Committee on Consumer Credit, Cmnd 4596 (1971), para. 5.7.49 ("Crowther Committee Report"). See also Discussion Paper, Personal Property Securities Law: A Blueprint for Reform (Queensland and Victoria Law Reform Commission, 1992) at 22.

51. A. Diamond, "The Reform of the Law of Security Interests", supra, note 1 at 245.

52. Contrast this with the requirement of the registration of company charges and registration under the Bills of Sale Laws.

53. Section 43 Alta Act. See also A. Diamond, "The Reform of the Law on Security Interests", supra, note 1 at 246.

secured party the trouble of having to effect new registration whenever the parties enter into a subsequent transaction. In the area of sales, where retention of title clauses is common, it will be unnecessary to file each sale contract, as one filing will cover all future sales between the parties, provided the collateral description is adequate to cover future sales.[54]

In relation to priorities between competing interests in the same collateral, generally, the first to perfect wins. This simplifies the problems inherent in the present registration of company charges in England and Nigeria. The rule that a registration effected within 90 days of executing the security agreement is valid and effective against a subsequently created interest, but which is registered first, does not promote facility and simplicity - which are some of the features that enhance secured transactions. This is apart from other issues such as the question of notice and the nature of security interest.[55]

The financing statement needs to indicate only the name and address of the debtor and the secured party in addition to a description of the collateral encumbered or that will be encumbered in the future. For a future creditor, the registered information may appear rather scanty and unhelpful in determining the credit-worthiness of the debtor. To avoid the potential for deceit by the debtor, it is provided that the prospective secured party can seek further information regarding financing statements from the secured creditors

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54. Ibid., at 247.

55. Ibid.

through the prospective debtor.[56]

It may be difficult to ascertain the essence of notice filing, since the party who checks the file does not fare better than a creditor who seeks information directly from the debtor before he grants any credit. However, it should be realised that the new filing system is mainly a secured creditors' protection scheme - generally, the date of filing determines the priority of competing claims. It should, therefore, be noted that the function of notice filing is not to give notice to the whole world of the existence of the security interest.[57] In addition to the simplification of the system of registration, another justification for the paucity of information in the financing statement may be the need to protect the privacy interest of the debtor and the secured financier, which is highly valued in present day business transactions.

(b). PERFECTION BY POSSESSION.

Perfection can also be attained by the possession of the collateral.[58] The underlying reason for this method of perfection is that by possessing the collateral,

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56. Section 18, Alta. Act. The secured party is under obligation to respond to the inquiry from the party with an interest in the property. But in the United States, the secured party is not obliged to respond to the enquiries from the prospective creditor. It is argued by Baird that even if the secured creditor does not respond to the enquiries of the prospective creditor, and there is the danger of the debtor misleading him in relation to the extent of his encumbered assets, these are not enough for the enlargement of the information in the financing statement. According to Baird, the presence or absence of security interests is not the determining factor for subsequent secured creditors to grant credit. Rather it is one of those considerations on the general financial health of the debtor, and information regarding this can be elicited from the debtor. See D.G. Baird, "Notice Filing and the Problem of Ostensible ownership" (1983), J. Leg. Stud. 53 at 62.

57. I. Davies, "The Reform of Personal Property Security Law: Can Article 9 of the Uniform Commercial Code Be a Precedent?" (1988), 37 I.C.L.Q. 465 at 479.

58. Section 24, Alta. Act. By virtue of this section, a security interest in goods, chattel paper, a security, a negotiable document of title, an instrument and money can be perfected by possession.

potential secured creditors will be put on notice that the creditor in possession has claims on the collateral.[59] It may also be argued that, considering the nature of some of the security interests subject to perfection by possession, to require perfection by registration may destroy their negotiability and transferability.[60]

The application of perfection by possession creates practical problems. The Act does not define "possession" with regard to perfection, and this leads to difficulty in distinguishing possession of the collateral from "seizure" or repossession of the collateral by the creditor. For instance, if the creditor did not register his security interest and on realizing that the debtor is defaulting in his loan obligation seizes the collateral, does this act constitute perfection by possession?[61] To permit seizure as a form of perfection will result in the problem of ostensible ownership which the law has always sought to remedy.[62] If the creditor seizes the goods shortly before the debtor goes into bankruptcy the trustee in bankruptcy may impugn this action as a case of fraudulent preference.

The problem inherent in this method of perfection has been remedied by the

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59. Steele J. in Re Darzinkas (1981), 132 D.L.R. (3d) 77 at 79. See also M. Catzman et al., Personal Property Security Law in Ontario (Toronto: Carswell Co. Ltd., 1976) at 121; A. Carfagini, "Statutory Requirements for Perfection by Possession Under the Ontario Personal Property Security Act" (1983), 7 C.B.L.J. 234; R.C. Cuming, "Personal Property Security Act: The New Kids on the Block" (1991), 19 C.B.L.J. 191 at 211.

60. I. Davies, "The Reform of the Personal Property Security Laws: Can Article 9 of the United States Uniform Commercial Code be a Precedent?" supra, note 57 at 486.

61. See A. Carfagini, "Statutory Requirement for Perfection by Possession under the Ontario Personal Property Security Act", supra, note 59 for a review of the cases on this point.

62. D. Baird & T. Jackson, "Possession and Ownership: An Examination of the Scope of Article 9" (1983), 35 Stan. L. Rev. 175.

Alberta Act, which provides that the affected security interest can only be perfected by possession if it is actually held as collateral and not while it is held pursuant to a seizure or repossession.[63] By this provision, perfection by possession is effective if the creditor assumes possession of the collateral at the moment the security agreement comes into effect - when there is attachment of the security interest. This legislative measure has put to rest the ambiguity and problems created by the present Manitoba and the former Ontario Act.[64]

However, the basic policy behind possessory security interest can be questioned. As has been stated, it is assumed that the possession of the collateral by the creditor gives public notice of his interest in the collateral to future creditors. But it is doubtful whether the surrender of possession by the debtor to the creditor amounts to some kind of public record of the existence of security interest.[65] Further, the development of

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63. See s.24(1). To avoid any doubt on this provision, s.24(2) prohibits any constructive possession by the secured party of collateral in the actual or apparent possession or control of the debtor or the debtor's agent.

64. S.24 of the existing Manitoba and the former Ontario Act are similarly worded and provides:

Except as provided in section 26, possession of the collateral by the secured party or on his behalf by a person other than the debtor or the debtor's agent, perfects a security interest in
(a) chattel paper; or
(b) goods; or
(c) instruments; or
(d) securities; or
(e) letters of credit and advices on credit; or
(f) negotiable document of title;
but subject to section 23, only during its actual holding as collateral.

The decision of the Ontario Division Court in Royal Trust Corp. of Canada v. No. 7 Honda Sales Ltd. (1988), 40 B.L.R. 109 is in line with the Alberta provision. But this decision has been revised by s.22 of the new Ontario Act, S.O. 1989, c.16, which provides that in certain specified security, "possession or repossession of the collateral by the secured party...", perfects the security interest. The new Manitoba Act equally allows perfection by seizure or repossession. See also Sifton Credit Union v. Barber [1986], 4 W.W.R. 341 (Man. Q.B.).

65. P. Coogan, "Article 9 - An Agenda for the Next Decade" (1978), 87 Yale L.J. 1012 at 1036.

"paperless" instruments like electronic fund transfer has diminished the importance of possession.[66] Advocating the abolition of perfection by possession, Coogan stated:

> [T]he distinctions based on 'possession' seem to be losing their utility and should be reconsidered with an eye to their abolition, especially in the provision for public notice and the exemption from the statute of frauds. It would seem that the purposes of giving notice are the same regardless of the nature of the collateral, even though the amount of information that can be placed on public record and the location of the record may vary. Future draftsmen may be able to devise a single, comprehensive means of satisfying the public notice requirement.[67]

(c). TEMPORARY PERFECTION.

If perfection is effected by possession, commercial necessity may demand that the secured party should surrender the collateral to the debtor for the purposes of sale or repair. During this period there will be lapse in the perfection of the security interest, but the law gives a period of grace within which the security interest is deemed to be perfected. This is referred to as "temporary perfection."[68] The purpose of this provision is to avoid the need for the registration of a financing statement during the period that the collateral is temporarily surrendered to the debtor so that it can be dealt with.[69]

Temporary perfection will equally be effective when there is inter-jurisdictional movement of goods subject to a security interest. In this regard, the secured party is

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66. Ibid., at 1036-37.

67. Ibid., 1049.

68. Section 26 Alta. Act.

69. R. Cuming & R. Wood, Alberta Personal Property Security Act Handbook, supra, note 19 at 142.

given a grace period to perfect the security interest in collateral, which has moved from one state or province to another. The security interest is deemed to be perfected during the grace period.[70] The same temporary perfection rule applies to purchase-money security interests[71] and interests in proceeds from an original collateral.[72]

If the first-to-register-wins rule were to be applied to these provisions of the Act, there would be injustice to secured parties - especially in cases where the collateral is surreptitiously removed from one jurisdiction to another. Although the law avoids what may appear as inequitable subordination of the rights of the secured party whenever any of the acts that may necessitate automatic temporary perfection occurs, it should be noted that this protective measure is not absolute.[73] In the case of surrender of collateral for the purpose of repairs, pursuant to s.26 of the Alberta Act, it is advisable that the secured party register its interest before the surrender is made.[74]

6.5(a). REGISTRATION PROBLEMS UNDER THE ACT.

A fundamental change in the North American model regime is the method of registering security interests. In terms of registration of a security interest, the Canadian Acts are based on computerised registration. This innovation has enhanced facility and

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70. Section 5(1), Alta. Act.

71. s.22(1), Alta. Act.

72. Ibid., s.28(3)

73. But note that there is no temporary perfection as against a buyer or lessee of goods who acquires the interest within the grace period without knowledge of the security interest.

74. R. Cuming & R. Wood, Alberta Personal Property Security Act Handbook, supra, note 19 at 143.

simplicity of secured financing transactions. But computerised registration has its own limitations; much will depend on how the computer is programmed. An error in registration or search may lead to serious consequences for the secured parties. The shortcomings of computerised registration are known to the provinces where they are operational and some legislative measures have been put in place to minimise the losses.

A financing statement tendered for filing should contain the name and address of the debtor and the secured party, and a description of the collateral.[75] If the collateral is a "consumer good" or "equipment",[76] the description will not be sufficient unless it is done by item or kind.[77] In other cases a general description of the collateral will suffice. The description of the collateral by "type" does not entail an exhaustive description since notice filing anticipates the making of further enquiry by the prospective secured party. The description of collateral by type is aimed at reducing the number of investigations to be made by a searching party.[78] Notwithstanding the flexibility of this provision, it has been argued that a "type or kind" description of collateral may require giving a reasonable searcher such information about the generic nature of the collateral

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75. s.10 Man. Act.

76. "Consumer goods" and "equipment" are defined terms under the Acts.

77. Sections 26-29 of the Alberta Personal Property Security Regulation state how collateral should be described, the contents of serial number description, and the description of proceeds.

78. I. Davies, "The Reform of Personal Property Security Laws: Can Article 9 of the United States Uniform Commercial Code be a Precedent?", supra, note 57 at 490. See also Touche Ross Ltd. v. Royal Bank of Canada [1984], 3 W.W.R. 259, per Tallis J. at 263-266.

as could be useful to him.[79]

Computer registration requires accuracy in the information tendered for registration. The difficulty here is with debtor-name registration, which may be incorrectly fed into the computer or misleading where the debtor adopts an alias. The Act tries to remedy this situation by requiring the registration of the serial number of certain collateral in addition to the debtor's name.[80] With this method, if the searching party does not find any encumbrance on the register because of the wrong name-search criterion, the use of the collateral serial number will provide a useful ancillary search result.

The debtor's name and collateral serial number are dual, not alternative, search criteria, since the name has to be used in addition to the serial number. In Ford Credit Canada Ltd. v. Percival Mercury Sales Ltd.,[81] the collateral was described by serial number but the manner of identification of the debtor on the financing statement was so defective as to be seriously misleading. However, the Court of Appeal of the province of Saskatchewan held that the registration was nevertheless valid since a searching party had available the serial number which, if used as the search criterion, would have

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79. Davies, ibid., at 492. Davies criticised the Court of Appeal decision in Touche Ross Ltd. v. Royal Bank of Canada, ibid., concerning "type or kind" description as being too broad and contrary to the legislative intention.

80. s.43(7), Alta. Act.

81. [1984], 5 W.W.R. 714, affirmed [1986], 6 W.W.R. 569 (Sask. C.A.). The validity of this case is highly suspect, since there are contrary decisions in some other provinces in Canada. See, for example, Re Paquette [1993] 7 W.W.R. 749 (Alta. Q.B.); Todd Acceptance Inc. v. Royal Bank of Canada [1990], 105 A.R. 316 (Alta. Q.B.); Re Charles (1988), 67 C.B.R. (N.S.) 260 (Ont. S.C.); Re Bellini Manufacturing & Importing Ltd. (1980), 33 C.B.R. 204 (Ont. S.C.). Contra Bank of Montreal v. Bank of Nova Scotia (1983), 24 Man. R. (2d) 217.

revealed the registration. This decision may be correct in the light of the then Saskatchewan Act, but could lead to further problems. If the decision were to be followed and the use of a collateral serial number is taken as an alternative to the debtor-name search and vice-versa, there will appear the problem of circular priority.[82]

Section 43(7) of the Alberta Act requires the use of the debtor-name and collateral serial number search criteria, and this appears to be a more sensible provision. According to some commentators, the basic public policy reason for requiring the inclusion of both registration criteria is the avoidance of confusion on the part of the users of the system. It is in the public interest that with respect to certain types of goods either or both registration criteria could be used in searching.[83]

However, even though the inclusion of the serial number search criterion is helpful in solving some of the registration problems, it should be noted that this does not apply to all forms of collateral. The absence of a universal application of this registration and search criterion to all types of collateral stems from the fact that not all types of goods have serial numbers, and only a few of those that have are reliable. The likelihood of two or more items having the same serial number made it necessary to restrict collateral serial number registration to certain categories of goods - mostly consumers goods and equipment in the hands of the debtor.[84]

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82. R. Cuming, "Judicial Treatment of the Saskatchewan Personal Property Security Act" (1986-87), 51 Sask. L Rev. 129 at 141.

83. In Re Paquette, supra, note 81, it was held that under s.43(7) of the Alberta Act, both must be correct and they are not alternative criteria. See also R. Cuming & R. Wood, "Alberta Personal Property Security Act Handbook", supra, note 19 at 250.

84. See R. Cuming, "Modernization of the Personal Property Security Registries: Some Old Problems Solved and Some New Ones Created" (1983-84), 48 Sask. L. Rev. 189 at 197.

(b). ERRORS IN DOCUMENTS OF REGISTRATION.

As it is difficult to find a human device that is error-proof, the likelihood of error in the new registry regime was anticipated by the drafters. A registering party may commit some errors or make some omission in the registration. Under the bills of sale law, some inessential errors or omissions in the course of registration may lead to the invalidation of the security. This is one of the reasons why this law is almost universally condemned. Under the present Canadian Acts, no dogmatic precision is required, and the effect of error is not necessarily fatal to the efficacy of the registration. There are curative provisions in the Acts for errors that are not misleading.[85]

Section 43(6) of the Alberta Act is a meaningful improvement on the provisions of the former Ontario and the present Manitoba Acts,[86] whose interpretation give rise to some problems. In Re Robert Sist Development Corporation Ltd.[87], Henry J., while

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85. See s.43(6), Alta. Act which provides:
The validity of the registration of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the registration of it unless the defect, irregularity, omission or error is seriously misleading.

86. Sections 4(1)(2) and 48(5), of the present Manitoba Act and sections 4 and 47(5) of the former Ontario Act are similarly worded. s.4(1), Manitoba Act provides:
A document to which this Act applies is not invalidated, nor shall its effect be destroyed by reason only of a defect, irregularity, omission or error therein or in the execution thereof unless, in the opinion of the judge or court the defect, irregularity, omission or error is shown to have actually misled some person whose interests are affected by the document.

s. 4(2): A registration under this Act is not invalidated nor shall its effect be destroyed by reason only of a defect, irregularity or error therein unless, in the opinion of the judge or court, the defect, irregularity or error is shown to have actually misled some person whose interests are affected by the registration.

s.48(5): An error of a clerical nature or in an immaterial or non-essential part of a financing statement or other document required or authorised to be registered in the personal property security registry that does not mislead does not invalidate the registration or destroy the effect of the registration.

87. (1978), 17 O.R. (2d) 305.

construing ss.4 and 47(5) of the old Ontario Act observed:

> Notwithstanding any jurisprudence covering prior statutes, I hold that the intention of the legislation was to cure such defects in security agreements and financing statements by the enactment in the new Act of sections 4 and 47(5). The defects are, therefore, not fatal unless some person is shown to have actually been misled.[88]

This pronouncement shows that a subjective test is applied on the effect of the irregularity, defect, error or omission. This means that the interested party must show that he was actually misled or prejudiced by relying on the document of registration.[89] The subjective requirement of these curative provisions will trigger difficult problems of proof on the part of the interested party. According to Ziegel:

> The requirement of proof of actual prejudice has an all-embracing quality - it will not only excuse minor and inconsequential errors (which is fair enough) but also all other errors and omissions however serious so long as they have not actually misled.[90]

Moreover, the subjective test will be problematic to a trustee in bankruptcy; since as a representative of all creditors, it is impossible for him to show that he was actually misled or prejudiced as he does not take any interest in the bankrupt's property.[91] Again, it has been argued that ad hoc test will lead to circular priority problems.[92] In

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88. Ibid., at 307.

89. See Steinbach Credit Union Ltd. v. Manitoba Agricultural Credit Corp. [1992], 1 W.W.R. 448, where the Manitoba Court of Appeal held that apart from the fact that the misspelling of the debtor's name was inessential to the document, there was no suggestion that any one was prejudiced.

90. J. Ziegel, "Detrimental Reliance and the PPSA" (1979-80), 4 C.B.L.J. 249 at 252.

91. R. Cuming & R. Wood, Alberta Personal Property Security Act Handbook, supra, note 19 at 251; I. Davies, "The Reform of the Personal Property Security Laws: Can Article 9 of the United States Uniform Commercial Code be a Precedent?", supra, note 57 at 495.

92. R. Cuming, "Judicial Treatment of the Saskatchewan PPSA" supra, note 83 at 139-140.

the light of these problems, an objective test as provided in the Alberta Act is preferred.[93]

It is also possible for the officials in the registry to make omissions or create errors in the course of registering a financing statement. Despite the inducement to register because of the priority conferred, the likelihood of mistake in the registry may be a disincentive to register. It is for this reason that the Canadian Acts created assurance funds for the compensation of those who rely on the register and are damaged by the action of the registry personnel.[94]

6.6. THE ISSUE OF PRIORITIES.

The determination of issues of priority has always been the battle ground in secured transactions. This is hardly surprising since the problem involves both commercial necessities and public policy. The previous judicial treatment of the problem of priorities was never uniform and sometimes incomprehensible. The priority provisions of Article 9 and the Canadian Acts are intended to bring order to this confused aspect of secured transactions in personal property.[95] The formulation of priority rules by the new regime is quite commendable, but whether the rules provide answers to the problems

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93. s.43(8), Alta. Act provides that as a condition to a finding that a defect, irregularity, omission or error is seriously misleading, proof that anyone was actually misled is unnecessary.

94. See s.45, Man. Act. But there are limits to the amount of money recoverable from the assurance fund.

95. According to Peter Coogan, the priority section of Article 9 was the most difficult, and consumed the time of the draftsmen more than any other section of the Article. See P. Coogan, "Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the 'Floating Lien' " (1959), 72 Harv. L.R. 838 at 855.

concerning the balancing of interests that have plagued the courts and engaged the time of the legislature in the past is a different matter entirely.

In most common law jurisdictions where the new regime is not in place, the determination of priority among competing security interests is made possible by tracing the title. This problem of title and form of security interests, which is regarded as a panacea to priority disputes in most jurisdictions, has been abandoned by the new regime. In its stead has been developed a comprehensive system of priority rules which is founded on sound commercial principles.[96] Perfection of security interest by registration or possession is fundamental to the new priority scheme.[97]

Generally, the approach of the new regime on the question of priority between competing security interest is that every other thing being equal, the first in time to perfect is first in right.[98] Priority is given to a secured party who is first to register a valid financing statement, take possession of the collateral for the purposes of perfecting security interest in it, or acquire a temporary perfected security interest in the collateral as prescribed by the Act.[99] Where there is competition between a perfected security interest and an unperfected interest, priority will be given to the perfected security

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96. R. McLaren, Personal Property Security: An Introductory Analysis, supra, note 9 at 5-5.

97. But perfection of security interest by registration is not always effective against all the world. Sometimes, fiduciary obligation may be invoked to alter the priority scheme. See for instance, Kuruyo Trading Ltd. v. Acme Garment Co. (1975) Ltd. (1988), 8 P.P.S.A.C. 161 (Man. Q.B.), where a bank which provided credit information to prospective creditor concealed its own security interest in the debtor's property, and was denied its priority position. A perfected security interest may be subject to statutory liens and section 427 Bank Act security. See also McLaren, ibid.

98. s. 34, Alta Act sets out the residual priority rules. See also s.35, Man. Act. If all competing perfected security interests have been perfected by registration, the first to register wins. s.35(1) Alta Act.

99. s.35(1), Alta. Act.

interest.[100] But where the competing security interests are unperfected, priority will be determined by the order of attachment of the security interests.[101]

An important question in this regard is what the priority position of a holder of perfected security interest who takes with knowledge of an unregistered security interest will be. Under the old law the priority of a holder of perfected security interest can only be assured when he takes in good faith, for value and without notice of a prior unperfected security interest in the same collateral. Apparently, this rule has prompted courts to hold under the new scheme that a security holder who takes with actual notice of a prior unregistered security interest will be subordinated to it.[102] However, this decision might have been reached *per incuriam* in the light of the provisions of the Acts, which do not specifically refer to "knowledge" as a factor in determining priority.[103]

The weight of authority is in favour of the position that knowledge of a prior perfected or unperfected security interest in the collateral does not affect priorities under the Act.[104] The rationale for this position is that a contrary view will compromise the integrity of the register. Further, the Land Titles Act, modelled on the Torrens system

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100. Ibid., s.35(1)(b).

101. Ibid., s.35(1)(c).

102. 5229617 Ontario Ltd. v. Concord Inn Motel Inc. (1988), 8 P.P.S.A.C. 265 (Ont. Dist. Div.).

103. R. McLaren, Personal Property Security: An Introductory Analysis, supra, note 9 at 5-11. See also s.72 of the revised Ontario Act which permits the application of, inter alia, the rules of equity so long as they do not conflict with the provisions of the Act.

104. Robert Simpson Co. v. Shadlock (1981), 31 O.R. (2d) 612 (H.C.); Bank of Nova Scotia v. Gaudreau (1984), 48 O.R. (2d) 478 (H.C.); National Trailer Convoy of Canada Ltd. v. Bank of Montreal (1980), 1 P.P.S.A.C. 87 (Ont. S.C.). See also Cuming & Wood, Alberta Personal Property Security Act Handbook, supra, note 19 at 205; McLaren, supra at 5-11.

which is operational in some Canadian jurisdictions, has worked well without the imposition of the "notice" conundrum.[105] It is however important to note that a subsequent perfected security interest taken in a bad faith could be subordinated to a prior unperfected security interest.[106]

The introduction of the doctrine of notice by the Court of Equity was intended to curb unconscionable bargains or conduct. The removal of this doctrine from the present personal property security law is intended to avoid uncertainty and enhance facility in secured transactions. But there have been calls to reintroduce the good faith purchaser without notice doctrine, so as to avoid inequity to holders of unperfected security interests. One of the reasons for this proposal is that the registration requirements of the novel legal regime could make compliance difficult to attain.[107] Moreover, it is argued that the whole priority scheme under the present Acts is unduly weighed in favour of professional or expert lenders, who know the rules well enough to take advantage of amateur lenders, who either lack the bargaining power or are not so knowledgeable.[108]

The priority conferred on the secured party who has perfected his security interest

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105. McLaren, ibid., at 5-10 to 11.

106. Carson Restaurant International Ltd. v. A-1 Restaurant Supply Ltd. [1989], 1 W.W.R. 266 (Sask. Q.B.). This decision of this case should be understood in light of its peculiar facts.

107. J. Ziegel, "Recent and Prospective Developments in the Personal Property Security Law Area" (1985), 10 C.B.L.J. 131 at 163.

108. D. Calson, "Rationality, Accident, and Priority Under Article 9 of the Uniform Commercial Code" (1987), 71 Minn. L. Rev. 207 at 209; G. Gilmore, "The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman" (1981), 15 Ga. L. Rev. 605 at 626; P. Beutel, "The Proposed Uniform Commercial Code as a Problem in Codification" (1951), 16 Law & Contemp. Probs. 140 at 144.

It should be observed that under the Alberta Act a holder of an unperfected security interest can assert it in the collateral as against a transferee who is not a secured party if the transferee gave no value or acquired the interest with knowledge of the unperfected security interest. See s.20(1)(c).

is limited in scope. A buyer or lessee of goods in the ordinary course of business has priority to the secured party, whether he has knowledge of the perfected security interests or not, unless he knows that the sale or lease is in breach of a security agreement.[109] This provision is founded on the need to avoid commercial disruption and the possibility of injustice to innocent buyers in the ordinary of business or lessees, which would occur if they are required in every case to carry out a search before entering into their transactions.[110]

There is also a provision that a buyer or lessee who gives new value without notice of a prior security interest, and who obtains possession of the goods, takes free from any security interest temporarily perfected. This means that a good faith buyer or lessee is not affected by the deemed perfection of security interests under the Act.[111] It would also appear that a transferee who takes without notice of a purchase money security interest before the latter is registered will not be subordinated to the interest of the purchase money interest holder.[112]

On a cursory look, the whole scheme of the Acts appears too sweeping and

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109. S.30(2), Alta. Act. By section 30(3) of the Act a buyer or lessee of goods takes free from a perfected or unperfected security interest in the goods if the buyer or lessee gave value for the interest acquired, and bought or leased the goods without knowledge of the security interest. However s.30(4) provides that subsection (3) does not apply to a security interest in a fixture, or goods the purchase price of which exceeds $1000 or, in the case of a lease, the market value of which exceeds $1000. These provisions are intended to protect consumers who purchase low cost items from being subordinated to prior perfected security interests. Also, these provisions prevent unnecessary cluttering of the register with security interests taken over small loans.

110. Cuming & Wood, Alberta Personal Property Security Act Handbook, supra, note 19 at 174.

111. See s.30(5), Alta. Act.

112. See s.21 Alta. Act., R. Cuming, "Second Generation Personal Property Security legislation in Canada" (1981-82), 46 Sask. L. Rev. 6 at 35.

restrictive of the rights of the debtor to obtain further secured credit. However, a subsequent secured party, in order to obtain priority, may request a subordination agreement, so that his interest will rank in priority to that of the former secured creditor. There may be a provision in the prior security agreement that permits the subordination of the security interest of the first creditor. It is important to note that a subordination agreement is enforceable by a third party, even though he is not privy to the subordination agreement, so long as the agreement confers benefits on him.[113]

A subsequent secured creditor eager to obtain a priority position against preexisting security interest holders may do so by the use of a "purchase-money security interest."[114] Section 34(2) of the Alberta Act gives priority to the holder of a purchase money security interests in collateral, other than inventory or its proceeds, that is perfected within 15 days from the time that the debtor or another person at the debtor's request obtains possession of the collateral. The priority of the purchase money security interest is premised on the need to ensure that the debtor's sources of credit are not exhausted. According to McLaren:

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113. S.40 Alta. Act. See also Euroclean Canada Inc. v. Forest Glade Investment Ltd. (1985), 16 D.L.R. 289, 293-294 (Ont. C.A.).

114. s.1(ii), Alta. Act defines "purchase money security interest" as:

(i) a security interest taken or reserved in collateral to secure payment of or part of its purchase price,

(ii) a security interest taken or reserved in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights,

(iii) the interest of a lessor of goods under a lease for a term of more than 1 year, or

(iv) the interest of a person who delivers goods to another person under a commercial consignment

but does not include a transaction of sale by and lease back to the seller, and, for the purposes of this definition, 'purchase price' and 'value' include credit charges or interest payable in respect of the purchase or loan.

> the purchase-money priority rules prevent bondage of the debtor to previous secured parties who might overreach their claim on the collateral those secured parties have taken as security for their loans.[115]

The purchase money financier supplements the pool of the debtor's assets in which the previous secured parties have taken security interests. This special priority enables the financier or supplier to take a security interest in the collateral it has financed or supplied, and the law ranks its claim in priority to others.[116]

In the case of a purchase money security interest in inventory and its proceeds, certain conditions must be met before the holder obtains priority. The holder should ensure that the security interest is perfected by registration at the time the debtor, or a third party at the request of the debtor, receives possession of the collateral. Before the interest is registered a notice should be served by the purchase money security holder on all other secured parties who have registered financing statements in which the collateral is classified as inventory.[117] Failure to comply with these conditions will deprive the purchase money security interest holder a super priority position, and his interest will be subordinated to prior perfected security interests. The priority of the purchase money

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115. McLaren Personal Property Security: An Introductory Analysis, supra, note 9 at 5-28.

116. McLaren, ibid., at 5-29. See Clarke Equipment of Canada Ltd. v. Bank Of Montreal (1984), 4 P.P.S.A.C. 38 (Man. C.A.).

117. s.34(3), Alta. Act. The notice must state that the person giving the notice expects to acquire a purchase money security interest in inventory of the debtor, and describes the inventory by item or kind. The notice must be given before the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier. See s. 34 (3)(c) & (d). The reason for giving notice in the case of inventory may be due to banking practice - banks, traditionally, lend on the security of inventory and receivables and it is impracticable for banks to make a search before each advance to check whether they are subject to purchase money security interests.

security interest is extended to the proceeds of the inventory.[118]

By section 28(1) of the Alberta Act, where collateral is dealt with or otherwise gives rise to proceeds,[119] the security interest continues in the collateral and extends to the proceeds.[120] For a secured party to have priority in the proceeds of the collateral, the security interest in the collateral must have been perfected. Section 28(2) provides that a security interest in proceeds is continuously perfected if the security interest in the original collateral is perfected in accordance with the Act.[121]

A secured party has the right to trace the proceeds of his collateral and the Act does not prescribe any limit to which the party may trace the proceeds of his collateral or the proceeds of proceeds.[122] The proceeds are still traceable even in the absence of a fiduciary relationship between the secured party and the person dealing with the proceeds.[123] Where money proceeds are mixed with other funds and cannot be

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118. Transamerica Commercial Finance Corp. v. Royal Bank [1990], 4 W.W.R. 673 (Sask. C.A.)., Agricultural Credit Corporation of Saskatchewan v. Pettyjohn [1991], 2 W.W.R. 689 (Sask. C.A.).

119. Section 1(1)(gg) Alta. Act defines proceeds as "identifiable or traceable personal property ... derived directly or indirectly from any dealing with collateral or proceeds of the collateral ..."

120. A secured party who expressly or impliedly authorised the dealing with the collateral cannot claim the proceeds of the collateral. If there is no authorization that the collateral may be dealt with, it seems that the common law principle of *nemo dat quod non habet* will apply.

121. But if a security interest in the original collateral is perfected in a manner different from the stipulation of s.28(2) of the Alberta Act, the security interest in the proceeds is deemed perfected within the period of 15 days that the security interest in the original collateral attaches to the proceeds. At the expiration of the grace period (15 days), the security interest in the proceeds of the collateral becomes unperfected. See s.28(3).

122. See Prince Albert Credit Union v. Cudworth Farm Equip. Ltd. (1985), 45 Sask.R. 67 at 71 (Q.B.). Contra General Motors Accept. Corp. of Canada Ltd. v. Bank of Nova Scotia (1986), 55 O.R. (2d) 438 at 442 (C.A.).

123. See s.1(6) Alta. Act. See also Transamerica Commercial Fin. Corp. v. Royal Bank (1989), 9 P.P.S.A.C. 148, affirmed [1990] 4 W.W.R. 673 (Sask. C.A.).

identified, the equitable tracing principles will apply.[124]

It should also be observed that pursuant to s.14 of the Alberta Act, a security agreement may cover future advances and, by s.35(4), the future advances will have priority to an intervening security interest provided that the security interest is perfected.[125]

6.7. RIGHTS AND REMEDIES ON DEFAULT.

The Act provides uniform and comprehensive provisions for the rights and remedies of the parties on default. This is another departure from the pre-Act laws where the rights and remedies of the parties to secured transactions depended on the form of security taken. The Act also provides for the appointment of receivers so that a separate treatment of receivers, for example, in company law, may no longer be required. But the default rights and remedies provisions do not apply to true leases for a term of more than one year or a commercial consignment. The common law, not the Act, regulate the rights and remedies of the parties in these areas.[126]

A secured party is entitled to seize the collateral upon the debtor's default and, if the collateral is insufficient to discharge the debt owed, the secured party may reduce

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124. See Re Hallet's Estate (1879), 13 Ch.D. 696; Re Diplock's Estate [1948] Ch. 465 (C.A.), affirmed (sub nom. Min. of Health v. Simpson [1951] A.C. 251 (H.L.).

125. But a future advance may be subject to the priority of an execution creditor who has seized the collateral and the secured party had knowledge of this seizure before the advance was made. See sections 14(2) and 35(5) Alta. Act.

126. See s.55 Alta. Act.

his claims to judgment.[127] It should be noted that in addition to the statutory remedies, the parties to a security agreement may stipulate other rights and remedies in the security agreement. But with the exception of permitted instances under the Act, the exercise of the contractual rights should not be inconsistent with the statutory rights and remedies.[128]

Section 58(2) of the Alberta Act provides that except in the case of receivership, a seizure of property pursuant to the enforcement of rights under a security agreement shall be conducted by a sheriff. But the seizure of the collateral by the sheriff on behalf of a secured party does not affect the priority position of the secured party in relation to other secured creditors.[129]

It has been held that a debtor must be given a reasonable time to pay after a demand for payment is made.[130] If the secured party seizes the collateral then notice of the seizure must be given to the debtor and other parties who have interest in the

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127. See s.55(5) ibid. The rights and remedies provided by s.55 are not mutually exclusive - they are cumulative - and the pursuit of one remedy is no bar to others. See Cuming & Wood, Alberta Personal Property Security Act Handbook, supra, note 19 at 290.

128. Section 56(2) ibid.

129. Section 58 (14), ibid. The essence of this provision is to avoid the consequences which go with the legal conclusion that, after a seizure by the sheriff, the collateral is under the guardianship of the court. See Cuming & Wood, supra, note 19 at 302. See also Gainers Ltd.v. Crystal Diaries Ltd. (1964), 4 D.L.R. (2d) 424 (Alta. S.C.). It should be noted that other provinces permit seizures by privately appointed bailiffs.

130. Kavcar Investment Ltd. v. Aetna Fin. Services Ltd. (1989), 62 D.L.R. (4th) 277 (Ont. C.A.). This additional measure by the court is aimed at protecting debtors, but it has been argued that the measure is not in conformity with the Act, which empowers a secured party to take possession of the collateral when the debtor defaults. See C. Doersken & M. Rudoff, "Reconsidering Lister v. Dunlop" (1989), 53 Sask. L. Rev. 236. See also Cuming and Wood, ibid., at 303.

property, and the notice must conform with the statutory stipulations.[131] But if the collateral is perishable, a secured party can dispense with the notice requirement.[132] A secured party may, after taking possession of the collateral, dispose of it by public or private sale. The secured party may purchase the collateral if the sale is in a public auction, provided that the purchase price bears a reasonable relationship to the market value.[133]

Where any surplus remains after the debt and the cost of realizing it have been paid, the Act provides the order by which the surplus should be paid to other parties who may have interests in the collateral or the debtor. Except when there is a contrary agreement, or unless the Act or any other Act otherwise provides, the debtor is liable for any deficiency.[134]

In the exercise of the rights and obligation arising upon default in accordance with the provision of the Act, a security agreement or any other applicable law, section 66 provides that the secured party must act in good faith and with commercial reasonableness. This provision is intended to balance the rights of all the parties and at the same time facilitate business transactions. The idea of commercial reasonableness

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131. Section 60(5), ibid. If a secured party decides to foreclose the debtor's interest, he should give a notice to all the parties that have interest in the collateral. If there is no objection to the foreclosure, the secured party is assumed irrevocably elected to have taken the collateral in satisfaction of the debt obligation. See s.62, ibid.

132. Section 60(15), ibid.

133. See s.60(11), Alta. Act.

134. See s.61, ibid.

under the Act is flexible and designed to meet changing business circumstances.[135] To ensure good faith and commercial reasonableness, courts are empowered to regulate the conduct of secured parties in realizing their loans. An example of the flexibility in the Act's provision can be seen in section 66(3), which provides that the principles of the common law, equity, and the law merchant, continue to apply insofar as they are not inconsistent with the provisions of the Act.[136]

6.8. CONCLUSION.

Article 9 and the Canadian Acts on personal property security are great improvements on the unsystematic position of the law in other jurisdictions. The model regime is founded on sound commercial principles, devoid of the jumble of common law and equity, whose principles are out of tune with present commercial realities and societal needs. But this is not to say that the model regime has no shortcomings. It does not make adequate provisions for unsecured creditors. The continuing review of the laws in the jurisdictions where they operate also attest to their limitations. We should, however, recognize the fact that no law can meet the aspirations of every interested person in society. According to an informed commentator:

A system of priorities which will give universal justice or universal satisfaction

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135. McLaren, Personal Property Security Act: An Introductory Analysis, supra, note 9 at 7-16.

136. According to Cuming and Wood, s. 66 recognises that the Act is not a complete code of law applicable personal property secured transactions. The recognition and application of other laws will fill the gap in the system and support the philosophical foundation of the Act. See Cuming and Wood, supra, note 19 at 336.

is beyond human devising...[137]

The model legal regime has a lot to commend it. It has worked well in its country of origin and taken firm root where it has been transplanted. The movement for reform along the line of Article 9 in some jurisdictions with outdated laws on personal property secured transactions[138] attests to its suitability to modern commercial needs. It is equally important to note that the commercial efficiency of the new regime has necessitated the call for international harmonization of personal property security law based on a functional approach,[139] which is the hub around which the whole concept of Article 9 revolves.

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137. R. Goode, "The Modernisation of Personal Property Security Law", supra note 8 at 236.

138. The effectiveness of Article 9 in settling some of the controversial areas in secured transactions has made it internationally appealing. Apart from Canada, which successfully introduced a variant of Article 9 into some of her common law jurisdictions, there are attempts in some other parts of the world to introduce laws along the line of Article 9. In Great Britain, for instance, the recommendation of the Crowther Committee for the reform of substantive law on credit transactions drew heavily on Article 9. This has been followed by the Diamond report of 1989 on the review of security interest in property. See A. Diamond, A Review of Security Interests in Property, supra note 28.

There are also reform efforts in Australia. See Personal Property Securities Law: A Blueprint for Reform (Discussion Paper of Queensland and Victoria Law Reform Commission, 1992). See also Personal Property Securities (Discussion Paper, Law Reform of New South Wales). For reform activity in New Zealand, see Farrar's report contained in Law Commission Preliminary Paper No. 6, Reform of Personal Property Security Law (1988). See also J. Farrar, "New Zealand Considers a Personal Property Security Act" (1990), 16 C.B.L.J. 328. The India Law Reform Commission was also attracted to the whole conceptual scheme of Article 9, and this was acknowledged in a 1976 project report. See Banking Laws Committee (Government of India), Project Study on Personal Property Security Law - Project Report (1976) at 4-5; which was cited by Coogan, "Article 9 - An Agenda for Reform" (1978), 87 Yale L.J. 1013 at 1055.

139. In 1968, the United Nations Commission on International Trade Law authorised the Secretary General to make a study of the law of security interests in the principal legal systems of the world. The report on this study was prepared by Professor Ulrich Drobnig of the Max Planck Institute for Foreign and Private International Law, in the then Federal Republic of Germany. See Report to the Secretary-General: Study on Security Interests, (Yearbook of the United Nations Commission on International Trade Law, 1977), Vol. VIII, 171, paras. 2.6.2-2.6.2.3. See generally, R.C. Cuming, "National and International Harmonization: Personal Property Security Law" in D. King (ed.), Commercial and Consumer Law From an International Perspective (Littleton, Colorado: Fred B. Rothman & Co., 1986) at 471.

Chapter 7.

REFORM.

7.0. INTRODUCTION.

It cannot be denied that a congenial legal climate ensures and enhances the effective functioning of economic activities. An efficient law of secured transactions must be based on the principles of facility, simplicity, certainty and predictability. All these seem to be lacking in the Nigerian laws relating to secured lending. As a result credit is not easily available for consumers, and, where available, the cost of credit is exorbitant.[1] The high cost of obtaining credit is reflected in the prices of goods and services, which, ultimately, are borne by ordinary consumers. In other areas some businesses never take off, or when they commence, die prematurely because of the absence of credit. Thus the prevailing legal regime of secured lending has a spiral effect on the economy as a whole. The indispensability of credit transactions in a progressive economy is responsible for the attention given to this area of the law by legal scholars, business people and the legislature. The cases of Canada and the United States are clear enough in this regard.

There is little doubt that some reforms are needed in Nigeria. It is outside the scope of this paper to discuss all aspects of the law of secured transactions that need reform in Nigeria. The proposals for reform that are discussed below are based on the deficiencies in the laws that have previously been analysed in this study

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1. This is the economic consequence of the present state of the law.

7.1. REAL PROPERTY SECURITY.

Customary land tenure system in Nigeria is defective, if not anachronistic, with respect to several issues concerning secured transactions. Apart from the analytical problems inherent in this tenure system, its continuing recognition at present is antithetical to the formulation of an effective legal regime of real property security. The conception of the tenure system predated industrialisation and served the subsistence agricultural economy effectively. Family or group ownership of land, contrary to some opinions, is not a peculiarity of the Nigerian or African customary law. It has been stated that family ownership is the first historical form of ownership.[2] But the basis of the functioning of contemporary economy is that, in most cases, only individual ownership of land can effect maximisation of value.[3]

It is important to observe that in Europe, for instance, the changing legal definition of people's relationship to land was to a great extent responsible for the transition from feudalism to capitalism.[4] Individualisation of ownership and the availability of title to land facilitates transfers and mortgages of land, which are essential requirements of commercialisation of agriculture. Further, it has been realised that agricultural development must, to a considerable degree, precede and support industrialisation.[5] The commercialisation of agriculture (which cannot be brought about

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2. J. Underwood, The Distribution of Ownership (New York: Ams Press Inc., 1968) at 26.

3. R. Posner, "The Economic Theory of Property Rights" in B. Ackerman ed. Economic Foundation of Property Law (Boston and Toronto: Little, Brown & Co., 1975) at 12.

4. P. van Mehren and T. Sawers, "Revitalising the Law and Development Movement: A Case Study of Title in Thailand" (1992), 33 Harv. Inter L.J. 67 at 73.

5. P. van Mehren and T. Sawers, ibid.

without the availability of credit) requires certainty of title to land. The possibility of credit grantors predicting with certainty the outcome of their grant of credit should reduce interest rates and make capital available for development.[6] The present tenure system needs some modification to give room for easy and inexpensive credit facilities. The law should make it economical to locate the locus of title to land. This proposal can be partly attained by making it easier for family or group owned land to be partitioned and title individualised. Individualization of ownership may eliminate the requirement of family consent to alienation - especially in cases of lands owned by polygamous families - where consent is very difficult to obtain.

There are social justifications for the constraints against alienation without consent. This practice is aimed at protecting the interests of future generations. Also it is believed in most African communities that only irresponsible persons would dissipate the inheritance of their forebears.[7] These rationales are in addition to preventing fraudulent alienation by some members of the family. But with industrialisation and market expansion the traditional prohibition against alienation increases the transaction costs and causes strain on the land tenure system.[8]

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6. Ibid, at 89. See also H. do Soto, "The Missing Ingredient: What Poor Countries Will Need to Make Their Markets Work" (1993), 328 The Economist, 8 (September).

7. This rule is even recognised by the Holy Book, The Bible: "The Lord forbid it me that I should give the inheritance of my fathers unto thee", 1 Kings 21:3; cited by Underwood, The Distribution of Ownership, supra, note 2. Also it has been argued that although alienability generally enhances efficiency of land use, group imposed restraints on alienation are defensible when they ban a transfer that would harm others more than it benefits the parties to the transaction. See R. Ellickson, "Property in Land" (1993), 102 Yale L.J. 1315 at 1376.

8. See M. Trebilcock, "Communal Property Rights: The Papua New Guinean Experience" (1984) U.T.L.J. 375 at 395.

Because of the unwritten and varying nature of customary laws, it is impossible to stipulate the rules of consent that will apply in a given circumstance. However, it is suggested that any land transaction entered into after careful investigation, should not be rendered void if it turns out that the proper consent has not been obtained. At most, the transaction should be rendered voidable, and some compensation made payable to the transferee by the family. If the interest of a third party, for example, a creditor, is affected, the family should elect either to avoid the sale by redeeming the property from the creditor, or accept the sale as it was made and deal with the member(s) who effected the sale as the customary law permits. This should not appear as a startling proposition, since a remarkable feature of customary law is its flexibility, its ability to adjust to changing circumstances.[9] The rise of the literacy level in the Nigerian society has alleviated some of the problems in family ownership. Most educated people who die testate now make provisions for the distribution of the family property - including land - in their will. This avoids the problem of group ownership in the future.[10]

The problem of the relationship of landlord and tenant created by customary law equally needs modernisation. The present incidents of customary tenancy are akin to what prevailed during the feudal era. Feudalism, as the medieval land tenure system, changed and diminished in response to economic and social changes. Under customary law, the

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9. In Lewis v. Bankole (1909), 1 N.L.R. 100, Osborne C.J., at page 101 remarked:

> One of the most striking features of West African native custom ... is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.

10. According to Pollock and Maitland, historically, in some cases, family ownership was the outcome of intestate succession. See F. Pollock and F. Maitland, History of English Law vol. 11 (Cambridge: University Press, 1964) at 247.

tributes payable to the landlords by tenants are symbolic and do not represent proportionate returns to the landlord for allowing the tenant the use of the land. The system is, therefore, out of tune with the present societal realities. It is obvious that its continued recognition is a great impediment to easy and inexpensive availability of credit for agricultural development.

The requirement that the landlord should consent to any alienation by the customary tenant renders secured lending dilatory, cumbersome, and expensive. The belief in some quarters that the Land Use Act has abolished this form of tenure was dashed by the Supreme Court's decision in Abioye v. Yakubu[11], which held that the Act neither altered nor abolished the incidents of tenancy under customary law. This decision has exacerbated the problem as double consent - the consent of the family and the consent of the governor - is now required for any alienation or other dealings on land. The problems created by the Supreme Court's decision can be resolved by abolishing customary tenancy. To avoid any accusation of expropriation, substantial symbolic compensation,[12] similar to the tribute payable at present, should be paid once and for

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11. (1991), 5 N.W.L.R. 130.

12. The compensation is symbolic because, instead of representing the actual value of the land, it symbolises or acknowledges the customary landlord's ownership of the land. This proposal is similar to the measure adopted to abolish what was considered as the anachronistic system of tenures in English law. By virtue of the English Law of Property Act, 1922 (as amended), as from January 1, 1926, every parcel of copyhold land was enfranchised and converted into a freehold land held in socage tenure. See ss. 128-137, L.P.A., 1922. The Act also stipulated the manner of payment of compensation, which were expected to have been discharged by November 1, 1950. Although certain incidents were preserved unless the parties agreed to their extinction upon payment of compensation, these incidents of tenure - which pertains to the right of the lord or the tenants to mines, minerals, and so on - may not apply to the Nigerian situation since the affected interests are mainly vested in the state. See generally, Cheshire and Burn's, Modern Law of Property E. Burn ed. (London: Butterworths, 1982) at 20-25, 82-85. A similar development occurred in Scotland where statutes have provided for the redemption of feuduties by the payment of compensation. See the Conveyancing and Feudal Reform (Scotland) Act, 1970 and the Land Tenure Reform (Scotland) Act of 1974. See generally C. Kolbert and N. Mackay, History of Scots and English Land Law (London:

all to the landlords by the tenants. This will bring certainty to the present confused position.[13] It should be mentioned that the problems of real property security in most developed economies are associated, not with the requirement of consent, but mostly with registrable but unregistered instruments or titles.

The Land Use Act is problematic in major respects. The most objectionable feature of the Act is the requirement of consent from the state governors to any alienation of land. The consent requirement, in addition to being paternalistic, makes lending on the security of land precarious, expensive and, in most cases, inequitable.[14] The whole scheme of the Act, which, *inter alia*, is to make land available to most Nigerians and the government for developmental purposes, is laudable. But since secured lending is essential to economic development, the Act is working against this aspiration by restricting the availability of the most important form of security for credit - land.[15] The abolition of the consent requirement will not do violence to the intendment of the legislature or the overall scheme of the Act. At present, the law is observed more in its

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Geographical Publications Ltd., 1977) at 326-337. It should be noted that in copyhold enfranchisement in England and feuduty redemption in Scotland, the compensation to the 'lord', while it may be small (depending on the economic value of the surviving rights), is real, not symbolic.

13. Another curious provision that needs amendment is section 36(5) of the Act which prohibits any form of transfer of land covered by this section. This provision is a major constraint on development. See O. Smith, "The Efficacy of Agricultural Charges as a Form of Security in Nigeria" (1989), 2 Gravitas Bus. L. Rev. 69.

14. See the decision of Savannah Bank (Nigeria) Ltd. v. Ajilo (1989), 1 N.W.L.R. 305; and sections 22 and 26 of the Act.

The law has always viewed inhibition on alienation with disfavour because it takes property away from commerce, concentrates wealth, prejudices creditors, and discourages property improvements. See A. Casner and W. Leach, Cases and Text on Property (Boston: Little & Brown Co., 1969) at 1008.

15. For the importance of land in secured transactions, see A. Johnson, "Adding Another Piece to the Financing Puzzle: The Role of Real Property Secured Debt" (1991), 24 Loy. L.A.L.Rev. 335.

breach and it is only effective in preventing outside creditors and other genuine investors from granting credit to needy domestic entrepreneurs who can offer only land as collateral.

There is also the need to define or curtail the broad powers of state governors under the Act. It seems that their power under the Act is so extensive that it impedes dealings in land, leads to unnecessary delays in commercial transactions, and introduces an unwelcome element of subjectivity to the process.

Further, there is the problem of ascertaining the nature of the right of occupancy, which can best be described as a revocable lease in English law.[16] There is the need to state, precisely, the nature of a right of occupancy and a certificate of occupancy, in order to remove the present state of uncertainty in the law. Commercial activities thrive well when there is order and predictability, and the absence of these important factors has rendered land a vulnerable security in Nigeria. As a result, reform is needed to win the confidence of creditors and make the granting of credit economical and easy.

The cost of obtaining credit is reduced when the transaction costs of secured lending is low. The lowering of the transaction costs can be achieved when there is a public record that can be reliably referred to by creditors investigating the genuineness of the collateral offered by debtors to secure their loans. The fear of insecurity of title offered as collateral has always been a major concern to creditors. Various jurisdictions at various stages in their history have attempted to tackle this problem. Consequently, there have emerged both title and instrument registration systems. These two systems

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16. See A. Allot, New Essays in African Law (London: Butterworths, 1970) at 323.

operate concurrently in Nigeria, but as has been shown, there is a considerable degree of difference in the security that each system confers. Although neither system is error-proof, it is undeniable that title registration is more effective in meeting the needs of registered owners of land, purchasers, and creditors.

In Nigeria, instrument registration is of little utility in secured lending, because of the defeasibility of the title conferred by it. It has already been pointed out that the registration of an instrument does not enhance its value, since registration does not affect the validity or otherwise of a document. As a result the system is mostly useful for evidentiary purposes. However, in some Canadian provinces where the Torrens system of registration is used, titles to land are considerably secure. Generally, the system is fairly certain, simple, inexpensive, and expeditious. These features have enabled creditors to rely on the system and, probably, lowered the cost of borrowing from banks.[17] In the case of Nigeria, the equivalent of the Torrens system - the Land Titles Act - operates in one state of the federation only. The remaining states use the instrument registration system. Because of the indefeasibility principle under the Land Titles Act, albeit *deferred indefeasibility*, it may be said that the system is as reliable and efficient as the Torrens system. The objectionable features of the system are not so serious to warrant a recommendation for an entirely new regime. However, the recent Model Act proposed by the Canadian *Joint Land Titles Committee* has some important provisions that may be

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17. Donna M. Sabastian, Senior Counsel to Royal Bank of Canada, Manitoba Branch, during the course of my interview with her expressed satisfaction with the working of the Torrens system in Canada. She stated that the system does facilitate the granting of credit by banks to debtors. Her opinion was shared by Michelle F. Docking, Account Manager of the same bank. See also J. Janczyk, "An Economic Analysis of the Land Titles System of Transferring Real Property" (1977), 6 J. Leg. Studies 213.

helpful in rectifying some of the problems inherent in the Nigerian Act. The balance struck by section 5.6 of the Model Act appears to be eminently sensible. By this section, if there is error in registration, the displaced owner, who is likely to have a closer connection with the land, and to suffer loss which will be harsher and more difficult to quantify, should be restored and the registered transferee compensated. But the court may, on equitable grounds, grant immediate indefeasibility in favour of the first registered transferee.

The provisions concerning fraud in the Model Act may not be altogether satisfactory, but it seems to be the most reasonable approach. Pursuant to the Model Act, a purchaser who knew that there was no authorization and who also knew that the earlier interest would be prejudiced by the latter transaction, would be acting fraudulently. But it is not clear how a purchaser will know that his purchase will prejudice the earlier interest, while the law at the same time ignores the issue of actual notice of the earlier interest.

The compensation provisions under the Nigerian Act leave much to be desired. It has been shown that the question of contributory negligence makes compensation illusory. The recommendation of the Joint Titles Committee that the appropriate time for the assessment of loss is when the claimant brings the claim to the attention of the registrar or sues on it appears to be fair. Also, the reduction of the number of overriding interests will bring a modicum of certainty to the registration regime.

Some of these provisions in the Model Act may be helpful to Nigeria in any future reform. Because of the efficiency of the Torrens system, or any registration

regime along that line, it is imperative that the system should apply to other states of the federation. The significance of such a broad application is that a modern expanded market can only be effective when there are "formalised" property rights for exchange.[18] A holder of formalised title has an unimpeachable proof of ownership and would not be affected by uncertainty of title or fraud. The introduction of this system will usher in a substantial, low-cost exchange of property rights in land, thereby enhancing greater economic productivity.[19]

Therefore, a reform of the law along the line of title registration will lead to greater certainty of title and thus facilitate the granting of credit. When this project is completed, in addition to reforming other problematic areas of the land tenure system and the Land Use Act, an effective system will be in place for real property security. Such a system will lead to precise definitions and definite assignments of property rights in land. It will equally give legal and tenure certainty to these rights. The presence of these features will lower the cost of transactions in land and ensure an optimal pattern of investment in the economy.

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18. Hernando do Soto has argued that the exchange of property in modern markets can only be effective when property rights are formalised; that is, embodied in a "universally obtainable, standardised instruments of exchange that is registered in a central system governed by legal rules." In the case of land, property rights are contained in formalised - registered - titles. Without such a title the marketing of land would be difficult. See H. do Soto, "The Missing Ingredient: What Poor Countries will Need to Make Their Markets Work", supra, note 6 at 8.

19. Ibid., at 8. do Soto opines that the economic growth of developed countries is not unconnected with their laws that provide for formalised titles. It follows that the anaemic economic condition of most third world countries may be attributed to the absence of formalised titles. Thus, unless there is a reappraisal of this essential economic factor, most of the economic measures in developing countries will remain largely unhelpful, and the long-run prospects for economic reform will remain poor. See H. do Soto, ibid., at 10.

7.2(a). PERSONAL PROPERTY SECURITY.

If the laws on real property security in Nigeria are defective in important respects, the legal regimes on personal property security are even more dated and more restrictive. The commercial and legal environment that led to the enactment of most of the laws is no longer existent. The ad hoc approach of the laws to commercial practices ignores the basic objective of those practices - to secure credit extended to debtors. Because of the preference of the law for form over substance, similar transactions are treated as if they are dissimilar. Thus the general law does not recognise hire purchase transactions, conditional sales and "Quistclose Trusts"[20] as forms of security interests. The varying legal provisions made for different, albeit similar, transactions in security interests makes the laws technical, cumbersome and deficient; while the cost of obtaining credit is prohibitive.

Most of these problems have been eliminated by Article 9 of the United States Uniform Commercial Code and the Canadian provincial Personal Property Security Acts. The purpose of Article 9 is:

> [T]o provide a simple and unified structure within which the immense variety of present day secured financing transactions can go forward with less cost and with greater certainty.[21]

Most of the industrialized nations are agreed that Article 9 is exportable. The whole experience of Canada has shown that the conceptual framework of Article 9 is workable

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20. See M. Bridge, "The Quistclose Trust in a World of Secured Transactions" (1992), 12 Oxford J. Legal Stud. 333. See the discussion on *Interaction with other Laws*, infra, and text associated with note 54 infra.

21. UCC s. 9-101 (comment).

in an alien soil.[22] The Conference on Comparative Commercial Law as a whole and the papers presented thereat did not reflect nor represent the experience of developing economies, and it is arguable that the low rate of credit requirement in developing countries, compared to developed countries, may not justify any suggestion for the exportation of Article 9 to the former. But because of the commercially sound basis of Article 9, it is a veritable model for the reform of the law of chattel mortgages in a less developed country like Nigeria. According to Cuming:

> To someone who is not a citizen of the United States of America, the primary importance of Article 9 lies not in the fact that it ultimately became the basis for personal property security in all but one jurisdiction of the United States. What is more important is that the central concepts of Article 9 are universal, that is, readily adaptable to almost any modern legal structure.[23]

It may not be profitable nor advisable for any country to undertake a wholesale transfer of Article 9. Rather, Article 9 is a sound model for commercial legislation that will treat all transactions that in substance create security interests as such. This will

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22. One may hasten to point out that the similarity of American commercial transactions with those of its Canadian neighbour would have helped in the easy transplant of Article 9 to Canada. See J. Ziegel, "The American Influence on the Development of Canadian Commercial Law" (1976), 26 Case Western Reserve L. Rev. 861. However, in a 1969 workshop in McGill University, it was agreed by the participants representing different industrialised countries that Article 9 is transplantable. See J. Ziegel and W. Foster ed. Aspects of Comparative Commercial Law (Montreal: McGill University; New York: Oceana Publications; Dobbs Ferry, 1968). See also chapter 6 ante. See also chapter 6, note 139 and accompanying text.

23. R. Cuming, "National and International Harmonization: Personal Property Security Law" in D. King ed. Commercial and Consumer Law from an International Perspective (Littleton, Colorado: Fred B. Rothman & Co., 1986) 471 at 474. In another remark by another scholar who was writing with Latin American countries in view:

> The legal traditions, cultural values and economic forces of the United States differ from the Latin American countries. Yet, the institutions and rules germinated in the United States [referring to Article 9] should be given the chance to flourish in developing countries, where the availability and use of credit is low, but the demand for it is increasingly high.

See A. Garro, "Security Interests in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform" (1987), 9 Houston J. Inter Law, 157 at 158.

remove the present unjustifiable position where the form of a transaction, rather than its substance, determines the legal treatment. It will equally put to an end the unnecessary categorisation of the various forms of security interests and the bewildering mix of common law, equitable and statutory rules that regulate these interests. Indeed, the catholic appeal of Article 9 was the basis of the recommendation of the Professor Drobnig Commission, which found that Article 9 has the conceptual framework for the preparation of an international model on personal property security law.[24] Again, Canada's lead in adopting Article 9 is of particular assistance to the Commonwealth jurisdictions. To a high degree, both Nigeria and Canada have a common source for their commercial law and practice -Great Britain. The style of legislative drafting used by the Canadian provinces that have enacted personal property security acts is clearer and more coherent as opposed to the excessive detail in Article 9. Accordingly, any serious legislative intention in this regard may have Canada as the reference point.

A few issues that are likely to be controversial if Nigeria were to import the Article 9 model need to be highlighted.

(b). IS THE FLOATING CHARGE STILL RELEVANT?

First, the place of the floating charge under the new scheme will be settled. That the floating charge, which is a nineteenth century creation of equity, is still in use today in some jurisdictions may leave one to ponder over the peculiar commercial attraction of this security device. Despite the employment of this form of security in secured

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24. See Report to the Secretary General: Study on Security Interests (Yearbook of the United Nations Commissions on International Trade Law, 1977), Vol. VIII, 171.

transactions for over a century, it has remained conceptually elusive. Perhaps it may be correct to state that its continued use as a form of security necessarily implies its importance, if not indispensability, in commerce.

It is often said that the major significance of the floating charge in commercial transaction is the trading autonomy granted to the debtor to deal with the charged assets in the ordinary course of business. But this commercial advantage contains the seed of destruction of the security, as it enables the debtor to grant other security interests ranking in priority to the floating charge, and in some cases the debtor may dissipate the assets and render the realization of the security illusory. But the floating charge provides for these risks with the concept of crystallization and negative pledges. Crystallization causes the charge to attach with, or without, active intervention on the part of the debenture holder, while the negative pledge clauses prohibit the debtor from encumbering his assets without the prior consent of the creditor. There is also the right to trace the assets to the hands of a purchaser outside the ordinary course of business.[25]

Vulnerable as the floating charge is, the debenture holder can claim his interests in the assets that is subject to judgment execution provided that the sheriff has not completed the execution. Alternatively, it could be provided in the security that an attempt to attach the security interest will, automatically, crystallize the charge. Again, because the debenture holder has a present security in the floating charge, he can apply to the court for an injunction restraining the debtor from jeopardising the security or

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25. R. Goode, Legal Problems of Credit and Security, (London: Sweet & Maxwell; Centre for Commercial Law Studies, 1988) at 51; L. Gower, D. Prentice and B. Pettet, Gower's Principles of Modern Company Law, (London: Sweet & Maxwell, 1992) at 417.

altering the risk secured. The floating chargee can also appoint a receiver to manage the company instead of selling its assets.[26]

In spite of the obvious advantages of the floating charge, it is an inferior security compared to a fixed charge. The use of a fixed charge will enable the creditor to avoid some of the commercial hazards to which a floating charge may be vulnerable. For instance, in terms of priority a fixed charge ranks first, unless the interest of a *bona fide* purchaser for value without notice is affected.[27] With regard to assets realization, it may be commercially more protective for creditors to obtain a fixed charge instead of a floating charge. However, this claim has been queried by Professor Goode, who contends:

> Assuming that the debtor company has a sound business it is not in the interest of either party unduly to fetter the company's ability to run its business, for it is from the income generated by the company's trading activities that the creditor will ultimately be paid. For the creditor to tie up the debtor with covenants so stringent that the creditor will have to run a blind eye to breaches in order to avoid impairing the efficiency of the enterprise is not good sense.[28]

It seems that this policy basis of the floating charge may equally be met by the device of a fixed security interest with an express or implied licence to deal,[29] or the ability of a debtor to pass title in inventory to purchasers in ordinary course of business

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26. Goode, Legal Problems of Credit and Security, ibid. If money is paid into court to satisfy the claims of other creditors and the holder of a floating charge crystallizes it while the money is still in court, he is entitled to payment out of the money paid into court in priority to the other claimants. The rationale for this is that the money still belong to the debtor company, and the court has temporary control over it. See Lane v. Merchants Consolidated Ltd. et al. [1990], 3 W.W.R. 364.

27. Goode, Legal Problems of Credit and Security, ibid., 52.

28. Goode, Legal Problems of Credit and Security, ibid., at 51.

29. See Wood, "The Floating Charge in Canada" (1989), 27 Alta.L. Rev. 199.

under the new regime. The weight of this contention is felt more in the case of inventory financing where the floating charge is seen as a fragile, inferior and unreliable form of security.[30] However, the very nature of a licence could suffice to render the utility of this financing scheme suspect. The acceptance of "licence" as the basis of the company's ability to deal with the charged assets has been rejected because of its shortcomings.[31] Apart from the fact that a fixed charge with a licence to deal is possible and permissible, there is the further problem of reconciling the concept of a "licence" to deal, which may be of a general and continuing nature, with a specific proprietary title that this security device confers.[32] It has been held that, generally, the courts have been unwilling to characterize charges which permit the debtor to deal with his assets in the normal way of business as fixed charges with licence to sell. Rather, the courts have characterized such charges as floating, with the result that they give the charge holder no priority over third parties who have an interest in the debtor's property prior to crystallization. Also, there are cases where the courts have upheld the right of a chattel mortgagor to sell his inventory in the ordinary course of business, relying on what the parties must have intended. In so doing, they have sometimes referred to the charge as fixed with a licence to sell, even though the accepted doctrine suggests that such a charge ought to be

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30. J. Ziegel, "The Legal Problems of Wholesale Financing of Durable Goods in Canada." (1963), 41 Can. Bar Rev. 54 at 62-65; D. Sher & D. Allan, "Financing Dealers Stock-in-Trade" (1965), N.Z.U.L.R. 371 at 392-410; D. Allan, "Stock-in-Trade Financing (Australia and New Zealand)" (1967), 2 U. Tas.L.Rev. 382 at 391-403.

31. Pennington, "The Genesis of the Floating Charge", (1960), 23 M.L.R. at 646.

32. Gough, Company Charges, (London: Butterworths, 1978) at 123.

considered as floating.[33]

It is also arguable that if the concept of automatic partial crystallization[34] is possible, then the claim that a specific security with a licence to deal confers and ensures a greater security against future creditors may no longer be tenable. The claim that a fixed charge enhances a superior priority position of the secured party to the proceeds of the collateral is equally questionable. Where there is a specific proprietary interest, the proprietary interest of the creditor can extend to the proceeds so long as the proceeds are still susceptible to being identified as the proceeds of a specific collateral. This involves great legal and, sometimes, administrative problems for the financing creditor which is avoided in the case of a floating charge. These difficulties outweigh the alleged advantage of fixed chargees proprietary interest in the proceeds, when compared with the floating charge because the floating charge covers the entire undertaking of the company. Further on the question of proceeds, both the fixed chargee and floating chargee are expected to monitor the debtor to avoid the dissipation of the collateral, but if a right to follow the proceeds arises, the fixed debenture holder, as opposed to the holder of the floating debenture, is faced with the problem of identifying mixed cash assets which have not been dissipated.[35]

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33. R. in Right of British Columbia v. Federal Business Development Bank [1988], 1 W.W.R. 1; per McLachlin J.A. (Wallace J.A. concurring). But see the dissenting judgment of Lambert J.A.

34. The concept of automatic partial crystallization is termed a "springing security" by Gough Company Charges, supra, note 32 at 190.

35. Gough, ibid., 191.

While recent legislative developments in some commonwealth jurisdictions[36] may call into question the desirability of the floating charge as a form of security in contemporary secured transactions,[37] it is noteworthy that American Courts were hostile to this form of security from the onset. At the peak of this judicial hostility the United States' Supreme Court held that a transfer of property which reserves to the transferor the right to dispose of the property or to apply the proceeds thereof for his own uses is fraudulent in law and voidable at the instance of the debtor's creditors.[38]

The objection to the floating lien in the United States proceeded from case law and what may be regarded as the judicial wisdom of the past. One of the reasons for objecting to this form of security is that the availability of the floating lien or blanket lien would create a situational monopoly for the creditor, and as the present and future assets of the debtor are encumbered, it would be difficult to meet the claims of unsecured creditors. Accordingly, other sources of credit would dry up, to the detriment of the debtor. Additionally, it was thought imperative for the law to protect a needy borrower against himself by not allowing him to encumber all the property he may own so as to

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36. Reference is being made to the enactment of Personal Property Security Acts in most Canadian common law provinces.

37. McLaren, Personal Property Security - An Introductory Analysis (Toronto: Carswell, 1992) at 2.28-2.28.1; G. Hammond, Personal Property (Auckland: Oxford University Press, 1990) at 295; Wood, "The Floating Charge in Canada", supra, note 29.

38. Benedict v. Ratner 268 U.S. 353 at 360, per Mr Justice Brandeis. In American jurisprudence, the equivalent of the English floating charge is termed the "floating lien", even though they bear similar features. Note also that although this decision was applicable to New York only, it was freely cited in other states in America.

secure a present loan.[39]

However, commercial necessities and continued pressures resulted in the creation of the American variant of the floating charge. Commenting on the eventual recognition of the floating lien Gilmore observed:

> The gradual crumbling of the initial well-defined judicial position of hostility to anything resembling a floating lien must be taken as sufficient proof that commercial needs entitled to protection, required the abandonment of a state of the law appropriate to the primitive stage of industrial development. The old rules, in so far as they have any surviving vitality lead only to intolerable technicalities in the law, which penalizes legitimate transactions and serve as traps for the unwary and the unskilled. Therefore, rather than pretend, on the level of legal fiction, that things cannot be done which in fact and in law can be done, sound analysis requires that the floating lien be recognised as valid and then cut down to size in situations where its unlimited and unrestricted application might lead to undesirable and unjust results.[40]

The tenacity of the floating charge and its eventual recognition by Article 9 of the American Uniform Commercial Code and the Canadian Personal Property Security regime may be enough proof of the importance of this security device.[41] Although, these laws do have sections bearing marked similarities to the floating charge, it should be noted that, in the two jurisdictions, the floating charge or lien is intended to be a full-fledged "legal" security interest, taking priority over all parties with the exception of

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39. Gilmore, Security Interests in Personal Property (Boston and Toronto: Little, Brown & Co., 1965) vol. 1 at 360.

40. Gilmore, ibid., at 360.

41. See A. Abel, "Has Article 9 Scuttled the Floating Charge?" in Ziegel (ed.), Aspects of Comparative Commercial Law (Montreal: McGill University; New York: Oceana Publications, Dobbs Ferry, 1968) at 426. In Canada, all the provinces that have enacted the Personal Property Security Act made provisions for the utilisation of the floating charge as a form of security interest.

those clearly given preference by the new regime or any other law.[42]

It is probable that changing the nature of a floating charge under the present regime to a form of specific security will cure the inferior position it has hitherto occupied on the priority ladder. This would mean that, apart from the flexibility of this security device, it also ensures a timely and full realization of the security interest. Nonetheless, because of the attraction of the floating lien there is the temptation for every creditor to take a floating lien, no matter how small the claim may be.[43] Since there is the possibility of abuse by creditors, it has been advised that a debtor should be cautious in assenting to an action which may shut him off from the possibilities of utilising current assets for seasonal and other short term borrowing.[44] In any event, as a result of the avowed importance of both short term and long term finance, a long term creditor who encumbers all the debtor's assets may do a disservice to himself and his debtor. Therefore, it appears that the susceptibility of the floating lien to abuse by creditors may justify an unadulterated floating charge in the present regime. According to an informed commentator:

> If something in the nature of a "floating lien" was desired, it might have been wise to have patterned it more closely on the English model, which leaves the encumbered assets free until the lender, as by appointing a receiver, has caused the lien to crystallize.[45]

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42. P. Coogan and J. Bok, "The Impact of Article 9 of the Uniform Commercial Code on Corporate Indenture." (1959), 69 Yale L.J. 257; McLaren, Personal Property Security, supra note 37 at 2-15.

43. Gilmore, Security Interest in Personal Property, supra, note 39 at 365.

44. Coogan & Bok, "The Impact of Article 9 of the U.C.C. on Corporate Indenture", supra, note 42 at 258.

45. Gilmore, Personal Property Security, supra, note 39 at 365.

It should be pointed out that the apparent gap that may occur by resorting to the floating lien can be covered by using the purchase-money security interest, which is a superior security interest - even to a prior legal interest. The use of a floating lien to cover both present and after-acquired property does not prevent the adoption of a purchase money security interest to finance new inventory, equipment or other assets.[46] Nevertheless, this potent security device is only usable for non-cash assets, and cannot meet the need of a debtor pressed for ready cash - for example, for administrative purposes in his company - which may be available if a floating charge is utilised.[47]

In conclusion, it is not disputed that the floating charge is a precarious and vulnerable security, which does not protect the secured party to the same extent as a fixed charge. But despite the weaknesses of this security, it has proved very useful in certain types of credit transactions where other forms of security may appear too rigid to meet the immediate needs of a debtor pressed for ready cash. Accordingly, the attraction of the floating charge might not be the result of a prolonged interest of jurists in attempting to grapple with its conceptually elusive nature or doctrinal intricacies.[48]

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46. The use of the *Romalpa Clause* may also meet some of the advantages of the purchase-money security interest. Further, the advantages of the purchase money security interest can be met, even better, by the use of a *Quistclose Trust*. This is derived from the case of Barclays Bank Ltd. v. Quistclose Investment Ltd. [1955], 1 W.L.R. 1080. It has been persuasively argued that this trust concept is another unrecognised form of security interest. See M. Bridge, "The Quistclose Trust in a World of Secured Transactions" (1992) Oxford J. Leg. Stud. 333.

47. Coogan & Bok, "The Impact of Article 9 of U.C.C. on Corporate Indenture", supra, note 42 at 258-259.

48. See Wood, "The Floating Charge in Canada" supra, note 29 at 192.

It seems to have more of commercial appeal.[49]

The retention of the floating charge was a controversial issue before the enactment of the first Ontario Act, but the legislation did allow the floating charge to function with all its features under the new scheme. This position was not followed by other provinces that adopted Article 9, and it was subsequently abandoned by Ontario. In its new form the floating charge in Canada is the equivalent of the American floating lien. There may be reservations on the wisdom of abandoning this useful commercial device. But in Canada, there is little, if any, regret for the demise of the floating charge and its replacement with a fixed security interest (the floating lien) under the new scheme.[50]

Any reform of the law of security interest in personal property in Nigeria along the lines of Article 9 should spare some attributes of the floating charge. The preservation of this security device should not undermine the conceptual framework of the model legal regime. Again, it has been pointed out that this security interest can perform important functions under the new scheme. For instance, the floating charge will not prevent a debtor pressed for needy cash for administrative purposes from giving security to a lender for such purposes that ranks in priority to the floating charge. Under

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49. According to the Cork Commission, "the floating charge has become so fundamental a part of the financial structure of the United Kingdom that its abolition cannot be contemplated." See Cork Commission Report on Consumer Credit, 1971, Cmnd. 4596 at 345-346. The New South Wales proposed personal property security law, along the line of Article 9, rejected the inclusion of the purchase money security interest. The commissioners were of the view that floating charges are the most common form of transactions that create purchase money security interests. See the Law Reform Commission of New South Wales, Discussion Paper 28, Personal Property Security, at 75. See also Gilmore, Personal Property Security, supra, note 39 at 360.

50. For a strong defence of the Canadian departure from the traditional features of the floating charge, see J. Ziegel, "The New Provincial Chattel Security Regimes" (1990), 70 Can. Bar Rev. 681 at 713 et seq.

the model regime not even a purchase money security interest can meet this need[51] and such a lender would need a subordination agreement from the "floating charge" holder which will be difficult to obtain if the debtor has reached his credit limit.

It seems that Nigeria may follow the path of the proposed English reform of security interests in personal property,[52] where the floating charge has been strengthened. The concept of crystallisation and automatic crystallisation may have to be abandoned. However, the retention of the essential aspects of the floating charge can be preserved under any proposed regime. For instance, it could be provided that creditors who extend credit to debtors for stipulated administrative purposes - for example, for the payment of wages, rents, taxes - should be entitled to a super priority position in the same way as purchase money security interest holders. This will ensure that debtors are not bonded to institutional creditors who may be unwilling to exceed their credit line, even when the loan is just required to meet the cost of administration in the company. By such a provision the new regime will provide the essential benefits of the floating charge and this can be done without any effect on its conceptual basis.

Most importantly, under the proposed regime the system of registration would be completely revamped. The present system's potential for injustice by allowing 90 days within which registration can be effected should give way to the model regime where the date of registration (or perfection) will determine the priority position of the floating

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51. P. Coogan and J. Bok, "The Impact of the Uniform Commercial Code on Corporate Indenture", supra, note 42 at 258-259.

52. See A. Diamond, A Review of Security Interests in Personal Property, Department of Trade and Industry, HMSO (1989).

chargee. With the idea of notice filing in place, this innovation will enhance simplicity and facility in secured lending.

(c). COMPUTER REGISTRATION.

Another crucial issue is computer registration. There is nothing that is inherently objectionable in this system of registration. It has a lot to commend it and has worked remarkably well in Canada where the system originated. There is no denying the fact that computer registration is error-prone because of the high degree of accuracy required. It is, however, pertinent to remark that no human device or activity is error-proof. In Canada, the insurance provision for the compensation of those who rely on the system and are damaged thereby - although the monetary liability is limited - has succeeded in removing the anxiety that the use of this system would have generated. The foreseeable problem in Nigeria is that, generally, the society is not computer literate and the introduction of this system of registration may be problematic at the initial stage. It may, however, be said that the filing of a financing notice which operates in most Canadian common law provinces does not require a detailed knowledge of computers.[53]

Moreover, the installation of computer registries is capital intensive, which the economy at present may not be able to support nation-wide. Again, other public utilities, like electricity, must be functioning well before the use of computers will be effective. The United States, on the other hand, did function with manual registration, which did not undermine the effectiveness of their registration system. Although there are efforts

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53. But the "paperless" form of computer registration that operates in British Columbia, for instance, requires sophisticated knowledge of computer.

to computerise the company registry in Nigeria, this is only possible because there is just one company registry in the country. Personal property security legislation will require registry offices in all the states of the federation and Nigeria may have to borrow from the United States' system of manual registration. This suggests that the requirement of computer registration is no reason to postpone any effort at reforming this area of the law.

(d). INTERACTION WITH OTHER LAWS.

A reform of the law on chattel security will demand the repeal or amendment of most of the laws that presently govern this aspect of secured transactions. Because the model North American regime is based on the functional approach and has a uniform set of rules, there will be no need to continue to observe the difference between chattel mortgages, conditional sale, and hire purchase transactions. These transactions, amongst others, for instance, registration under the Companies Act, will be uniformly regulated under any proposed regime. The law that protects illiterate persons may need modification, since sole proprietors, whether literate or not, will be allowed to grant security for debts incurred under the proposed regime. This proposition can be justified on the ground that there are now more educated people in Nigeria than there were when the law was enacted. Again, transactions that involve the taking of security are now conducted mostly by lawyers, chartered secretaries and accountants.

There will also be the need to reappraise some other laws, like the Sale of Goods Act, which will have some interaction with the proposed law. Since the location of title

to any property is no longer relevant, aspects of the Sale of Goods Act that relate to this should be repealed, to the extent that they concern security interests. The repeal should cover bills of sale, which are not intended as absolute sales, the registration provisions of the Companies Act, and the rule in Dearle v. Hall,[54] where the priority of conflicting security interests in personal property and of absolute assignments of choses in action are in issue.

Important in this regard is bankruptcy legislation which has some impact on the operation of personal property security law. The effectiveness of the model regime in the United States and Canada may have much to do with the compatibility of their bankruptcy legislation with the new regime. There will be minor problems in the reform of the law in this area. The federal government in Nigeria is empowered to legislate on bankruptcy matters, as well as commercial issues so that the question of conflict between federal and state laws present in Canada and the United States, will be absent in Nigeria. What may be required in Nigeria is the type of legislation that will avoid any conflict between personal property legislation and the bankruptcy law concerning priorities of creditors.

Moreover, since the law will impact on real property, for example fixtures, there will also be the need to spell out the pattern of registration in the land registry that will be effective and compatible with the system of registration under a new Act.

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54. (1823-28), 3 Russ 1, [1824-34] All ER 28. See J. Ziegel, "Repeal of Bills of Sale Legislation" (1984), 9 C.B.L.J. 117. See generally, R. Goode and L. Gower, "Is Article 9 of the Uniform Commercial Code Exportable? An English Reaction" in Ziegel and Forster ed., Aspects of Comparative Commercial Law, supra, note 22 at 288, where the authors discussed the areas that will be reappraised in England and other Commonwealth countries before Article 9 is exported to those jurisdictions.

The implication of this discussion is the need for thorough research and a study of the potential impact of any proposed regime on business practices in Nigeria. The whole philosophical foundation of Article 9 is sound but it is unthinkable that a wholesale transplant will be advocated without a consideration of the domestic circumstances. According to informed commentators:

> One of the most impressive features of the work of Karl Llewellyn and his colleagues was that it was based on detached and lengthy research into American business practices. The last thing that they would have wished is that it should be extended to other countries without equally thorough research into the practices prevailing there.[55]

The constitutional allocation of legislative powers in Nigeria should simplify any reform effort. Because the federal government appears to be the competent authority to legislate in this area, there will be uniformity of laws in the whole federation.[56] Moreover, Nigeria has no equivalent of the section 427 Bank Act conundrum in Canada,[57] and this will make for easy functioning of any proposed legislation along this line. However, the essential research and planning needed before any reform will come to fruition will require capital investment. This may appear too heavy for Nigeria's presently lean financial standing. But considering the importance of the availability of large amounts of credit at lower rates to meet both consumer and commercial needs, and

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55. Goode and Gower, "Is Article 9 of the Uniform Commercial Code Exportable? An English Reaction", ibid, at 325.

56. This will avoid the conflict of legislations common in most federal systems like Canada and the United States.

57. For the conflict between section 178 (currently s.427) of the Bank Act and the provincial Personal Property Security Acts, see R. Cuming, "The Relationship between Personal Property Security Acts and section 178 of the Bank Act: Federal Paramountcy and Provincial Legislative Policy" (1988), 14 C.B.L.J. 315; R. Cuming, "PPSA - Section 178 Bank Act Overlap: No Closer to Solution" (1991), 18 C.B.L.J. 135.

for the expansion and growth of the economy, it seems that the extra cost would be more than justified.[58] Such an undertaking abandons inadequate and archaic laws and enhances order and predictability in business transactions, and will meet the present and future commercial realities and societal needs.

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58. See also Garro, "Security Interests in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform", supra, note 23 at 201; Goode and Gower, "Is Article 9 of the Uniform Commercial Code Exportable? An English Reaction", supra, note 22 at 349; J. Ziegel, "The Canadian Personal Property Security Legislation" (1986), L.M.C.L.Q. 160.

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